



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 28, 2014

Mr. Sterling Harmon
Appellate Chief
Office of the Criminal District Attorney
County of McLennan
219 North 6th Street, Suite 200
Waco, Texas 76701

OR2014-19410

Dear Mr. Harmon:

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# 540910.

The McLennan County Criminal District Attorney's Office (the "district attorney's office") received a request for the case files, videos, reports, disposition records, and all other documents pertaining to three named individuals. You state the district attorney's office does not have some information.¹ You state some information was released to the requestor. You claim portions of the remaining information are excepted from disclosure under section 552.108 of the Government Code. We have considered the exception you claim.

Initially, we note the district attorney's office has not submitted information pertaining to one of the named individuals. However, you acknowledge information pertaining to this individual exists, and you argue it is excepted from disclosure under section 552.108(a)(1). We note pursuant to section 552.301(e), a governmental body must provide this office with a copy of the responsive information or a representative sample thereof within fifteen

¹The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

business days of receipt of the request. *See* Gov't Code § 552.301(e). Therefore, the district attorney's office did not comply with the requirements of section 552.301(e) of the Government Code in providing information responsive to this portion of the request. *See id.* § 552.301(a), (e). Thus, pursuant to section 552.302 of the Government Code, the information at issue is presumed to be subject to required public disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); *see also* Open Records Decision No. 630 (1994). Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the requirements of section 552.301 results in the waiver of its claims under the exceptions at issue, unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* Generally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third party interests are at stake. Open Records Decision No. 150 at 2 (1977). Although you raise section 552.108 for the information at issue, this is a discretionary exception to disclosure that protects a governmental body's interest and may be waived. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions in general), 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions), 177 at 3 (1977) (statutory predecessor to section 552.108 subject to waiver). Thus, the district attorney's office may not withhold any information pertaining to the named individual at issue under section 552.108.

Section 552.101 of the Government Code excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. A compilation of an individual's criminal history is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person. *Cf. U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989) (finding significant privacy interest in compilation of individual's criminal history by recognizing distinction between public records found in courthouse files and local police stations and compiled summary of criminal history information). Furthermore, we find a compilation of a private citizen's criminal history is generally not of legitimate concern to the public. Upon review, we find the present request requires the district attorney's office to compile unspecified law enforcement records concerning the named individuals. Therefore, to the extent the district attorney's office maintains law enforcement records depicting the named individuals as

suspects, arrestees, or criminal defendants, the district attorney's office must withhold such information under section 552.101 in conjunction with common-law privacy.²

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Lauren Dahlstein
Assistant Attorney General
Open Records Division

LMD/som

Ref: ID# 540910

Enc. Submitted documents

c: Requestor
(w/o enclosures)

²As our ruling is dispositive, we need not address your arguments against disclosure.