



February 24, 2015

Mr. Bill Delmore  
Assistant District Attorney  
9th Judicial District  
207 West Phillips, Second Floor  
Conroe, Texas 77301

OR2015-03634

Dear Mr. Delmore:

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# 555933.

The Montgomery County District Attorney's Office (the "district attorney's office") received a request for information pertaining to a specified case. You claim the district attorney's office is not required to comply with this request pursuant to section 552.028 of the Government Code. Alternatively, you claim the requested information is excepted from disclosure under section 552.108 of the Government Code. We have considered your arguments.

Initially, you assert the district attorney's office need not comply with the request pursuant to section 552.028 of the Government Code. Section 552.028 provides, in relevant part:

(a) A governmental body is not required to accept or comply with a request for information from:

- (1) an individual who is imprisoned or confined in a correctional facility; or
- (2) an agent of that individual, other than that individual's attorney when the attorney is requesting information that is subject to disclosure under [the Act].

(b) This section does not prohibit a governmental body from disclosing to an individual described by Subsection (a)(1), or that individual's agent, information held by the governmental body pertaining to that individual.

Gov't Code § 552.028(a)-(b). You state the requestor is the mother of an incarcerated individual. However, the requestor has represented to this office that she is not the agent of her son, and you have not otherwise established she is requesting the information at issue on behalf of the incarcerated individual. Therefore, we find you have failed to demonstrate the request for information was submitted by an agent of an individual who is imprisoned or confined in a correctional facility. Thus, section 552.028 is not applicable in this instance. Accordingly, we will consider your argument against disclosure of the requested information.

Next, we must address the district attorney's office's obligations under the Act. Section 552.301 of the Government Code prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. *See id.* § 552.301. Pursuant to section 552.301(b), the 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 Gov't Code* § 552.301(a), (b). In addition, pursuant to section 552.301(e) of the Government Code, a governmental body is required to submit to this office within fifteen business days of receiving an open records request: (1) 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. *Id.* § 552.301(e)(1)(A)-(D). In this instance, you state the district attorney's office received the request for information on October 16, 2014. Accordingly, the district attorney's office's ten-business-day deadline was October 30, 2014, and its fifteen-business-day-deadline was November 6, 2014. However, the envelope in which you submitted your request for a decision and the information required by section 552.301(e)(1)(A)-(C) was meter-marked December 26, 2014. *See id.* § 552.308 (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Furthermore, as of the date of this letter, you have not submitted for our review a copy or representative sample of the information requested. Consequently, we find the district attorney's office failed to comply with the requirements of section 552.301 of the Government Code.

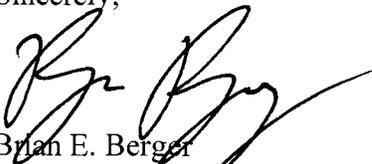
Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the requirements of section 552.301 results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See id.* § 552.302 (where request for attorney general decision does not comply with requirements of section 552.301, information at issue is presumed to be public); *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) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); *see also* Open Records Decision No. 630 (1994). 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 the requested information is excepted under section 552.108 of the Government Code, this section is discretionary in nature. It serves only to protect a governmental body's interests and may be waived, and, as a result, it does not constitute a compelling reason to withhold information for purposes of section 552.302. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 177 at 3 (1977) (statutory predecessor to section 552.108 subject to waiver). Thus, the requested information may not be withheld under section 552.108 of the Government Code. Furthermore, because you have not submitted a copy of the specific information requested or a representative sample to this office for our review, we have no basis for finding the requested information is otherwise confidential by law. Consequently, we have no choice but to order you to release the requested information in accordance with section 552.302 of the Government Code.

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](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,



Bryan E. Berger  
Assistant Attorney General  
Open Records Division

BB/akg

Ref: ID# 555933

c: Requestor