



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 16, 2006

Ms. Bertha A. Ontiveros
Assistant County Attorney
El Paso County
500 E. San Antonio, Room 503
El Paso, Texas 79901

OR2006-02628

Dear Ms. Ontiveros:

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# 244407.

The El Paso County Sheriff's Office (the "sheriff") received a request for copies of all ST1 reports, pictures, and video pertaining to a specified incident. You state that the sheriff does not maintain the requested ST1 reports.¹ You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, and 552.108 of the Government Code. We have also received comments from the District Attorney for the Thirty-Fourth Judicial District (the "district attorney") arguing that the submitted information is excepted from disclosure under sections 552.103 and 552.108. *See Gov't Code § 552.304* (interested party may submit comments stating why information should or should not be released). We have considered the claimed exceptions and reviewed the submitted information.

Initially, we must address the sheriff's obligations under the Act. Section 552.301(b) of the Government Code provides that a governmental body that wishes to withhold requested information must "ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the 10th business day after the date of receiving

¹The Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex.Civ.App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

the written request.” Gov’t Code § 552.301(b). You state that the sheriff received this request on December 14, 2005. However, you did not request a ruling or submit the information for our review until January 3, 2006. Thus, the sheriff has failed to comply with the procedural requirements of section 552.301.

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 id.* § 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). The presumption that information is public under section 552.302 can generally be overcome by demonstrating 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). Sections 552.103 and 552.108 of the Government Code are discretionary exceptions to disclosure that protect a governmental body’s interests and may be waived. *See* Gov’t Code § 552.007; *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 Gov’t Code § 552.103); Open Records Decision Nos. 665 at 2 n.5 (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 177 at 3 (1977) (statutory predecessor to Gov’t Code § 552.108 subject to waiver). In failing to comply with section 552.301, the sheriff waived his claims under sections 552.103 and 552.108. Therefore, the submitted information may not be withheld on the basis of the sheriff’s claims under these exceptions. However, the interests of a third party under section 552.103 or section 552.108 can provide a compelling reason for non-disclosure under section 552.302. *See* Open Records Decision Nos. 586 (1991) (need of another governmental body to withhold information under statutory predecessor section 552.108 can provide compelling reason to overcome presumption of openness), 469 (1987) (university may withhold information under Gov’t Code § 552.103 predecessor to protect district attorney’s interest in anticipated criminal litigation), 121 (1976) (same). Therefore, we will consider whether the sheriff may withhold the submitted information on the basis of the district attorney’s claims under sections 552.103 and 552.108. Additionally, we will address section 552.101 of the Government Code, as the applicability of this exception also can provide a compelling reason for non-disclosure.

Section 552.108 of the Government Code excepts from disclosure:

- (a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if
 - (1) release of the information would interfere with the detection, investigation, or prosecution of crime[.]

Gov't Code § 552.108(a). In this instance, the district attorney has advised that the submitted information pertains an ongoing prosecution and that release of the submitted information would interfere with the prosecution of crime. Based upon these representations and our review, we conclude the submitted information may be withheld pursuant to section 552.108(a)(1) of the Government Code.² Although section 552.108(a)(1) of the Government Code authorizes the sheriff to withhold the submitted information from disclosure, we note that the sheriff has the discretion to release all or part of this information that is not otherwise confidential by law. *Id.* § 552.007.

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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).

²As our ruling under section 552.108 is dispositive, we need not address the remaining arguments.

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 Office of the Attorney General 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. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments with in 10 calendar days of the date of this ruling.

Sincerely,



L. Joseph James
Assistant Attorney General
Open Records Division

LJJ/jh

Ref: ID# 244407

Enc. Submitted documents

c: Ms. Sandra Escalante
Legal Assistant for
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(w/o enclosures)