



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 23, 2003

Ms. Sheri Bryce Dye
Assistant Criminal District Attorney
Bexar County - Civil Section
300 Dolorosa, Suite 4049
San Antonio, Texas 78205-3030

OR2003-7627

Dear Ms. Dye:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 189932.

The Bexar County Elections Administrator's Office (the "elections office") received a request for any and all complaints against Barney Perez, including any violation or infraction of any election or campaign law within the last five years. The request seeks not only information maintained by the elections office but also information maintained by its attorney. The Bexar County District Attorney (the "DA") has submitted briefing to this office on behalf of the DA and the elections office, which the DA represents. The DA claims that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.108, 552.111, and 552.135 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.108(a) excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime... if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime." The elections office is not a "law enforcement agency" for purposes of section 552.108. *See* Open Records Decision No. 199 (1978) (predecessor statute). However, a non-law-enforcement agency may withhold information under section 552.108 if the information relates to possible criminal conduct and has been or will be forwarded to an appropriate law enforcement agency for investigation. *See* Attorney General Opinion MW-575 (1982), Open Records Decision No. 493 (1988); *see also* Open Records

Decision No. 372 (1983) (where incident involving allegedly criminal conduct is still under active investigation or prosecution, law enforcement exception may be invoked by any proper custodian of information which relates to incident). A governmental body that raises an exception to disclosure under section 552.108 must reasonably explain how and why section 552.108 is applicable to that information. *See* Gov't Code § 552.301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986). Where a non-law-enforcement agency has evidentiary information in its custody, the custodian of such information may withhold the information under section 552.108 if it demonstrates that the information relates to a pending case and provides a representation from the law enforcement entity that it wishes to withhold the information. *See generally* Open Record Decisions Nos. 474 (1987), 372 (1983).

You note that although the requestor addressed his request to the elections office, the information was forwarded to the DA because the information sought is directly related to the active criminal investigation and up-coming prosecution of Mr. Perez by the DA. You further assert that the premature release of the submitted information held by the elections office would interfere with the active criminal investigation and pending prosecution of crime. Based on these representations and our review of the submitted information in Exhibit B, we conclude that the elections office may withhold the submitted information pursuant to section 552.108(a)(1). *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177, 186-87 (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).

Next, we consider your arguments for the information in Exhibit C that is maintained by the DA. Section 552.111 of the Government Code excepts from disclosure “an interagency or intragency memorandum or letter that would not be available by law to a party in litigation with the agency.” In Open Records Decision No. 647 (1996), this office held that a governmental body may withhold information under section 552.111 of the Government Code if the governmental body can show 1) that the information was created for civil trial or in anticipation of civil litigation under the test articulated in *National Tank v. Brotherton*, 851 S.W.2d 193 (Tex. 1993), or after a civil lawsuit is filed, and (2) that the work product consists of or tends to reveal an attorney’s “mental processes, conclusions, and legal theories.” Open Records Decision No. 647 at 5 (1996). The work product doctrine is applicable to litigation files in criminal as well as civil litigation. *Curry v. Walker*, 873 S.W.2d 379, 381 (Tex. 1994) (citing *United States v. Nobles*, 422 U.S. 225, 236 (1975)). In *Curry*, the Texas Supreme Court held that a request for a district attorney’s “entire file” was “too broad” and, citing *National Union Fire Insurance Co. v. Valdez*, 863 S.W.2d 458, 460 (Tex. 1993), held that “the decision as to what to include in [the file] necessarily reveals the attorney’s thought processes concerning the prosecution or defense of the case.” *Curry*, 873 S.W.2d at 380.

In this case, the requestor seeks all documents pertaining to any violation of election or campaign law maintained by the elections office or its attorney. Therefore, the requestor's request encompasses the district attorney's entire file pertaining to the case at issue. As you have demonstrated that the file was prepared in anticipation of litigation, we conclude that the requested information in Exhibit C may be withheld from disclosure in its entirety under section 552.111.¹

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).

¹ As we have resolved the matter under section 552.111 of the Government Code, we need not address your other claimed exceptions for the information in Exhibit C.

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,



Debbie K. Lee
Assistant Attorney General
Open Records Division

DKL/seg

Ref: ID# 189932

Enc. Submitted documents

c: Mr. Vincent Lázaro
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(w/o enclosures)