



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

November 14, 2013

Mr. Art Bauereiss  
District Attorney  
Angelina County District Attorney's Office  
P.O. Box 908  
Lufkin, Texas 75902-0908

OR2013-19937

Dear Mr. Bauereiss:

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# 505608.

The Angelina County District Attorney's Office (the "district attorney's office") received a request for all e-mails, facsimiles, written correspondence, text messages, electronic files, or documents related to a named individual for the time period of September 22, 2008 through the date of the request. You state you have released some responsive information to the requestor. You claim portions of the submitted information are not subject to the Act. In addition, and in the alternative, you claim the submitted information is excepted from disclosure under sections 552.101, 552.108, and 552.1325 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, you assert that some of the submitted information is not subject to the Act. You state portions of the submitted information consist of two grand jury subpoenas and correspondence regarding these subpoenas. The judiciary is expressly excluded from the requirements of the Act. Gov't Code § 552.003(1)(B). This office has determined that a grand jury, for purposes of the Act, is a part of the judiciary and therefore not subject to the Act. *See* Open Records Decision No. 411 (1984). Further, records kept by a governmental body that is acting as an agent for a grand jury are considered records in the constructive possession of the grand jury, and therefore are also not subject to the Act. *See* Open Records Decisions Nos. 513 (1988), 411, 398 (1983). *But see* ORD 513 at 4 (defining limits of judiciary exclusion). Thus, to the extent the information at issue is held by the district attorney's office as an agent of the grand jury, this information consists of records of the judiciary not subject to disclosure under the Act and we do not address its public availability. To the extent the information at issue is not held by the district attorney's office as an agent of the grand jury, we will address your arguments against disclosure of this information.

Next, we note you have redacted portions of the submitted information. You do not assert, nor does our review of the records indicate, you have been authorized to withhold this information without seeking a ruling from this office. *See* Gov't Code § 552.301(a); Open Records Decision No. 673 (2001). Therefore, information must be submitted in a manner that enables this office to determine whether the information comes within the scope of an exception to disclosure. In this instance, we can discern the nature of the redacted information; thus, being deprived of this information does not inhibit our ability to make a ruling. In the future, however, the district attorney's office should refrain from redacting any information it is not authorized to withhold in seeking an open records ruling. Failure to do so may result in the presumption the redacted information is public. *See* Gov't Code § 552.302.

Next, we note the district attorney's office did not fully comply with section 552.301 of the Government Code. Section 552.301(b) requires that a governmental body ask for a decision from this office and state which exceptions apply to the requested information by the tenth business day after receiving the request. Gov't Code § 552.301(b). While you raised sections 552.101 and 552.108 of the Government Code within the ten-business-day time period required by section 552.301(b), you did not raise section 552.1325 within that time. Accordingly, with respect to your arguments under section 552.1325, we find the district attorney's office violated section 552.301(b).

A governmental body's failure to comply with section 552.301 results in the waiver of its untimely claim, unless that claim is a compelling reason for withholding 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). A compelling reason to withhold information exists where information is confidential by law or third-party interests are at stake. Open Records Decision No. 150 at 2 (1977). Because section 552.1325 of the Government Code can provide a compelling reason to withhold information, we have considered the applicability of this section to the submitted information. We have also considered your timely raised arguments against disclosure.

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. Section 552.101 encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. A compilation of an individual's criminal history is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person. *Cf. U.S. Dep't of Justice v. Reporters*

*Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989) (finding significant privacy interest in compilation of individual's criminal history by recognizing distinction between public records found in courthouse files and local police stations and compiled summary of criminal history information). Furthermore, we find a compilation of a private citizen's criminal history is generally not of legitimate concern to the public.

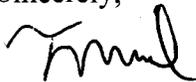
Upon review, we find the present request requires the district attorney's office to compile unspecified law enforcement records concerning the named individual. Accordingly, we find the request implicates the named individual's right to privacy. Therefore, to the extent the district attorney's office maintains law enforcement records depicting the named individual as a suspect, arrestee, or criminal defendant, the district attorney's office must withhold such information under section 552.101 in conjunction with common-law privacy.<sup>1</sup>

In summary, to the extent the responsive information is held by the district attorney's office as an agent of the grand jury, this information consists of records of the judiciary not subject to disclosure under the Act and need not be released to the requestor. To the extent the district attorney's office maintains law enforcement records depicting the named individual as a suspect, arrestee, or criminal defendant, the district attorney's office must withhold such information under section 552.101 in conjunction with common-law privacy.

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.texasattorneygeneral.gov/open/orl\\_ruling\\_info.shtml](http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml), 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Tim Neal  
Assistant Attorney General  
Open Records Division

TN/tch

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<sup>1</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure.

Mr. Art Bauereiss - Page 4

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Enc. Submitted documents

c: Requestor  
(w/o enclosures)