



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 2, 2004

Ms. Patricia J. Acosta
Assistant District Attorney
34th Judicial District
500 East San Antonio Street, 2nd Floor
El Paso, Texas 79901-2420

OR2004-4488

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# 202646.

The District Attorney for the 34th Judicial District (the "district attorney") received a request for information relating to two specified cause numbers, including all files, records, and other documents pertaining to the arrest, investigation, and trial. You inform us that the district attorney has released some of the requested information. You claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.108, and 552.130 of the Government Code. We have considered the exceptions you claim and have reviewed the information you submitted.

Initially, we address the requestor's contention that information disclosed to defense counsel may not subsequently be withheld from disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. We note that in *Brady v. Maryland*, 373 U.S. 83 (1963), the United States Supreme Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87; *see also Wyatt v. State*, 23 S.W.3d 18, 27 (Tex. Crim. App. 2000) ("[A] due process violation [under *Brady*] has occurred if a prosecutor: (1) fails to disclose evidence, (2) favorable to the accused, (3) which creates a probability of a different outcome."). You inform us that the district attorney allows a defendant's attorney to review the State's case file in order to comply with the constitutional requirements of due process.

We conclude that previous disclosure of information to defense counsel under such circumstances does not waive the district attorney's right to claim an exception to disclosure under section 552.108. See Open Records Decision Nos. 579 at 9 (1990) (exchanging information among litigants in informal discovery is not voluntary release of information for purposes of statutory predecessor to Act), 454 at 2 (1986) (governmental body that disclosed information because it reasonably concluded it had constitutional obligation to do so could still invoke statutory predecessor to Gov't Code § 552.108); but see Open Records Decision No. 177 (1977) (statutory predecessor to Gov't Code § 552.108 subject to waiver). We therefore conclude that the district attorney has not waived his claim under section 552.108.

Section 552.108 excepts from required public disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication.[.]" Gov't Code § 552.108(a)(2). A governmental body that claims an exception to disclosure under section 552.108 must reasonably explain how and why this exception is applicable to the information that the governmental body seeks to withhold. See *id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986).

Section 552.108(a)(2) is applicable only if the information in question relates to a concluded case that did not result in a conviction or a deferred adjudication. You inform us that the information that the district attorney seeks to withhold under section 552.108(a)(2) relates to causes that were dismissed. Based on your representation, we find that section 552.108(a)(2) is applicable in this instance.

Section 552.108 does not except from disclosure "basic information about an arrested person, an arrest, or a crime." Gov't Code § 552.108(c). Section 552.108(c) refers to the basic front-page information held to be public in *Houston Chronicle Publishing 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). See Open Records Decision No. 127 at 3-4 (1976) (summarizing types of information deemed public by *Houston Chronicle*). You represent to this office that the district attorney has released basic front-page information in accordance with section 552.108(c). We therefore conclude that the district attorney may withhold the remaining requested information under section 552.108(a)(2). We note that the district attorney has discretion under section 552.108 to release additional information that is not otherwise confidential by law. See Gov't Code § 552.007; Open Records Decision No. 177 (1977) (statutory predecessor to Gov't Code § 552.108 did not prohibit release of information). As our conclusion under section 552.108 is dispositive, we need not address your arguments under sections 552.101 and 552.130.

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).

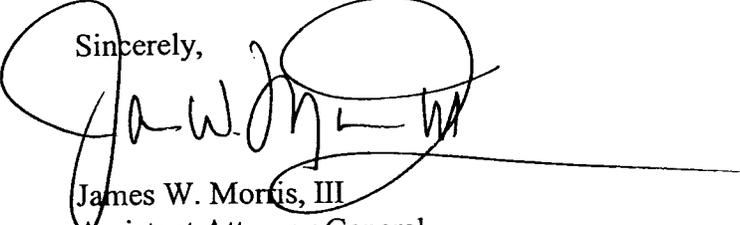
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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,



James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 202646

Enc: Submitted documents

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(w/o enclosures)