



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 19, 2011

Mr. Ben Stool
Assistant District Attorney
Dallas County Criminal District Attorney's Office
4100 Elm Street Suite 500
Dallas, Texas 75202-3384

OR2011-13506

Dear Mr. Stool:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 430206.

The Dallas County Constable, Precinct 2 (the "county") received requests from two requestors for information relating to a named former deputy constable (the "deputy"), including information relating to the deputy's termination, records of the county's investigation of the deputy, and his personnel file. You claim the submitted information is excepted from disclosure under sections 552.103 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the information you submitted.¹ We also have considered the comments we received from the first requestor. *See* Gov't Code § 552.304 (any person may submit written comments stating why information at issue in request for attorney general decision should or should not be released).

We first note the requested information includes the deputy's personnel file. Although you state you have submitted a representative sample of the requested information, the submitted representative sample of information consists exclusively of records of the county's

¹This letter ruling assumes the submitted representative sample of information is truly representative of the information at issue. This ruling neither reaches nor authorizes the county to withhold any information that is substantially different from the submitted information. *See* Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

investigation and termination of the deputy. Thus, we find the submitted information is not representative of the information responsive to part three of the first request for information and the second request, both of which seek the deputy's personnel file. We therefore assume the county has released any other personnel records relating to the deputy that existed when the county received these requests for information. If the county has not released any such information, then it must do so immediately.² *See id.* §§ 552.221, .301, .302; Open Records Decision No. 664 (2000).

Next, we must determine whether the county complied with section 552.301 of the Government Code in requesting this decision. Section 552.301 prescribes procedures a governmental body must follow in asking this office to determine whether information is exempted from public disclosure under the Act. *See Gov't Code* § 552.301(a). Section 552.301(e)(1)(A) requires the governmental body to submit to this office "written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld[.]" *Id.* § 552.301(e)(1)(A). Section 552.301(e-1) provides as follows:

A governmental body that submits written comments to the attorney general under Subsection (e)(1)(A) shall send a copy of those comments to the person who requested the information from the governmental body not later than the 15th business day after the date of receiving the written request. If the written comments disclose or contain the substance of the information requested, the copy of the comments provided to the person must be a redacted copy.

Id. § 552.301(e-1). You have provided our office with a copy of the written comments the county provided to the first requestor pursuant to section 552.301(e-1). The first requestor states, and we agree, that except for part of one sentence, the county has redacted its entire argument under section 552.108 of the Government Code from the first requestor's copy of the county's comments. We note the redacted portion of the county's comments neither discloses nor contains the substance of the information requested. We therefore conclude the county failed to comply with section 552.301(e-1) of the Government Code in requesting a decision under section 552.108.

Section 552.108 is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See Open Records Decision Nos.* 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 586 at 1-2 (1991) (statutory predecessor to Gov't Code § 552.108 may be

²We note the Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); *Open Records Decision Nos.* 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

waived), 177 at 3 (1977) (same). In failing to comply with section 552.301(e-1) with regard to its claim under section 552.108, the county has waived this exception with regard to both of the instant requests for information because section 552.108 is not a compelling reason to withhold the information. *See* Gov't Code § 552.302; *see also id.* § 552.007; Open Records Decision No. 400 at 2 (1983). Therefore, the county may not withhold any of the submitted information under section 552.108 of the Government Code.

We next note the submitted information falls within the scope of section 552.022 of the Government Code. Section 552.022(a)(1) provides for required public disclosure of “a completed report, audit, evaluation, or investigation made of, for, or by a governmental body,” unless the information is expressly confidential under other law or excepted from disclosure under section 552.108 of the Government Code. Gov't Code § 552.022(a)(1). In this instance, the submitted information consists of a completed investigation made for or by the county. Although the county also seeks to withhold the submitted information under section 552.103 of the Government Code, that section is a discretionary exception a governmental body may waive. *See id.* § 552.007; *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive Gov't Code § 552.103). As such, section 552.103 is not other law that makes information expressly confidential for purposes of section 552.022(a)(1). Therefore, the county may not withhold any of the submitted information under section 552.103 of the Government Code. As you claim no other exception to disclosure, the submitted information must be released to both requestors in its entirety.

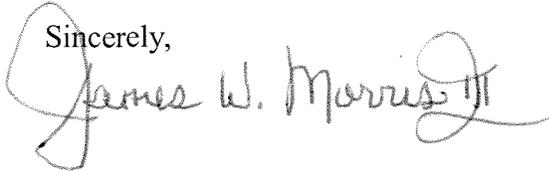
We note some of the submitted information appears to be protected by copyright. A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *See* Open Records Decision No. 180 at 3 (1977); *see also* Open Records Decision No. 109 (1975). A custodian of public records also must comply with copyright law, however, and is not required to furnish copies of records that are copyrighted. *See* ORD 180 at 3. A member of the public who wishes to make copies of copyrighted materials must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. Thus, in releasing the submitted information to the requestors, the county may only release any copyrighted information in accordance with copyright law.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public

information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in cursive script that reads "James W. Morris, III". The signature is written in dark ink and is positioned to the right of the word "Sincerely,".

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/em

Ref: ID# 430206

Enc: Submitted documents

c: Requestors
(w/o enclosures)