



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

September 22, 2011

Ms. Susan Fillion  
Assistant County Attorney  
Harris County Attorney's Office  
1019 Congress, 15<sup>th</sup> Floor  
Houston, Texas 77002-1700

OR2011-13737

Dear Ms. Fillion:

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# 430676 (C.A. File 11PIA0262).

The Harris County Constable, Precinct 5 (the "constable") received a request for all records or documents in the personnel file of a named officer, including but not limited to any misconduct, complaints, reprimands, or demotions. You claim the submitted information is excepted from disclosure under sections 552.103 and 552.108 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and reviewed the submitted information.

Initially, we must address the constable's obligations under the Act. Section 552.301 of the Government Code describes the procedural obligations placed on a governmental body that receives a written request for information it wishes to withhold. Pursuant to section 552.301(e), a governmental body receiving an open records request for information that it wishes to withhold pursuant to one of the exceptions to public disclosure is required to submit to this office within fifteen business days of receiving the request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed

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<sup>1</sup>Although you also raise sections 552.101, 552.117, and 552.130, you have provided no arguments regarding the applicability of these exceptions. Thus, we assume that you have withdrawn your claims under these exceptions. See Gov't Code § 552.301(b), (e), .302.

statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See* Gov't Code § 552.301(e). You state the constable received the request for information on July 6, 2011. You further state, and provide documentation showing, you provided the requestor with a cost estimate on July 11, 2011 in compliance with section 552.2615 of the Government Code. *See id.* § 552.2615 (providing that governmental body shall provide requestor with estimate of charges if charges exceed \$40). The requestor complied with section 552.2615 by accepting the charges. *See id.* § 552.2615(b). Section 552.2615 of the Government Code provides that the submission of an estimate of charges to the requestor does not toll the governmental body's deadlines to ask for an attorney general decision under section 552.301. *See id.* § 552.2615(g) (providing that "[t]he time deadlines imposed by this section do not affect the application of a time deadline imposed on a governmental body under Subchapter G"). You assert that calculating ten-business days from July 11, 2011, the brief and responsive documents were due on July 25, 2011 and request an extension of the constable's fifteen-business-day deadline to August 1, 2011. We note, however, that the deadlines prescribed by section 552.301 are fixed by statute. *See* Open Records Decision No. 514 at 1-2 (1988), Attorney General Opinion JM-672 (1987). Accordingly, the constable's ten business day deadline began on July 6, 2011. Thus, the constable's ten- and fifteen-business-day deadlines were July 20, 2011 and July 27, 2011, respectively. In this instance, you did not state the exceptions to disclosure that apply to the submitted information, submit arguments explaining why the raised exceptions apply, or submit a copy of the specific information requested or representative samples until August 1, 2011. *See* Gov't Code § 552.308 (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Consequently, we find the constable failed to comply with the requirements of section 552.301 of the Government Code.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the requirements of section 552.301 results in the legal presumption the requested information is public and must be released unless a compelling reason exists to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); *see also* Open Records Decision No. 630 (1994). Generally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third party interests are at stake. Open Records Decision No. 150 at 2 (1977). Although you raise sections 552.103 and 552.108 of the Government Code, these exceptions are discretionary in nature and may be waived. *See 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 section 552.103); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999)

(waiver of discretionary exceptions), 177 at 3 (1977) (statutory predecessor to section 552.108 subject to waiver). Thus, the constable has waived its claims under sections 552.103 and 552.108. We note, however, the interests under sections 552.103 and 552.108 of a governmental body other than the one that failed to comply with section 552.301 can provide a compelling reason for non-disclosure under section 552.302. *See* Open Records Decision No. 586 at 2-3 (1991). You inform us the Harris County District Attorney's Office (the "district attorney") asserts an interest in the submitted information. Therefore, we will consider whether the constable may withhold the submitted information on behalf of the district attorney under sections 552.103 and 552.108 of the Government Code.

We note that some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

(a) [T]he following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). The submitted information contains completed evaluations that are subject to section 552.022(a)(1). The constable must release this information pursuant to section 552.022 unless it is excepted from disclosure under section 552.108 of the Government Code or is expressly made confidential under other law. *See id.* As previously noted, section 552.103 of the Government Code is a discretionary exception to disclosure that protects the governmental body's interests and may be waived. *See Dallas Area Rapid Transit*, 4 S.W.3d at 475-76. As such, section 552.103 is not "other law" that makes information confidential for purposes of section 552.022. Therefore, the constable may not withhold the information subject to section 552.022(a)(1) pursuant to section 552.103 of the Government Code. However, because information subject to section 552.022(a)(1) may be excepted under section 552.108 of the Government Code, we will consider the applicability of this exception to the submitted information.

Section 552.108(a)(1) of the Government Code excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime[.]" Gov't Code § 552.108(a)(1). A governmental body claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* § 552.301(e)(1)(A). In this instance, you submit an affidavit from an assistant district attorney who informs us that the district attorney is "presently representing the State of Texas in the criminal case

pending against” a named defendant who “is charged with driving while intoxicated.” The assistant district attorney further states that the release of the submitted information would interfere with the pending prosecution. Based upon these representations and our review, we conclude release of the submitted information would interfere with the pending criminal prosecution, and agree that section 552.108(a)(1) is applicable. *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975) (court delineates law enforcement interests that are present in active cases), *writ ref'd n.r.e.*, 536 S.W.2d 559 (Tex. 1976). Accordingly, the constable may withhold the submitted information in its entirety under section 552.108 of the Government Code.<sup>2</sup>

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](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,



Kirsten Brew  
Assistant Attorney General  
Open Records Division

KB/em

Ref: ID# 430676

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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<sup>2</sup>As our ruling is dispositive, we need not address your remaining argument against disclosure.