



November 3, 1999

Sheriff Henry B. Hodge
Kendall County Sheriff
6 Staudt Street
Boerne, Texas 78006

OR99-3118

Dear Mr. Hodge:

You have asked 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# 128866.

The Kendall County Sheriff (the "sheriff") received the following request for information

[a]ny and all records pertaining to the seizure of funds from criminal suspects since November 1997 on which the department has initiated forfeiture proceedings. I would also like to see any bank statements or county records which reflect the deposit, withdrawal or other transactions concerning said funds, and any departmental records concerning the incident(s) which led to their seizure and attempts to have them declared contraband and/or forfeited.

You did not, however, submit to this office copies of any responsive information. *See* Gov't Code § 301(e)(1)(D).¹ Furthermore, you have not raised any exceptions to disclosure for the requested records. *See* Gov't Code § 552.301(e)(1)(A).² We have considered the arguments you have raised for the pending request.³

¹Act of May 25, 1999, 76th Leg., R.S., ch. 1319, § 20, 1999 Tex. Sess. Law Serv. 4500, 4509 (Vernon).

²Act of May 25, 1999, 76th Leg., R.S., ch. 1319, § 20, 1999 Tex. Sess. Law Serv. 4500, 4509 (Vernon).

³Since you did not submit any responsive records, we assume that the responsive information only existed in the sheriff's computer system and other responsive records, such as written documents, do not exist since you have not raised an exception nor submitted other records.

You represent that “[i]n mid-April 1999 [the sheriff’s office] had a major computer crash where the hard drive was severely damaged. All data that was recorded has been destroyed.” You also assert that attempts at “data recovery” were unsuccessful. A governmental body is not expected to produce information which does not exist, nor does the act require a governmental body to prepare new information. Open Records Decision Nos. 605 (1992), 555 (1990), 362 (1983). We agree that the sheriff’s office is not required to provide information which is not in its possession. Open Records Decision No. 452 (1986).

We next address your assertion that “[o]ur Computer Specialist advised that the backups that were being made were not of a good quality due to internal problems.”⁴ We assume that you have notified the requestor of this fact in accordance with section 552.231 of the Government Code, which sets out procedures for advising the requestor of estimated costs and delays when responding to requests for information that require programming or manipulation of data. “Public information,” as defined by section 552.002, must be produced for inspection or duplication or both, unless an applicable exception applies to the information. See Open Records Decision Nos. 565 (1990), 549 (1990), 470 (1987). Therefore, to the extent the “backups” of the responsive information exist, chapter 552 of the Government Code places on the custodian of public records the burden of establishing that records are excepted from public disclosure. Attorney General Opinion H-436 (1974). Section 552.301(e)(1)(D) requires that a governmental body must submit to this office a copy of the specific information requested or representative samples of the information if a voluminous amount of information was requested. Responsive documents or representative samples of responsive documents are required because “[i]n order to determine whether information is subject to a particular exception, this office ordinarily must review the information.” Open Records Decision No. 497 at 4 (1988). The failure to submit a copy of the information to this office results in the presumption that the information is public and must be released. *Id.* Because you did not comply with section 552.301(e), the responsive information, to the extent it exists, is presumed to be public and must be released.

You also state that the requestor “feels that he should be granted the privilege to scroll through our system for the data that he has requested on Seizure Funds and Bank Records. Since we have sensitive information also stored on this system on many confidential actors, as well as on going investigations, it would be impossible to allow him to scroll this system.” We agree that if public information is “inextricably intertwined” with information that may be withheld under the act, all of the information may be withheld. Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 470 (1987), 393 (1983), 239 (1980), 174 (1977). However, you have not submitted a copy of the specific information requested or representative samples of the information nor established that the records are excepted from public disclosure under the act’s exceptions. See Gov’t Code § 552.301(e)(1).

⁴We assume that the city has followed the requisite records retention policies. See generally Local Gov. Code § 203.041 *et seq.* (local government record retention schedules).

Based on the sheriff's letter, dated October 7, 1999, we further understand that the requestor has also requested "a report of what happened, who made the repairs, as well requesting information on items replaced and the replacement cost to" the sheriff's office. However, you did not submit a copy of the request letter from the requestor as required by the act. See Gov't Code § 552.301(e)(1)(B). In your letter to the requestor, you also advise the requestor to "seek any additional information through the County Treasurer's Office and/or County Auditor's Office." We advise the sheriff's office that although the act applies only to information in a governmental body's possession, the sheriff has not averred that it does not possess the requested information.⁵ See Open Records Decision No. 555 (1990); Gov't Code § 552.002(a) (defining public information). Therefore, if the sheriff's office has any of the information requested in the requestor's second request, the information is presumed public and must be released, because you did not comply with section 552.301(e).

Finally, we address your assertion that "[w]ith the lost data, etc. there would not be any reason for [the requestor] to review any other records." We advise you that the legislature has prohibited governmental bodies from inquiring into the motives of a requestor in seeking information. Gov't Code § 552.222(b).

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,

A handwritten signature in cursive script that reads "Sam Haddad". The signature is written in black ink and is positioned above the typed name.

Sam Haddad
Assistant Attorney General
Open Records Division

SH/nc

Ref.: ID# 128866

Encl. None

⁵Section 552.002(a) defines the term "public information" to include information that is "collected, assembled, or maintained . . . (1) by a governmental body; or (2) for a governmental body and the governmental body owns the information or has a right of access to it." Gov't Code § 552.002(a) (emphasis added); see Open Records Decision No. 558 (1990) (where governmental body has right of access to or ownership of information prepared by outside entity, information is subject to Public Information Act).

cc: Ms. Zeke McCormack
San Antonio Express-News
San Antonio, Texas 78297
(w/o enclosures)