



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 30, 2004

Ms. Myrna S. Reingold
Galveston County
123 Rosenberg, Suite 4127
Galveston, Texas 77550-1454

OR2004-0700

Dear Ms. Reingold:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 195427.

The Galveston County Criminal District Attorney (the "district attorney") received five requests for copies of audio recordings of telephone conversations between Robert Durst and other persons made while Durst was incarcerated in Pennsylvania. One of the requestors also seeks copies of transcripts of the audio recordings. You state that the district attorney does not have all of the responsive audio recordings nor any responsive transcripts. We note that a governmental body is not required to obtain information not in its possession. Open Records Decision No. 558 (1990). You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that you also argue that the submitted information is not subject to the Public Information Act (the "Act"). Section 552.002 of the Government Code defines public information as "information that 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." You argue that access to information held by the District Court is not subject to the Act. The Act generally requires the disclosure of information maintained by a "governmental body." While the Act's definition of a "governmental body" is broad, it specifically excludes "the judiciary." See Gov't Code § 552.003(1)(A), (B). However, although you make this argument, you also state that "the only information that constitutes

responsive information held by the District Attorney, a governmental body subject to the Act, is the seven CDs in the District Attorney's possession." Thus, we determine that the submitted information, which, as you state, is in the possession of the district attorney, is subject to the Act. We will therefore address your arguments against disclosure for the submitted information.

I. Two Requests Dated November 4, 2003 and November 10, 2003

Section 552.107(2) of the Government Code exempts from required public disclosure information if "a court by order has prohibited disclosure of the information." The district attorney urges that it is prohibited by court order from disclosing the submitted information, and explains that a Galveston County District Court entered a gag order prohibiting the release of information in *The State of Texas v. Robert Durst*, No. 01-CR-1900, No. 01-CR-1901, No. 01-CR-2007. In the protective order, the court prohibited numerous entities and individuals, including the district attorney, from disclosing "any information about this case or this defendant to any news media personnel." You state that at the time the district attorney received these two requests, the criminal case for murder against Robert Durst was pending and the gag order was in effect. You also represent and the submitted information shows that the recordings relate to the defendant, and the requestors are media personnel. For this reason, in response to these two requests, the district attorney is required to withhold the submitted information pursuant to section 552.107(2) of the Government Code.

II. Three Requests Dated November 12, 2003, November 13, 2003, and January 13, 2004

You state that these three requests were received after the conclusion of the murder case against Robert Durst. You state that the gag order referenced above was lifted at the conclusion of the murder trial, and therefore was no longer in effect when the district attorney received these three requests. You argue, however, that the submitted information is excepted from disclosure under section 552.108 of the Government Code. Section 552.108(a)(2) of the Government Code exempts from disclosure information concerning an investigation that concluded in a result other than conviction or deferred adjudication. See Gov't Code § 552.108(a)(2). A governmental body claiming section 552.108(a)(2) must demonstrate that the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. The district attorney explains that the jury returned a verdict of not guilty, and therefore the submitted information relates to an investigation that concluded in a result other than a conviction or deferred adjudication. Therefore, in response to these three requests, the submitted information is excepted from disclosure under section 552.108(a)(2). Although section 552.108(a)(2) authorizes you to withhold the submitted information from disclosure, you may choose to release all or part of this information that is not otherwise confidential by law. See Gov't Code § 552.007. Because our ruling is dispositive, we need not address your remaining arguments.

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.

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,



Sarah I. Swanson
Assistant Attorney General
Open Records Division

SIS/sdk

Ref: ID# 195427

Enc. Submitted documents

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