



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 25, 2012

Ms. Rhonda Modisette
Records Supervisor
Nacogdoches Police Department
P.O. Box 635030
Nacogdoches, Texas 75963-5030

OR2012-17074

Dear Ms. Modisette:

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# 468873.

The Nacogdoches Police Department (the "department") received a request for information pertaining to the latest sexual assault investigation involving only adults that is no longer being investigated by the department and contains certain categories of specified information. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.108, 552.130, and 552.138 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we must address the department's obligations under the Act. Section 552.301 of the Government Code prescribes the procedures a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(b) of the Government Code, a governmental body must ask for the attorney general's decision and state the exceptions that apply within ten business days after receiving a request for information it wishes to withhold. *See Gov't Code § 552.301(b)*. You state the department received the request for information on July 29, 2012. We note July 29, 2012 was a Sunday; therefore, for purposes of the Act, we find the department is deemed to have received the request on Monday, July 30, 2012. Thus, the department's ten-business-day deadline was August 13, 2012. You state the requestor agreed to grant the department a ten-day extension, to process his request. However, we note the deadlines prescribed by section 552.301 are fixed by statute and cannot be altered by agreement. *See Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990)* (obligations of a governmental body under predecessor to Act cannot be compromised

simply by decision to enter into contract), 514 at 1–2 (1988). You did not seek a ruling from this office until August 17, 2012. *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). Thus, we find the department failed to comply with the procedural requirements of section 552.301 of the Government Code in asking this office for a ruling.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption the information is public and must be released. Information presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *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 (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); Open Records Decision No. 630 (1994). A compelling reason exists when third-party interests are at stake or when information is confidential under other law. Open Records Decision No. 150 (1977). Although you claim section 552.108 of the Government Code, we note this is a discretionary exception designed to protect a governmental body's interests and may be waived. *See* Open Records Decision Nos. 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions), 177 (1977) (statutory predecessor to section 552.108 subject to waiver). However, the interests under section 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 state the Nacogdoches District Attorney's Office (the "district attorney's office") asserts a law enforcement interest in the submitted information. Therefore, we will consider whether the submitted information may be withheld based on the district attorney's office's law enforcement interest. Additionally, because sections 552.101, 552.130, and 552.138 of the Government Code can provide compelling reasons for non-disclosure, we will consider their applicability to the submitted information.

Section 552.108(a)(2) 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 . . . it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication[.]" Gov't Code § 552.108(a)(2). Section 552.108(a)(2) is applicable only if the information at issue relates to a concluded criminal case that did not result in a conviction or deferred adjudication. A governmental body that claims an exception to disclosure under section 552.108 must reasonably explain how and why this exception is applicable to the information the governmental body seeks to withhold. *See id.* § 552.301(e)(1)(A). You state the submitted report pertains to a concluded criminal investigation. You inform us the case was not billed by a grand jury and that the district

attorney's office objects to release of the information because such release "would interfere if the case were to be reopened due to pending lab results or upon discovery of new evidence." Based on these conflicting representations, we are unable to determine whether the investigation at issue relates to a concluded criminal investigation or an ongoing criminal investigation. Thus, we find the district attorney's office has failed to demonstrate how the submitted information relates to a concluded criminal investigation that did not result in conviction or deferred adjudication under section 552.108(a)(2). Consequently, the submitted information may not be withheld under section 552.108(a)(2) of the Government Code.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses the doctrine of common-law privacy. Common-law privacy protects information that (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The type of information considered intimate or embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. This office has concluded information that either identifies or tends to identify a victim of sexual assault or other sex-related offense must be withheld under common-law privacy. See Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982); see also *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied) (identity of witnesses to and victims of sexual harassment was highly intimate or embarrassing information and public did not have a legitimate interest in such information).

In this instance, the submitted information pertains to an alleged sexual assault. Although portions of the submitted information use a pseudonym for the alleged sexual assault victim, we note other portions of the submitted information contain identifying information of the alleged sexual assault victim. Accordingly, we find the department must withhold the alleged sexual assault victim's identifying information, which we have marked and indicated on the submitted CD, under section 552.101 of the Government Code in conjunction with common-law privacy.¹ However, we find none of the remaining information at issue is highly intimate or embarrassing and of no legitimate public interest; therefore, the remaining information at issue may not be withheld under section 552.101 in conjunction with common-law privacy.

Section 552.130 of the Government Code provides that information relating to a motor vehicle operator's or driver's license or permit or a motor vehicle title or registration issued

¹As our ruling is dispositive for this information, we need not address your remaining argument against disclosure.

by an agency of this state or another state or country is excepted from public release. Gov't Code § 552.130(a)(1), (2). Accordingly, the department must withhold the motor vehicle record information we have marked under section 552.130.

In summary, the department must withhold the information we have marked and indicated on the submitted CD under section 552.101 of the Government Code in conjunction with common-law privacy. The department must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code. The remaining information must be released.²

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,



Vanessa Burgess
Assistant Attorney General
Open Records Division

VB/dls

Ref: ID# 468873

Enc. Submitted documents

c: Requestor
(w/o enclosures)

²We note the information being released contains social security numbers. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act. Gov't Code § 552.147(b).