



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

February 17, 2004

Mr. Jason Martinson
Open Records Coordinator
Texas Parks & Wildlife
4200 Smith School Road
Austin, Texas 78744-3291

OR2004-1131

Dear Mr. Martinson:

You ask 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# 196274.

The Texas Parks and Wildlife Department (the "department") received a request for "the personnel files of the two Walker County Game Wardens," information related to arrests made by these game wardens "under Operation Game Thief," and other arrests, tickets, fines, or penalties imposed by these two wardens for any cause from January 1, 1998 to date. You state that some responsive information will be provided to the requestor. You claim that a portion of the requested information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.108, 552.117, 552.130, and 552.136 of the Government Code. We have considered the exceptions you claim.

We begin by noting that section 552.301(e) of the Government Code requires a governmental body to submit to this office within fifteen business days of receiving an open records 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. *See*

Gov't Code § 552.301(e). As of the date of this letter, you have not provided this office with general written comments stating the reasons why the stated exceptions apply that would allow the information at issue to be withheld or a copy or representative sample of the information that the department seeks to withhold. Consequently, you failed to submit the requisite information within the fifteen business day period mandated by section 552.301(e) of the Government Code.

Because the department failed to comply with the procedural requirements of section 552.301 with regard to the requested information, the information at issue is now presumed public. *See* Gov't Code § 552.302; *see also* *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.--Austin 1990, no writ); *City of Houston v. Houston Chronicle Publ'g Co.*, 673 S.W.2d 316, 323 (Tex. App.--Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). The department must demonstrate a compelling interest in order to overcome the presumption that the information at issue is now public. *See id.* Normally, a compelling interest is demonstrated when some other source of law makes the requested information confidential or when third party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977). Although the department claims that the information at issue is excepted from disclosure pursuant to section 552.103 of the Government Code, we note that this exception to disclosure is a discretionary exception to disclosure under the Act that does not constitute a compelling interest that is sufficient to overcome the presumption that the information at issue is now public.¹ Further, we note that, although the department claims that the information at issue is also excepted from disclosure pursuant to section 552.108 of the Government Code, the department in this instance has not demonstrated a compelling interest under this exception to disclosure that would allow any portion of the information at issue to be withheld from disclosure. *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 in certain circumstances). Accordingly, we conclude that the department may not withhold the information at issue under either section 552.103 or section 552.108 of the Government Code. Furthermore, although the department claims that the information at issue is excepted from disclosure pursuant to sections 552.101, 552.102, 552.117, 552.130 and 552.136 of the Government Code, which can provide compelling reasons for nondisclosure of requested information under section 552.302, we have no basis for concluding that it is so excepted under these exceptions to disclosure because the department failed to submit any portion of

¹ Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.*, Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation and does not itself make information confidential), 473 (1987) (governmental body may waive section 552.111), 522 at 4 (1989) (discretionary exceptions in general); *see also* *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.--Dallas 1999, no pet.) (governmental body may waive section 552.103). Discretionary exceptions, therefore, do not constitute "other law" that makes information confidential.

the information at issue to us for our review. Accordingly, we also conclude that the department may not withhold any portion of the information at issue under section 552.101, 552.102, 552.117, 552.130, or 552.136 of the Government Code. Consequently, the department must release the information at issue to the requestor.

However, we caution the department that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. *See* Gov't Code § 552.352. Prior to releasing the information at issue, the department should ensure that it does not contain any such confidential information. If the department believes that any portion of the information at issue is indeed confidential and may not lawfully be released, it must challenge this ruling in court as outlined below.

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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/jh

Ref: ID# 196274

No enclosures

c: Mr. George H. Russell
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Huntsville, Texas 77340