OFFICE OF THE ATTORNEY GENERAL · STATE OF TEXAS
JOHN CORNYN

April 19, 2002

Mr. Fred Hernandez
District Attorney
63rd Judicial District
P.O. Box 1405
Del Rio, Texas 78841-1405

OR2002-1998

Dear Mr. Hernandez:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 161680.

The Office of the District Attorney for the 63rd Judicial District (the "district attorney") received a request for "all documents presented in or used for Cause no. 8759/8760, *The State of Texas v. Tommy Lynn Sells*," including all photographs presented in the case. The requestor subsequently clarified the request to exclude certain graphic photographs. You advise that the district attorney does not possess one of the photographs to which the requestor refers.[1] You claim that the remaining requested information is excepted from disclosure under sections 552.103 and 552.108 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information.

As an initial matter, we note that with the exception of four photographs, you have failed to submit information responsive to the request for information.[2] 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 a copy of the specific information

[1] The Public Information Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.--San Antonio 1978, writ dism'd); Open Records Decision No. 452 at 3 (1986).

[2] You have submitted a copy of an order granting an extension of time to the appellant to file a brief in order to show that the case is on appeal.

requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. Under section 552.302 of the Government Code, a governmental body's failure to timely submit to this office the information required in section 552.301(e) results in the legal presumption that the information is public. 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).

You contend that apart from the photographs requested, the request is too general, broad, and vague to reasonably ascertain what information is being sought. We disagree; the requestor clearly specifies that she is seeking all documents presented in or used in two named interrelated cases. In any case, section 552.222(b) of the Government Code provides that if a governmental body is unable to determine the nature of the records being sought, it may ask the requestor to clarify the request so that the desired records may be identified. If the requestor chooses not to narrow a broad request, the governmental body must release all responsive information if not claiming an exception to disclosure applies, or request a ruling under section 552.301 of the Government Code for any information it seeks to withhold. The administrative inconvenience of providing public records is not a ground for refusal to comply with the Public Information Act. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 687 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977).

You state that you interpret "presented in the case" to mean exhibits admitted into evidence or pleadings filed with the court. You then represent that those items are part of the court's official file. As noted previously, the Public Information Act does not require a governmental body to disclose information that did not exist in its possession or to which it did not have a right of access at the time the request was received. *See* Gov't Code § 552.002 (information is considered "public information" as long as it "is collected assembled, or maintained under a law or ordinance or in connection with the transaction of official business: (1) by a governmental body; or (2) for a governmental body and the governmental body owns the information or has a right of access to it"); *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266; Open Records Decision No. 452 at 3. Because you have not submitted most of the requested information, we have no basis for finding that you may withhold it under section 552.103 or section 552.108. Thus, to the extent that this information is within the district attorney's possession or the district attorney has a right of access to this information, we have no choice but to order it released per section 552.302.

We now address your arguments for excepting the submitted photographs. Section 552.108(a)(1) states that information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from required public disclosure "if 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, if the information does not supply the explanation on its face, 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). You explain that the photographs were obtained through investigation and for use in the prosecution of the crime that is the basis of Cause No. 8759, which is still pending on appeal. We therefore conclude that release of this information 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). You may therefore withhold the submitted photographs under section 552.108(a)(1). As section 552.108 is dispositive for this information, we do not address your claim under section 552.103. The remaining requested information must be released.

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, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, 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).

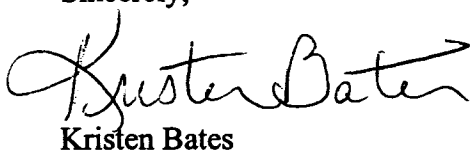
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental

body. *Id.* § 552.321(a); *Texas Department of Public 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 Texas Building and Procurement Commission 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



Kristen Bates
Assistant Attorney General
Open Records Division

KAB/seg

Ref: ID# 161680

Enc. Submitted documents

c: Ms. Diane Fanning
P.O. Box 310346
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(w/o enclosures)