



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 23, 2003

Ms. Patricia J. Acosta
Assistant District Attorney
Thirty-Fourth Judicial District
500 East San Antonio Street, 2nd Floor
El Paso, Texas 79901-2420

OR2003-6679

Dear Ms. Acosta:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 188127.

The Office the District Attorney, 34th Judicial District (the "district attorney") received a written request for a video tape recording of a particular sobriety test that was held as evidence in connection with the prosecution of a criminal matter. You explain that under the authority of article 2.07 of the Code of Criminal Procedure, the judge hearing the case signed an order removing the district attorney and members of his office from representation of the state in the matter and appointed another individual as district attorney pro tem. The requested videotape was subsequently transferred to the district attorney pro tem, in whose possession the videotape remains. You contend that because the district attorney no longer possesses the videotape, the district attorney is not required to provide the videotape to the requestor. In the alternative, you contend that the videotape is excepted from required public disclosure pursuant to sections 552.101 and 552.108 of the Government Code.

The Public Information Act (the "Act") does not require a governmental body to obtain information not in its possession in response to a records request. Open Records Decision No. 445 (1986), 317 (1982). Furthermore, this office has no indication that the district attorney has a right of access to the requested videotape currently held by the district attorney pro tem. *See* Gov't Code § 552.002(a) (defining "public information" for purposes of the Act); Open Records Decision No. 462 at 4 (1987). Accordingly, we conclude that the district

attorney does not “maintain” the requested videotape for purposes of the Act and therefore need not comply with the records request.¹

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 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 Texas Building and Procurement Commission at (512) 475-2497.

¹Because we resolve your request on other grounds, we do not address your other arguments for non-disclosure.

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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CMN/RWP/seg

Ref: ID# 188127

c: Mr. Rick Isaias
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