



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

September 10, 2003

Ms. Kimberley Mickelson
Olson & Olson
Three Allen Center
333 Clay Street, Suite 3485
Houston, Texas 77002

OR2003-6351

Dear Ms. Mickelson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 187417.

The City of Seabrook Police Department (the "department"), which you represent, received a request for two police reports and a booking video. You state that the requestor subsequently clarified his request so as to specify which police reports he was requesting. You claim that 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.

You state that the department received the requestor's request for information on June 17, 2003. Although you state that the requestor verbally amended his original request on June 25, 2003, we note that a governmental body that requests an attorney general decision with respect to requested information that it seeks to withhold from disclosure must request that decision of the attorney general within ten business days after the date of the governmental body's receipt of the *written* request for information. *See* Gov't Code § 552.301. However, if a governmental body is unclear as to what information has been requested of it by a requestor, the governmental body may ask the requestor to clarify the request. *See* Gov't Code § 552.222. You do not inform us when the department requested clarification from the requestor concerning the original request for information. Accordingly, the ten business day deadline that the department was required to abide by in requesting this decision from us was not tolled on the date that the requestor verbally amended his request.

See Gov't Code § 552.301(b); Open Records Decision No. 663 at 5 (1999) (providing that ten-day period is tolled during the clarification process). Consequently, the department was required to request a decision from our office as to whether any portion of the requested information could be withheld from disclosure on or before July 1, 2003. However, you did not request a decision from us regarding the requested information until July 8, 2003. Accordingly, we must conclude that the department failed to comply with the procedural requirements of section 552.301 in requesting this decision from us. See Gov't Code § 552.301 (describing ten and fifteen business day requirements in requesting attorney general decision).

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 that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. See Gov't Code § 552.302; *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 section 552.302); Open Records Decision No. 319 (1982). You contend that the requested information is excepted under section 552.108 of the Government Code. However, you have not demonstrated a compelling reason for withholding the requested information under section 552.108. See Open Records Decision Nos. 473 at 2 (1987) (discretionary exceptions under predecessor to Public Information Act ("Act") can be waived), 177 (1977) (governmental body may waive statutory predecessor to section 552.108); *but see* Open Records Decision No. 586 (1991) (need of another governmental body to withhold requested information may provide compelling reason for nondisclosure under section 552.108). Therefore, the department may not withhold the requested information under section 552.108. However, a demonstration that information is confidential or affects the interests of a third party may provide a compelling reason for overcoming the presumption of openness. See Open Records Decision No. 150 (1977). Therefore, we will address your argument 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." This section encompasses common-law privacy and excepts from disclosure private facts about an individual. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information is excepted from required public disclosure by a common-law right of privacy if the information (1) 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. *Id.*

In Open Records Decision No. 393 (1983), this office concluded that, generally, only information that either identifies or tends to identify a victim of sexual assault or other sex-related offense may be withheld under common-law privacy, but because the identifying

information was inextricably intertwined with other releasable information, the governmental body was required to withhold the entire report. Open Records Decision No 393 (1983) at 2; see Open Records Decision No. 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 legitimate interest in such information); Open Records Decision No. 440 (1986) (detailed descriptions of serious sexual offenses must be withheld). The requestor in this case knows the identity of the alleged victim of the relevant offense. We believe that, in this instance, withholding only identifying information from the requestor would not preserve the victim's common-law right to privacy. We conclude, therefore, that the department must withhold the entire offense report in Case No. 2003-273 pursuant to section 552.101.

We note that portions of the submitted videotape includes images of several peace officers that must be withheld from disclosure under section 552.119 of the Government Code. Section 552.119 excepts from public disclosure a photograph of a peace officer¹ 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. Open Records Decision No. 502 (1988). The video contains images of peace officers, and it does not appear that any of the exceptions are applicable. Unless the peace officers have executed any written consents to disclosure, the department must withhold the video images of the peace officers from disclosure under section 552.119. However, to the extent that the department does not maintain the technological capability to redact this information from the videotape, we conclude that the department must withhold the videotape in its entirety.

In summary, the department must withhold report no. 2003-273 in its entirety pursuant to section 552.101. Video images of peace officers must be withheld from disclosure under section 552.119, unless the peace officers have executed written consents to disclosure. However, to the extent that the department does not maintain the technological capability to redact this information from the videotape, the department must withhold the videotape in its entirety. The remaining submitted information must be released to the requestor.²

¹"Peace officer" is defined by article 2.12 of the Code of Criminal Procedure.

²Some of the documents marked for release contain or consist of confidential information that is not subject to release to the general public. See Gov't Code § 552.352. However, the requestor in this instance has a special right of access to the information. Gov't Code § 552.023. Because some of the information is confidential with respect to the general public, if the department receives a future request for this information from an individual other than the requestor or his authorized representative, the department should again seek our decision.

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 Dep't of Pub. 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,

A handwritten signature in black ink, appearing to read "Cindy Nettles". The signature is fluid and cursive, with the first name being more prominent.

Cindy Nettles
Assistant Attorney General
Open Records Division

CN/jh

Ref: ID# 187417

Enc. Submitted documents

c: Mr. Steve McCutcheon
1005 North Heron
Seabrook, Texas 77586
(w/o enclosures)