



**ATTORNEY GENERAL OF TEXAS**  
**GREG ABBOTT**

August 26, 2004

Mr. Hugh Coleman  
Assistant District Attorney  
Denton County Criminal District Attorney's Office  
127 North Woodrow Lane  
Denton, Texas 76205

OR2004-7305

Dear Mr. Coleman:

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# 207937.

The Denton County Sheriff's Office (the "sheriff") received a request for "copies of all audiotapes relating to the illegal wiretapping activities of [three named individuals], or purporting to contain the voice of [a fourth individual]." You state that "basic incident information" is being provided to the requestor. You claim that the remaining 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.

Initially, we address the sheriff's obligations under the Act. Section 552.301 provides, in relevant part, that a governmental body that seeks to withhold requested information from the public must "submit to the attorney general . . . a copy of the specific information requested, or submit representative samples of the information if a voluminous amount of information was requested[.]" Gov't Code § 552.301(e)(1)(D). If a governmental body undertakes to comply with section 552.301(e)(1)(D) by submitting representative samples, the submitted information must be genuinely representative of the requested information as a whole. *See* Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988). If a governmental body fails to comply with section 552.301, the requested information is presumed to be subject to required public disclosure and must be released unless there is a compelling reason to withhold that information from the public. *See* Gov't Code § 552.302;

*see also 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 assert that the sheriff has submitted to this office a "representative sample" of the responsive information. You acknowledge that the requestor specifically requested "audiotapes." You state that the sheriff "has identified potential 'audiotapes' from the case file and has noted them on the representative sample of information [and that] those audio tapes have been logged as evidence to the criminal case and are held securely in the [sheriff's] evidence room." However, to date, you have not submitted any audiotapes to this office. Based on the significant discrepancy between the specific information requested and the contents of the records that you submitted, we conclude that the submitted records do not constitute a representative sample of the responsive information that the sheriff seeks to withhold. *See* Gov't Code § 552.301(e)(1)(D); Open Records Decision No. 497 at 4 (1988). Consequently, because the submitted records are not genuinely representative of responsive information held by the sheriff, the sheriff has failed to comply with the procedural requirements of section 552.301, and therefore requested information that differs substantially from the submitted records is presumed to be public. Gov't Code § 552.302.

Section 552.108 is a discretionary exception to disclosure that protects a governmental body's interests and may be waived by the governmental body. *See* Open Records Decision No. 177 (1977) (governmental body may waive statutory predecessor to section 552.108); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). *But see* Open Records Decision No. 586 at 3 (1991) (need of another governmental body to withhold information under section 552.108 can provide compelling reason under section 552.302). Although you raise section 552.108, you have not demonstrated a compelling reason to withhold the information at issue under section 552.108. *Id.* Accordingly, we find you have waived your claim under section 552.108 in this instance and we determine that none of the information at issue may be withheld under section 552.108. Furthermore, although section 552.101 of the Government Code is an exception that can provide a compelling reason for nondisclosure of requested information under section 552.302, we have no basis for concluding that the requested information is excepted under this section because you failed to submit any portion of the information to us for our review. Therefore, we have no choice but to order the sheriff to release the information at issue. If you believe that the information at issue is confidential, private, or proprietary and may not lawfully be released, you must challenge this ruling in court as outlined below.

We further note that the submitted information is not responsive to the instant request. Thus, the sheriff need not release it in response to this request and this ruling will not address that 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 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 cursive script that reads "Cindy Nettles". The signature is written in black ink and is positioned above the typed name.

Cindy Nettles  
Assistant Attorney General  
Open Records Division

CN/jh

Ref: ID# 207937

Enc. Submitted documents

c: Mr. David J. Moraine  
1512 East McKinney, Suite 200  
Denton, Texas 76209  
(w/o enclosures)