



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 25, 2006

Mr. James F. Booher
Assistant Criminal District Attorney
County of Hays
Hays County Justice Center
110 East Martin Luther King
San Marcos, Texas 78666

OR2006-11208

Dear Mr. Booher:

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# 260280.

The Hays County Sheriff's Office (the "sheriff") received a request for all documents and records related to a specified search warrant involving the requestor. The sheriff received additional correspondence from the same requestor limiting his original request to the affidavits of two named individuals. You state that the sheriff has no responsive information for one of the named individuals, and you claim that the responsive statement of the remaining named individual is excepted from disclosure under section 552.108 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, we must address the sheriff's procedural obligations under section 552.301 of the Government Code. Pursuant to section 552.301(b), a governmental body must ask for the attorney general's decision and state the exceptions that apply within ten business days after receiving the request. *See id.* § 552.301(a), (b). It appears that the sheriff did not ask for our decision within the ten business day deadline. You do not inform us that the sheriff requested clarification from the requestor concerning the original request for information. Accordingly, the ten business day deadline that the sheriff was required to abide by in requesting this decision from us was not tolled until the date that the requestor clarified his request. *See Gov't Code* § 552.301(b); Open Records Decision No. 663 at 5 (1999) (providing that ten-day period is tolled during the clarification process). Consequently, the

sheriff was required to request a decision from our office as to whether any portion of the requested information could be withheld from disclosure within ten days of receiving the original request for information. We note, and you acknowledge, that the original request for information, which encompasses the affidavits at issue, is dated June 9, 2006. Your request for a decision is postmarked July 20, 2006. Accordingly, we must conclude that the sheriff failed to timely submit this request for a decision within the ten business day deadline under section 552.301(b).

Additionally, 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. You did not, however, submit to this office a signed statement or sufficient evidence showing the date the governmental body received the original written request as required by section 552.301(e). As such, the sheriff has not complied with the procedural requirements of section 552.301 in requesting this decision from us. *See* Gov't Code § 552.301 (describing ten and fifteen business day requirements in requesting attorney general decision).

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 a compelling reason exists 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). 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). Section 552.108 is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See* Open Records Decision Nos. 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions), 177 (1977) (statutory predecessor to section 552.108 subject to waiver). In failing to comply with section 552.301, the sheriff has waived its claim under section 552.108.

However, the interests under this exception 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 of the Government Code. *See* Open Records Decision No. 586 at 2-3 (1991) (claim of another governmental body under statutory predecessor to section 552.108 can provide compelling reason for non-disclosure). In this instance, you inform us that the Cyber Crimes Unit of the Office of the Attorney General's Criminal Investigations Division (the "CID") asserts a law enforcement interest in the submitted information. Therefore, we will consider whether the sheriff may withhold the submitted information on behalf of the CID under section 552.108 of the Government Code.

The CID asserts that the responsive information is excepted from public disclosure under section 552.108 of the Government Code. Section 552.108(a) excepts from disclosure “[i]nformation 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.” Generally, a governmental body claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. See Gov’t Code §§ 552.108(a)(1), (b)(1), .301(e)(1)(A); see also *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). The CID has submitted a letter to this office stating that the division’s criminal investigation of the case to which the responsive information relates is active and ongoing. Based on the CID’s representations and our review, we conclude that release of the information at issue would interfere with the detection, investigation, or prosecution of crime. 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). Therefore, section 552.108(a)(1) is applicable to the submitted information.

Further, although section 552.108(c) provides that “basic information” is not excepted from disclosure by section 552.108, the submitted witness statement is not among the type of information that constitutes basic information. See *Houston Chronicle*, 531 S.W.2d at 186-88; Open Records Decision No. 127 at 3-4 (1976) (summarizing types of information deemed public by *Houston Chronicle*). We accordingly conclude that the sheriff may withhold the information at issue on behalf of the CID under section 552.108 of the Government Code.

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 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,



Heather Pendleton Ross
Assistant Attorney General
Open Records Division

HPR/dh

Ref: ID# 260280

Enc. Submitted documents

c: Mr. Paul A. Lawrence
830 Engelke Road
Niederwald, Texas 78640
(w/o enclosures)