



November 7, 2002

Mr. K. Scott Oliver
Assistant Criminal District Attorney
Bexar County - Civil Section
300 Dolorosa, Suite 4049
San Antonio, Texas 78205-3030

OR2002-6356

Dear Mr. Oliver:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 171179.

The Bexar County District Attorney's Office (the "district attorney") received three requests for copies of videotapes and audiotapes relating to a specified criminal case prosecuted by the district attorney. You claim that the requested information is excepted from disclosure under section 552.101 of the Government Code in conjunction with common-law privacy. We have considered the exception you claim and reviewed the submitted representative sample of information.¹ We have also considered comments submitted by counsel for the individual prosecuted in this case. See Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Initially, we must address the district attorney's obligations under section 552.301 of the Government Code. Under 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

¹ We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

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 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.

In your request for a decision from this office, you indicate that the district attorney received the first request on August 5, 2002. Thus, you were required to submit a copy or representative sample of the information requested by August 26, 2002. The package containing the submitted representative sample indicates that it was mailed on August 29, 2002. Consequently, we find that you failed to submit the representative sample of information within the fifteen-business-day period mandated by section 552.301(e)(1)(D) of the Government Code. *See Gov't Code § 552.308(a)* (fifteen-day requirement met if request bears post office cancellation mark indicating time within fifteen-day period).

Pursuant to section 552.302 of the Government Code, a governmental body's failure to submit to this office the information required in section 552.301(e) results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See 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). You contend that the requested information implicates the privacy of the individuals depicted in the video and audio tapes, and argue that the requested information is excepted under section 552.101 of the Government Code. Section 552.101 provides a compelling reason to overcome the presumption of openness. *See Open Records Decision No. 630* (1994) (presumption of openness overcome by a showing that the information is made confidential by another source of law or affects third party interests). We will therefore address your arguments under section 552.101.

Section 552.101 of the Government Code excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 also encompasses the doctrine of common-law privacy. Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). To demonstrate that information may be withheld from public disclosure pursuant to section 552.101 and common-law privacy, both prongs of the *Industrial Foundation* test must be affirmatively established. *Id.* at 681-82.

To determine whether the release of information would be highly objectionable to a reasonable person, we must look to the information itself, to determine whether it contains highly intimate or embarrassing facts. Upon review of the requested information, we agree that some of the individual's conversations and activities recorded on the audiotapes and videotapes are highly intimate and embarrassing. Thus, we find that certain portions of the requested information meet the first prong of the *Industrial Foundation* test. However, because the test requires an affirmative showing of both elements, "[t]here may be circumstances in which the special nature of the information makes it of legitimate concern to the public even though the information is of a highly private and embarrassing nature." *Industrial Found.*, 540 S.W.2d at 685. Accordingly, we now turn to the second prong of the *Industrial Foundation* test.

The second prong of the test requires a demonstration that the information at issue "is not of legitimate public concern." *Industrial Found.*, 540 S.W.2d at 684-85. Whether any particular information is "of legitimate public concern" must be determined on a case-by-case basis, "considering the nature of the information and the public's legitimate interest in its disclosure." *Star-Telegram, Inc. v. Doe*, 915 S.W.2d 471, 474 (Tex. 1995). In this case, another party depicted in these recordings contacted the San Antonio Police Department after the individual at issue allegedly discussed his involvement in past criminal acts and stated his desire to engage in certain criminal acts in the future. The requested videotapes and audiotapes were made by the San Antonio Police Department in the course of the ensuing criminal investigation of the individual, and document specific instances during which this individual engaged in criminal activity. You state that the videotapes and audiotapes are evidence in the criminal case brought against this individual by the district attorney pursuant to this investigation. Generally, the public has a legitimate interest in the details of crime and police efforts to combat crime in the community. *Cf. Anonsen v. Donahue*, 857 S.W.2d 700, 703 (Tex. App.--Houston [1st Dist.] 1993, writ denied) (matters of legitimate public concern extend beyond subjects of political or public affairs to all matters customarily regarded as "news" and all matters giving information to the public where the public may reasonably be expected to have a legitimate interest in what is published); *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177, 186 (Tex. Civ. App.--Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (public's legitimate interest in community affairs is particularly sensitive and important as applied to police activity). Because the videotapes and audiotapes at issue are police records documenting this individual's involvement in criminal activity, we determine that the requested audiotapes and videotapes are subject to a legitimate public interest. Thus, the second prong of the *Industrial Foundation* test has not been established in this case. *See Industrial Found.*, 540 S.W.2d at 685. Consequently, the videotapes and audiotapes at issue are not excepted from disclosure under section 552.101 in conjunction with common-law privacy.

We note, however, that one of the submitted videotapes, which we have marked, includes images of several peace officers.² Section 552.119 of the Government Code excepts from public disclosure a photograph of a peace officer, that, if released, would endanger the life or physical safety of the officer unless one of three exceptions applies. The three exceptions are: (1) the officer is under indictment or charged with an offense by information; (2) the officer is a party in a fire or police civil service hearing or a case in arbitration; or (3) the photograph is introduced as evidence in a judicial proceeding. This section also provides that a photograph exempt from disclosure under this section may be made public only if the peace officer gives written consent to the disclosure. This office has determined that this provision excepts such photographs from disclosure without the need for any specific showing that release of the photograph would endanger the life or safety of the officer. Open Records Decision No. 502 (1988). It does not appear that any of the exceptions to section 552.119 apply. Furthermore, you have not informed us that any of the peace officers depicted in the videotape executed a written consent to disclosure of their images. Thus, the district attorney must withhold any portion of the marked videotape that includes the image of a peace officer under section 552.119, unless the district attorney obtains written consent from the peace officers for their disclosure. The remaining portions of the marked videotape are not protected under section 552.119 of the Government Code. If, however, the district attorney is unable to obscure the faces of peace officers on the videotape, then the district attorney must withhold the marked videotape in its entirety under section 552.119 of the Government Code.

We also note that the marked videotape contains an image of a Texas license plate. Section 552.130 of the Government Code excepts motor vehicle license and registration information issued by an agency of this state from public disclosure. The portion of the videotape containing the Texas license plate number must be withheld from disclosure. If, however, the district attorney is unable to obscure the license plate number, then the district attorney must withhold the marked videotape in its entirety under section 552.130 of the Government Code.

In summary, the district attorney must withhold any portion of the marked videotape that includes the image of a peace officer under section 552.119 of the Government Code, and the portion of the marked videotape that includes a Texas license plate number under section 552.130 of the Government Code. If, however, the district attorney is unable to obscure the faces of peace officers or the license plate number on the videotape, then the district attorney must withhold the marked videotape in its entirety. The remaining audiotapes and videotapes must be released to the requestors.

²"Peace officer" is defined by article 2.12 of the Code of Criminal Procedure.

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 Department 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 Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code

§ 552.325. 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,



David R. Saldivar
Assistant Attorney General
Open Records Division

DRS/seg

Ref: ID# 171179

Enc: Submitted documents

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