



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

January 27, 2005

Mr. Miguel "Mike" D. Wise
711 South Georgia Avenue
Weslaco, Texas 78596

OR2005-00787

Dear Mr. Wise:

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# 216799.

The Office of State Representative Miguel "Mike" D. Wise received a request for information relating to (1) correspondence sent by you or your staff to other governmental or private entities that references the Texas Funeral Service Commission ("TFSC"), O.C. (Chet Robbins), TFSC commissioners, or employees of TFSC; (2) open records requests received by your office regarding TFSC or its employees and documents released that pertain to the requests; (3) correspondence that mentions a specified case filed in El Paso County, Texas and the TFSC or an *amicus* brief; and (4) state-issued credit card, travel and telephone records relating to you or your staff since October 1, 2003. You ask whether the requested information is excepted from disclosure under sections 552.301, 552.302, and 552.303 of the Government Code. We have considered your comments and have reviewed the information you submitted. We also have considered the comments that we received from the requestors. *See* Gov't Code § 552.304 (any person may submit written comments stating why information at issue in request for attorney general decision should or should not be released). We assume that you have released any other information that is responsive to this request, to the extent that such information existed when you received the request. If not, then you must release any such information at this time. *See* Gov't Code §§ 552.221, .301, .302; Open Records Decision No. 664 (2000).¹

¹We note that the Act does not require you to release information that did not exist when you received this request or to create responsive information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

We next note that sections 552.301, 552.302, and 552.303 are not exceptions to public disclosure under the Act. Rather, section 552.301 prescribes procedures that must be followed 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). Section 552.302 provides that if a governmental body does not request an attorney general decision as prescribed by 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 the information. *See id.* § 552.302.²

You have not claimed any of the exceptions to public disclosure that are found in subchapter C of the Act. *See id.* § 552.101 *et seq.* Thus, as you have not fully complied with section 552.301 of the Act in requesting this decision, the requested information is presumed to be public under section 552.302 and must be released, unless there is a compelling reason to withhold any of the information. *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 by a demonstration that the information is confidential by law or that third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982). In this instance, the Travis County District Attorney (the "district attorney") has asserted a law enforcement interest in the submitted information under section 552.108. The claim under section 552.108 of a governmental body other than the one that failed to comply with section 552.301 can provide a compelling reason for non-disclosure under section 552.302. *See* Open Records Decision No. 586 at 3 (1991) (interests of another law enforcement agency under statutory predecessor to Gov't Code § 552.108 overcame failure of governmental body that received request for information to timely seek attorney general decision). Accordingly, we will address the district attorney's arguments. We also note that sections 552.136 and 552.137 encompass some of the submitted

²Section 552.303 provides, among other things, that a governmental body may release requested information to the public before the attorney general renders a decision under the Act, unless the information is confidential by law. *See* Gov't Code § 552.303(a). Other provisions of section 552.303 prescribe procedures under which the attorney general may obtain further information from a governmental body if the attorney general determines that such information is necessary for the rendition of a decision under the Act. *See id.* § 552.3032(b)-(e).

information.³ As the applicability of these exceptions can provide a compelling reason for non-disclosure, we also will address sections 552.136 and 552.137.

Section 552.108 excepts from public disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]" Gov't Code § 552.108(a)(1). A governmental body that claims an exception to disclosure under section 552.108 must reasonably explain how and why this exception is applicable to the information that the governmental body seeks to withhold. *See id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986).

In this instance, the district attorney informs us that some of the submitted information relates to an active and ongoing criminal investigation. The district attorney states that he does not object to the release of (1) any information that you or your office received in response to open records requests submitted by you or your office to other governmental bodies or (2) any information that you or your office previously released in response to prior open records requests submitted to you or your office. The district attorney does object, however, to the release of all other information that has been provided to the district attorney's office by you or your office. The district attorney asserts that the release of such information would interfere with the detection, investigation, or prosecution of crime. Based on the district attorney's representations and our review of the submitted information, we find that section 552.108(a)(1) is applicable in this instance. *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases). We therefore conclude that, to the extent that the submitted information falls within the scope of the district attorney's objection to public disclosure, you may withhold any such information under section 552.108(a)(1) of the Government Code.⁴

Because the extent to which section 552.108 is applicable in this instance is not clear, we must also address sections 552.136 and 552.137 of the Government Code. Section 552.136 is applicable to certain account numbers and other access devices and provides as follows:

- (a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile

³Unlike other exceptions to public disclosure under the Act, this office will raise sections 552.136 and 552.137 on behalf of a governmental body, as these sections are mandatory exceptions to disclosure that a governmental body may not waive. *See* Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

⁴We suggest that you consult with the district attorney to ascertain the extent to which the submitted information is encompassed by his objection to disclosure.

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 account number information that you must withhold under section 552.136.

Section 552.137 is applicable to certain e-mail addresses and provides as follows:

(a) Except as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

(c) Subsection (a) does not apply to an e-mail address:

(1) provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent;

(2) provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor's agent;

(3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract; or

(4) provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public.

(d) Subsection (a) does not prevent a governmental body from disclosing an e-mail address for any reason to another governmental body or to a federal agency.

Gov't Code § 552.137. Section 552.137 excepts from public disclosure certain e-mail addresses of members of the public that are provided for the purpose of communicating electronically with a governmental body, unless the individual to whom the e-mail address belongs has affirmatively consented to its public disclosure. The types of e-mail addresses listed in section 552.137(c) may not be withheld under this exception. Likewise, section 552.137 is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees. We have marked e-mail addresses that you must withhold under section 552.137, unless a particular e-mail address pertains to an individual who has affirmatively consented to its public disclosure.

In summary: (1) to the extent that the district attorney's objection to disclosure encompasses the submitted information, you may withhold any such information under section 552.108(a)(1); and (2) to the extent that the district attorney's objection to disclosure does not encompass the submitted information, you must withhold the marked account number information under section 552.136, and you must withhold the marked e-mail addresses under section 552.137, unless a particular e-mail address belongs to an individual who has affirmatively consented to its public disclosure. The rest of the submitted information must be released.

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

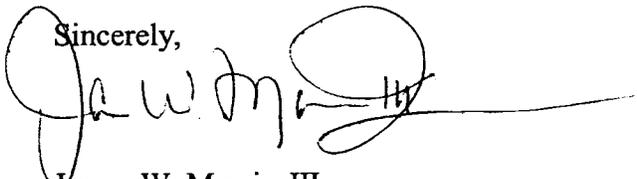
will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure 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,



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

JWM/sdk

Ref: ID# 216799

Enc: Submitted documents

c: Mr. and Mrs. O.C. Robbins
1003 Deer Run
Round Rock, Texas 78681
(w/o enclosures)

Ms. Julie Joe
Assistant County Attorney
Travis County Attorney's Office
P.O. Box 1748
Austin, Texas 78767
(w/o enclosures)