



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

January 6, 2017

Mr. Andrew Wipke
Assistant District Attorney
County of Lubbock
904 Broadway, Second Floor
Lubbock, Texas 79401

OR2017-00455

Dear Mr. Wipke:

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# 640719.

The Lubbock County District Attorney's Office (the "district attorney's office") received a request for the name and personal cellular telephone number of every employee of the district attorney's office receiving a stipend for their usage of their personal cellular telephone for district attorney's office official business. The district attorney's office claims the submitted information is excepted from disclosure under sections 552.108, 552.147, and 552.152 of the Government Code. We have considered the exceptions the district attorney's office claims and reviewed the submitted information.

Initially, we must address the district attorney's office's obligations under section 552.301 of the Government Code, which prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(b) requires that a governmental body ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request. Gov't Code § 552.301(b). The district attorney's office states it received the request for information on October 10, 2016; therefore, the district attorney's office's ten-business-day deadline was October 24, 2016. While the district attorney's office raised sections 552.101 and 552.152 of the Government Code within the ten-business-day time period as required by section 552.301(b), the district attorney's office did not raise

section 552.108 of the Government Code until after the ten-business-day deadline had passed. Thus, the district attorney's office failed to comply with the requirements of section 552.301 as to its assertion of section 552.108.

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 there is a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ); *see also* Open Records Decision No. 630 (1994). Generally, a governmental body may demonstrate a compelling reason to withhold information by showing that the information is made confidential by another source of law or affects third-party interests. *See* ORD 630. The district attorney's office claims section 552.108 of the Government Code for the submitted information. However, this exception is discretionary in nature. It serves to protect a governmental body's interests and may be waived; as such, it does not constitute a compelling reason to withhold information. *See* Gov't Code § 552.007; Open Records Decision No. 177 (1977) (governmental body may waive statutory predecessor to section 552.108); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Thus, in failing to comply with section 552.301 in regard to section 552.108, the district attorney's office has waived its claim under section 552.108 and may not withhold any of the submitted information on this basis. However, we will address the district attorney's office's remaining arguments against disclosure of the submitted information.

Next, we note the requestor only seeks the name and personal cellular telephone number of the specified individuals. We note the submitted information contains information beyond this information. Accordingly, the submitted information that does not consist of the name and personal cellular telephone number of the specified individuals is not responsive to the instant request. This ruling does not address the public availability of non-responsive information, and the district attorney's office is not required to release such information in response to this request.¹

Section 552.152 of the Government Code provides,

Information in the custody of a governmental body that relates to an employee or officer of the governmental body is excepted from [required public disclosure] if, under the specific circumstances pertaining to the employee or officer, disclosure of the information would subject the employee or officer to a substantial threat of physical harm.

¹As our ruling is dispositive, we need not address the district attorney's office's arguments against disclosure of this information.

Gov't Code § 552.152. The district attorney's office states "[the] individuals [at issue] are involved with the prosecution of criminal offenses; or engaged in criminal investigations and undercover operations, including drug raids." Upon review, we find to the extent the responsive information identifies employees of the district attorney's office engaged in undercover operations, release of this information would subject the employee to a substantial threat of physical harm. Therefore, to the extent the responsive information identifies employees of the district attorney's office engaged in undercover operations, the district attorney's office must withhold the employees' information under section 552.152 of the Government. However, to the extent the responsive information does not identify employees of the district attorney's office engaged in undercover operations, we find the district attorney's office has failed to demonstrate release of the information would subject an employee to a substantial threat of physical harm. Thus, in that event, the district attorney's office may not withhold any of the remaining responsive information under section 552.152 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, 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,



Rahat Huq
Assistant Attorney General
Open Records Division

RSH/som

Ref: ID# 640719

Enc. Submitted documents

c: Requestor
(w/o enclosures)