



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 7, 2006

Mr. Boyd Kennedy  
Attorney  
Texas Parks & Wildlife  
4200 Smith School Road  
Austin, Texas 78744-3291

OR2006-05951

Dear Mr. Kennedy:

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# 249972.

The Texas Parks and Wildlife Department (the "department") received a request for information related to an undercover operation in which game fish were sold.<sup>1</sup> You state that some of the information has been released. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.108, 552.111, and 552.119 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We begin by addressing the department's obligations under the Act. Pursuant to section 552.301(e), a governmental body is required 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. Although you state the department received the request for information on March 13, 2006, you did not submit to this office a

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<sup>1</sup> As you have not submitted the request for information, we take our description from your brief.

copy of the written request for information until May 31, 2006. Thus, the department failed to comply with the procedural requirements mandated by section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to submit to this office the information required in section 552.301(e) results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See 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). Generally, a compelling reason exists when third party interests are at stake or when information is confidential under other law. Open Records Decision No. 150 (1977).

Although you assert that the submitted information is excepted pursuant to sections 552.108 and 552.111, these are discretionary exceptions that protect a governmental body's interests and may be waived by a governmental body's failure to comply with the procedural requirements of the Act. *See* Open Records Decision Nos. 522 at 4 (1989) (discretionary exceptions in general), 473 (1987) (governmental body may waive section 552.111), 177 (1977) (governmental body may waive statutory predecessor to section 552.108). Thus, in this instance, neither provision constitutes a compelling reason to withhold the submitted information. *But see* Open Records Decision No. 586 (1991) (need of another governmental body to withhold information may provide compelling reason for nondisclosure under section 552.108). Therefore, the department may not withhold any of the information under either section 552.108 or section 552.111. However, sections 552.101 and 552.119 each can provide a compelling reason to withhold information, and we will address your arguments concerning those exceptions. *See* Gov't Code § 552.302.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information protected by other statutes. You argue that some of the submitted information, drafts of probable cause affidavits, is confidential under article 15.26 of the Code of Criminal Procedure. However, article 15.26 governs the execution of arrest warrants and the public availability of arrest warrants and supporting affidavits. *See* Code Crim. Proc. art. 15.26 ("In executing a warrant of arrest, it shall always be made known to the accused under what authority the arrest is made . . . . The arrest warrant, and any affidavit presented to the magistrate in support of the issuance of the warrant, is public information."). Article 15.26 does not expressly make information confidential. *See* Open Records Decision Nos. 658 at 4 (1998) (statutory confidentiality must be express, and confidentiality requirement will not be implied from statutory structure), 478 at 2 (1987) (statutory confidentiality requires express language making certain information confidential or stating that information shall not be released to public). Furthermore, a draft affidavit is not made confidential under article 15.26 simply because that provision makes an affidavit presented to a magistrate public. *See* Open Records

Decision No. 525 at 4 (1989) (information cannot be withheld by negative implication simply because statute designates other specific information as public information). Consequently, we conclude that the department may not withhold any of the submitted information pursuant to section 552.101 of the Government Code in conjunction with article 15.26 of the Code of Criminal Procedure.

You also claim the submitted information constituting videotapes is excepted from disclosure pursuant to section 552.119 of the Government Code, which provides:

(a) A photograph that depicts a peace officer as defined by Article 2.12, Code of Criminal Procedure, the release of which would endanger the life or physical safety of the officer, is excepted from [required public disclosure] unless:

- (1) the officer is under indictment or charged with an offense by information;
- (2) the officer is a party in a civil service hearing or a case in arbitration; or
- (3) the photograph is introduced as evidence in a judicial proceeding.

(b) A photograph excepted from disclosure under Subsection (a) may be made public only if the peace officer gives written consent to the disclosure.

Gov't Code § 552.119. Under section 552.119, a governmental body must demonstrate, if the documents do not demonstrate on their face, that release of the photograph would endanger the life or physical safety of a peace officer. Furthermore, a photograph of a peace officer cannot be withheld under section 552.119 if (1) the officer is under indictment or charged with an offense by information; (2) the officer is a party in a civil service hearing or a case in arbitration; (3) the photograph is introduced as evidence in a judicial proceeding; or (4) the officer gives written consent to the disclosure.

In this instance, you have not demonstrated, nor is it apparent from our review of the submitted information, that release of the submitted videotapes with a game warden's image would endanger the life or physical safety of the game warden. We therefore determine that the department may not withhold the submitted videotapes pursuant to section 552.119 of the Government Code.

However, we note the submitted information includes a Texas driver's license number. Section 552.130 of the Government Code excepts from disclosure information that "relates to . . . a motor vehicle operator's or driver's license or permit issued by an agency of this

state [or] a motor vehicle title or registration issued by an agency of this state.”<sup>2</sup> Gov’t Code § 552.130. In accordance with section 552.130, the department must withhold the marked Texas driver’s license number. The remaining submitted information must be released to the requestor.

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).

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

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<sup>2</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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 within 10 calendar days of the date of this ruling.

Sincerely,



Ramsey A. Abarca  
Assistant Attorney General  
Open Records Division

RAA/eb

Ref: ID# 249972

Enc. Submitted documents

c: Mr. Barry Johnson  
P. O. Box 330844  
Fort Worth, Texas 76163  
(w/o enclosures)