



October 5, 2001

Ms. Myrna S. Reingold  
Galveston County Legal Department  
4127 Shearn Moody Plaza  
123 Rosenberg  
Galveston, Texas 77550-1454

OR2001-4491

Dear Ms. Reingold:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 152859.

The Galveston County Sheriff's Department (the "sheriff") received a request for information regarding the arrest record of a named individual, including incidents of assault and indecent exposure. You indicate that you have released basic front page information concerning the assault and indecent exposure incidents. However, you claim that the remainder of the requested information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We begin by addressing your arguments with respect to a responsive videotape relating to the indecent exposure case. You indicate that the videotape "is not available at this time" and was not sent for our review. Nevertheless, you contend that the videotape is excepted from disclosure under section 552.101 of the Government Code. The Public Information Act does not require a governmental body to make available information which does not exist. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.--San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 (1992), 362 (1983). However, to the extent the videotape does exist and the sheriff maintains the information, the sheriff is required to submit a copy of the videotape to this office if it seeks to withhold the information. See Gov't Code §§ 552.002, .301. If a governmental body does not provide this office with a copy of the requested information, as required by section 552.301, the requested information is presumed to be public and must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. See Gov't Code §§ 552.301, .302; *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

Gov't Code § 552.302); Open Records Decision No. 319 (1982). Here, we have no basis for determining that a compelling reason exists for withholding the videotape because you have not submitted it. Thus, to the extent the sheriff possesses the videotape, we have no choice but to order the requested videotape released pursuant to section 552.302. If you believe the videotape is confidential and may not lawfully be released, you must challenge the ruling in court as outlined below. We caution that the distribution of confidential information constitutes a criminal offense. *See* Gov't Code § 552.352.

Next, we address your argument that some of the submitted information is excepted from disclosure under section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." For information to be protected from public disclosure by the common law right of privacy under section 552.101, the information must meet the criteria set out in *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). In *Industrial Foundation*, the Texas Supreme Court stated that information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person and (2) the information is not of legitimate concern to the public. 540 S.W.2d at 685. Where an individual's criminal history information has been compiled by a governmental entity, the information takes on a character that implicates the individual's right to privacy. *See United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989). Accordingly, we have marked information that is confidential under common law privacy and must be withheld under section 552.101.

Next, you contend that some of the submitted information is excepted from disclosure under section 552.108 of the Government Code. Section 552.108 provides, in part,

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of Section 552.021 if:

- (1) release of the information would interfere with the detection, investigation, or prosecution of crime; [or]
- (2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation 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, if the responsive information does not do so on its face, how and why section 552.108 is applicable. *See* Gov't Code § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986). Section 552.108(a)(2) protects information pertaining to a closed case that did not result in a conviction or deferred adjudication. *See* Open Records Decision No. 216 (1978) (addressing

applicability of statutory predecessor to closed cases). You contend that the information relating to the assault case is excepted under section 552.108(a)(2) because “[t]here *has been* no conviction or deferred adjudication probation resulting from this investigation.” (Emphasis added). You also appear to contend that the same information is excepted under section 552.108(a)(1) because the information relates to a “potential criminal case.” Nevertheless, you also indicate that the assault case has been dismissed at the request of the complainant. Based on your arguments, it is unclear whether the assault case is closed or open. Thus, we determine that you have failed to adequately demonstrate either that the case is pending and is thus excepted under section 552.108(a)(1) or that the case has reached some final result other than conviction or deferred adjudication and is thus excepted under section 552.108(a)(2). Therefore, the sheriff may not withhold the submitted information relating to the assault case under section 552.108.

You also appear to contend that the submitted information relating to the indecent exposure case is excepted under section 552.108. However, you do not apply section 552.108 to this information. Therefore, you may not withhold the submitted information relating to the indecent exposure case under section 552.108.

In summary, to the extent the sheriff possesses a copy of the videotape from the indecent exposure case, it must release the videotape to the requestor. The sheriff must withhold some of the submitted information, which we have marked, under section 552.101 and common law privacy. However, the sheriff must release the remainder of the submitted information.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records

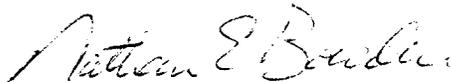
will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dept. of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Nathan E. Bowden  
Assistant Attorney General  
Open Records Division

NEB/sdk

Ref: ID# 152859

Enc: Submitted documents

c: Mr. Calvin Sabatini  
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(w/o enclosures)