



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

December 31, 2003

Mr. Ron G. McFarlane, Jr.
Sifford, Anderson, Vice & McFarlane, L.L.P.
2001 Bryan Street, Suite 2050
Dallas, Texas 75201

OR2003-9412

Dear Mr. McFarlane:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 193574.

The Cedar Hill Police Department (the "department"), which you represent, received a request for "the reason(s) to [sic] why a Warrant for my Arrest was issued[.]" You claim that the information deemed to be responsive to this request is excepted from disclosure under section 552.108 of the Government Code.¹ We have considered the exception you raise and have reviewed the information you submitted.

We first note that the submitted information includes an arrest warrant and the supporting affidavit for the warrant. The 78th Legislature recently amended article 15.26 of the Code of Criminal Procedure to add language providing:

The arrest warrant, and any affidavit presented to the magistrate in support of the issuance of the warrant, *is public information*, and beginning immediately when the warrant is executed the magistrate's clerk shall make

¹We note that the Public Information Act (the "Act"), chapter 552 of the Government Code, does not require a governmental body to answer factual questions, conduct legal research, or create new information in responding to a request for information. See Open Records Decision Nos. 563 at 8 (1990), 555 at 1-2 (1990). Likewise, a governmental body need not take affirmative steps to create or obtain information that is not in its possession, so long as no other individual or entity holds that information on behalf of the governmental body that received the request. See Gov't Code § 552.002(a); Open Records Decision Nos. 534 at 2-3 (1989), 518 at 3 (1989). However, a governmental body must make a good-faith effort to relate a request to any responsive information that is within the governmental body's possession or control. See Open Records Decision No. 561 at 8-9 (1990).

a copy of the warrant and the affidavit available for public inspection in the clerk's office during normal business hours. A person may request the clerk to provide copies of the warrant and affidavit on payment of the cost of providing the copies.

Act of May 31, 2003, 78th Leg., R.S., ch. 390, § 1, 2003 Tex. Sess. Laws Serv. 1631 (to be codified as amendment to Crim. Proc. Code art. 15.26) (emphasis added). Thus, arrest warrants and affidavits for arrest warrants that have been presented to a magistrate are made public by, and must be released under, article 15.26 of the Code of Criminal Procedure. As a general rule, the exceptions to disclosure found in the Act do not apply to information that is made public by other statutes. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Therefore, the department must release the arrest warrant and the affidavit for the warrant that we have marked under article 15.26 of the Code of Criminal Procedure.

We next note that the department has not complied with section 552.301 of the Government Code in requesting this decision. Section 552.301 prescribes procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(b) requires the governmental body to ask for the attorney general's decision and state the exceptions to disclosure that it claims not later than the tenth business day after the date of its receipt of the written request for information. *See* Gov't Code § 552.301(b). Section 552.301(e) requires the governmental body to submit to the attorney general, not later than the fifteenth business day after the date of its receipt of the request, (1) written comments stating why the governmental body's claimed exceptions apply to the information that it seeks to withhold; (2) a copy of the written request for information; (3) a signed statement of the date on which the governmental body received the request, or evidence sufficient to establish that date; and (4) the specific information that the governmental body seeks to withhold or representative samples of the information if it is voluminous. *See id.* § 552.301(e)(1)(A)-(D). If a governmental body does not request an attorney general decision as prescribed by section 552.301, the information requested in writing is presumed to be subject to required public disclosure and must be released, unless there is a compelling reason to withhold the information. *See id.* § 552.302.

You inform us that the department received this request for information on October 7, 2003. The date of your submission of the information at issue, October 30, 2003, was beyond the fifteen-business-day period prescribed by section 552.301(e). Thus, the department has not timely complied with section 552.301 in requesting this decision, and therefore the submitted information is presumed to be public and must be released under section 552.302, unless there is a compelling reason to withhold any of the information from the public. *See also Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ). The presumption that information is public under section 552.302 can generally be overcome when the information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982). Section 552.108 of the Government

Code, which the department raises, is a discretionary exception to disclosure that protects the governmental body's interests and may be waived. *See* Gov't Code § 552.007; Open Records Decision No. 177 (1977) (statutory predecessor did not prohibit release of information). The department's claim under section 552.108 is not a compelling reason for non-disclosure under section 552.302. *But see* Open Records Decision No. 586 at 2-3 (1991) (need of another governmental body to withhold information under statutory predecessor can provide compelling reason for non-disclosure). The department has waived its claim under section 552.108 in failing to comply with section 552.301. *See* Open Records Decision No. 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions). Therefore, the department may not withhold any of the submitted information under section 552.108.

We note, however, that the department may be required to withhold some of the submitted information under section 552.101 of the Government Code.² Section 552.101 excepts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception encompasses information that another statute makes confidential. A social security number is confidential under section 552.101 in conjunction with 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), if a governmental body obtained or maintains the social security number under any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 at 2-4 (1994). It is not apparent to this office that the social security numbers contained in the submitted documents are confidential under section 405(c)(2)(C)(viii)(I) of the federal law. You have cited no law, and we are aware of no law, enacted on or after October 1, 1990 that authorizes the department to obtain or maintain a social security number. Thus, we have no basis for concluding that the social security numbers in question here were obtained or are maintained under such a law and are therefore confidential under the federal law. Moreover, one of the social security numbers in question is that of the requestor. The requestor has a right of access to her own social security number under section 552.023 of the Government Code, and that information may not be withheld from her under section 552.101 in conjunction with section 405(c)(2)(C)(viii)(I) of title 42 of the United States Code. Otherwise, we caution you that the Act imposes criminal penalties for the release of confidential information. *See* Gov't Code §§ 552.007, .352. Therefore, before releasing the social security number that we have marked, the department should ensure that it was not obtained and is not maintained under any provision of law enacted on or after October 1, 1990.

The submitted documents also contain Texas driver's license numbers. Section 552.130 of the Government Code excepts from public disclosure information that relates to "a motor

² Unlike other exceptions to disclosure, this office will raise section 552.101 on behalf of a governmental body, because chapter 552 of the Government Code prescribes criminal penalties for the release of confidential information. *See* Gov't Code §§ 552.007, .352; Open Records Decision No. 325 at 2 (1982).

vehicle operator's or driver's license or permit issued by an agency of this state[.]” Gov't Code § 552.130(a)(1). The department must withhold the Texas driver's license number that we have marked under section 552.130. The requestor also has a right of access to her own Texas driver's license number under section 552.023.

Lastly, we note that some of the submitted information is confidential under section 552.136 of the Government Code. This exception provides as follows:

(a) In this section, “access device” means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

(1) obtain money, goods, services, or another thing of value; or

(2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Gov't Code § 552.136. We have marked the information that the department must withhold under section 552.136. The requestor also has a right of access to her own bank account number under section 552.023.

In summary: (1) the department may be required to withhold the marked social security number under section 552.101 of the Government Code in conjunction with section 405(c)(2)(C)(viii)(I) of title 42 of the United States Code; (2) the department must withhold the marked Texas driver's license number under section 552.130; and (3) the department must withhold the marked information that is confidential under section 552.136. The rest of the submitted information, including the marked arrest warrant and affidavit that are made public under article 15.26 of the Code of Criminal Procedure, must be released to the requestor.³

³We note that the submitted documents also contain other information that the department would be required to withhold from the public under section 552.101. That information relates to the requestor, however, and may not be withheld from her on privacy grounds. See Gov't Code § 552.023(a); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning herself). Should the department receive another request from a person who would not have a right of access to the requestor's private information, the department should resubmit this same information and request another decision. See Gov't Code §§ 552.301, .302.

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).

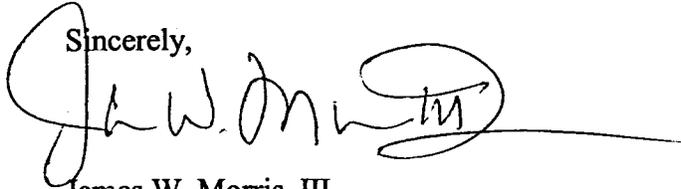
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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 "J.W. Morris, III". The signature is fluid and cursive, with a large initial "J" and a stylized "M" at the end. A horizontal line extends from the end of the signature to the right.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 193574

Enc: Submitted documents

c: Ms. Elisabeth McDaniel
P.O. Box 2798
Cedar Hill, Texas 75106
(w/o enclosures)