



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 5, 2008

Mr. Eric Stoebner
Assistant District Attorney
Frank Crowley Courts Building
133 North Industrial Boulevard, LB-19
Dallas, Texas 75207-4399

OR2008-01706

Dear Mr. Stoebner:

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# 300174.

The Dallas County District Attorney's Office (the "district attorney") received a request for information pertaining to a specified case. You state that the district attorney does not have some of the requested information.¹ You claim that the submitted information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information. We have also considered comments submitted by an interested third party. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information that other statutes make confidential. Section 411.153 of the Government Code provides as follows:

- (a) A DNA record stored in the DNA database is confidential and is not subject to disclosure under the open records law, Chapter 552.
- (b) A person commits an offense if the person knowingly discloses information in a DNA record or information related to a DNA analysis of a sample collected under this subchapter.

¹We note that the Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ.App.—San Antonio 1978, writ dismissed); Open Records Decision Nos.605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

(c) An offense under this section is a state jail felony.

(d) A violation under this section constitutes official misconduct.

Gov't Code § 411.153. A DNA "record" means the results of a forensic DNA analysis performed by a DNA laboratory. *See id.* §§ 411.141(6),(7). "Forensic analysis" is defined as "a medical, chemical, toxicologic, ballistic, or other expert examination or test performed on physical evidence, including DNA evidence, for the purpose of determining the connection of the evidence to a criminal action." *See* Code Crim. Proc. art. 38.35(4); *see also* Gov't Code § 411.141(10)(providing "forensic analysis" has meaning assigned by Article 38.35 of the Code of Criminal Procedure). A "DNA database" means "one or more databases that contain forensic DNA records maintained by the director [of public safety of the Department of Public Safety ("DPS")]." Gov't Code § 411.141(5); *see id.* § 411.001(3).

The DPS director is required to establish certain procedures for DNA laboratories. *See id.* §§ 411.144(a); 411.142(h)(requiring the director to establish standards for DNA analysis). A DNA laboratory conducting a forensic DNA analysis under subchapter G of Chapter 411 shall comply with subchapter G and the rules adopted under this chapter. *See id.* § 411.144(d); 37 T.A.C. § 28.82(a). The DPS director has adopted rules that govern the regulation of forensic DNA laboratories in this state. *See* 37 T.A.C. §§ 28.81, 28.82 (describing the minimum standards that a forensic DNA laboratory must abide by); *see also* Gov't Code § 411.147(b).

In this instance, you seek to withhold the submitted information under section 411.153(b) of the Government Code. You state that "the purpose of the [DNA] samples here was to provide evidence in a criminal trial. . . ." *See* Code Crim. Proc. art. 38.35(b). We assume that the submitted DNA record at issue is the result of a forensic DNA analysis performed by a DNA laboratory in accordance with DPS regulations. Therefore, based upon your representations and our review, we conclude that the submitted information is confidential under section 411.153(b). Consequently, the information is excepted from disclosure under section 552.101 in conjunction with section 411.153 of the Government Code.² As our ruling is dispositive, we need not address your remaining argument against disclosure.

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

²We note that section 411.147 allows the DPS director to release DNA samples in certain instances. *See* Gov't Code § 411.147(c).

governmental body wants to challenge this ruling, the governmental body must file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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, 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 challenge 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 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 10 calendar days of the date of this ruling.

Sincerely,



Paige Savoie
Assistant Attorney General
Open Records Division

PS/ma

Ref: ID# 300174

Enc. Submitted documents

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