



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 23, 2006

Ms. Thao La
Assistant District Attorney
Dallas County District Attorney's Office
Civil Division, Administrative Building
Dallas County
411 Elm Street, 5th Floor
Dallas, Texas 75202

OR2006-02844

Dear Ms. La:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 244593.

The Southwestern Institute for Forensic Sciences ("SWIFS") received a request for a specified autopsy report. You claim that the requested information is excepted from disclosure under section 552.108 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, we address your statement that SWIFS "did release, via intergovernmental transfers, the requested documents to the Dallas County Public Defender's Office, and to the Child Protective Services of the Texas Department of [Family and Protective] Services."¹ We note that section 552.007(b) of the Government Code does not permit selective disclosure of information to the public. *See* Gov't Code 552.007(b); Open Record Decision No. 463 at 1-2 (1987). Thus, if information has been voluntarily released to any member of the public, that same information may not subsequently be withheld from the public unless its public disclosure is expressly prohibited by law. *See* Gov't Code 552.007(a); Open Records Decision Nos. 518 at 3 (1989), 490 at 2 (1988). However, in Open Records Decision No. 661 (1999), this office determined that whether a governmental entity may release information to another governmental entity is not generally a question under the Act as the

¹In your brief to this office, you refer to the "Department of Protective and Regulatory Services." We note that, in 2005, the Department of Protective and Regulatory Services was renamed the Department of Family and Protective Services. *See* Act of May 29, 2005, 79th Leg., R.S., ch. 263, §§ 1.74, 1.75, 2005 Tex. Gen. Laws 621, 661.

Act is concerned with the required release of information to the public. *See* Gov't Code §§ 552.001, .002, .021; Open Records Decision No. 655 (1997).

This office has long recognized that it is the public policy of this state that governmental bodies should cooperate with each other in the interest of the efficient and economical administration of statutory duties. *See, e. g.*, Attorney General Opinion H-836 (1976); Open Records Decision No. 655. *But see* Attorney General Opinions DM-353 at 4 n. 6 (1995) (interagency transfer prohibited where confidentiality statute enumerates specific entities to which release of confidential information is authorized and where receiving agency is not among statute's enumerated entities), JM-590 (1986) (same); Open Records Decision Nos. 655 (same), 650 (1996) (transfer of confidential information to federal agency impermissible unless federal law requires its disclosure). A state agency's transfer of information to another entity that is subject to the Act does not generally constitute a release of the information to the public for purposes of section 552.007 of the Government Code. *See, e. g.*, Attorney General Opinions H-917 at 1 (1976), H-242 at 4 (1974); *see also* Gov't Code §§ 552.007, .352. Therefore, we conclude that the disclosure of the autopsy report to Child Protective Services did not waive SWIFS' right to claim an exception to disclosure under section 552.108 for the information.

However, with respect to the release of this information to the Dallas County Public Defender's Office, 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."). As such, if the disclosure to the Dallas County Public Defender's Office was for the purpose of allowing the defendant's attorney to review the State's case file in order to comply with the constitutional requirements of due process, then such disclosure did not waive SWIFS' right to now claim section 552.108 for this information. *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 section 552.108). However, if this disclosure was not for the purpose of complying with the constitutional requirements of due process, then we conclude that such release did constitute a release to the public for purposes of section 552.007 and therefore waived SWIFS' claim under section 552.108. *See* Gov't Code 552.007(b); Open Record Decision Nos. 463 at 1-2 (1987), 177 (1977) (statutory predecessor to section 552.108 subject to waiver). Because you do not inform this office why SWIFS released the information to the Dallas County Public Defender's Office, we must address your claim under section 552.108 conditionally.

Section 552.108 of the Government Code 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.” Gov’t Code § 552.108(a)(1). Section 552.108 may be invoked by the proper custodian of information relating to an investigation or prosecution of criminal conduct. Open Records Decision No. 474 at 4-5 (1987). Where a non-law enforcement agency is in the custody of information that would otherwise qualify for exception under section 552.108 as information relating to the pending case of a law enforcement agency, the custodian of the records may withhold the information if it provides the attorney general with a demonstration that the information relates to the pending case and a representation from the law enforcement entity that it wishes to withhold the information.

You explain that the prosecuting Dallas County District Attorney’s Office objects to the release of the report because it relates to an active investigation and pending prosecution. Based on your representations, we find that you have demonstrated that release of the information at this time would interfere with the ongoing investigation and prosecution. Therefore, we conclude that if the previous disclosure of information to the Dallas County Public Defender’s Office was for the purpose of complying with the constitutional requirements of due process under *Brady*, then SWIFS may withhold the autopsy report from disclosure under section 552.108(a)(1). If, however, the disclosure to the Dallas County Public Defender’s Office was not for such a purpose, then SWIFS has waived its right to claim exception to disclosure under section 552.108, and the submitted autopsy report must be released to the requestor.

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 ten 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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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); *Tex. 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 Office of the Attorney General 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. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within ten calendar days of the date of this ruling.

Sincerely,



Robert B. Rapfogel
Assistant Attorney General
Open Records Division

RBR/krl

Ref: ID# 244593

Enc. Submitted documents

c: Ms. Sheila Walker
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(w/o enclosures)