



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 4, 2008

Mr. Scott A. Durfee
General Counsel
Harris County District Attorney
1201 Franklin Street, Suite 600
Houston, Texas 77002-1923

OR2008-07652

Dear Mr. Durfee:

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# 312009.

The Harris County District Attorney (the "district attorney") received a request for: (1) manuals, handbooks, or policies pertaining to jury selection training, practices or procedures, including those related to the process of seeking the death penalty; (2) a list of jury trials prosecuted by named individuals; (3) documents related to training, conferences, or seminars regarding jury selection attended by named individuals; (4) jury selection sheets containing notations made by named individuals; (5) written evaluations of named individuals; (6) e-mail correspondence between named individuals regarding jury selection; and (7) personnel files of named individuals. You state that the district attorney does not have responsive information for the portion of the request pertaining to e-mail correspondence regarding jury selection.¹ You claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.103, 552.108,

¹ We note that the Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex.Civ.App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.²

Initially, we note that some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in part, that

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

- (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). In this instance, Exhibit F-6 contains completed performance evaluations. The completed evaluations must be released under section 552.022(a)(1), unless the information is excepted from disclosure under section 552.108 or expressly confidential under other law. We note that section 552.103 of the Government Code is a discretionary exception to disclosure that a governmental body may waive. *See id.* § 552.007; *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive Gov't Code § 552.103); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 473 (1987) (governmental body may waive section 552.111). As such, section 552.103 is not other law that makes information confidential for the purposes of section 552.022. Therefore, the district attorney may not withhold the evaluations in Exhibit F-6 under section 552.103. However, because information subject to section 552.022(a)(1) may be withheld under section 552.108 we will address this claim for this information.

Section 552.108 of the Government Code provides in pertinent part as follows:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of Section 552.021 if:

- (1) release of the information would interfere with the detection, investigation, or prosecution of crime;

² We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Gov't Code § 552.108(a)(1). Section 552.108 is applicable to certain specific types of law enforcement information. 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 at issue. *See id.* §§ 552.108(a)(1), 301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). In this instance, you state that the evaluations are those of the prosecutors assigned to a pending criminal case. Based on your representation and our review of the information, we conclude that the release of these evaluations would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (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). Therefore, the district attorney may withhold the evaluations under section 552.108(a)(1) of the Government Code.

We now turn to your argument under section 552.103 of the Government Code for the information not subject to 552.022. Section 552.103 provides in part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body that claims an exception to disclosure under section 552.103 must provide relevant facts and documents sufficient to establish the applicability of this exception to the information at issue. To meet this burden, the governmental body must demonstrate that: (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information; and (2) the information at issue is related to the pending or anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, *writ ref'd n.r.e.*). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See Open Records Decision No. 551 at 4 (1990).*

You state, and provide documentation showing, that the district attorney received the request for information after a lawsuit styled *State of Texas v. Juan Leonardo Quintero*, Cause No. 1085704, was filed in the 248th District Court of Harris County, Texas. Furthermore,

you explain that most of the information at issue was the subject of subpoenas served on the named individuals, who are the prosecutors assigned to this case, which were quashed by the presiding judge. Based upon your representations and our review of the information at issue, we conclude that the litigation was pending on the date that the district attorney received the instant request and that this information is related to the litigation. Therefore, the district attorney may withhold Exhibits F-1 through F-5 and F-7 under section 552.103 of the Government Code.

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). We also note that the applicability of section 552.103(a) ends once the litigation has concluded or is no longer anticipated. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

In summary, the district attorney may withhold the evaluations under section 552.108(a)(1) of the Government Code. The district attorney may withhold the remaining information under section 552.103 of the Government Code.³

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 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,

³As our ruling is dispositive, we need not address your remaining arguments against disclosure.

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,



Olivia A. Maceo
Assistant Attorney General
Open Records Division

OM/mcf

Ref: ID# 312009

Enc. Submitted documents

c: Mr. D. Corey Lawson
Vinson & Elkins, L.L.P.
First City Tower
1001 Franklin, Suite 2500
Houston, Texas 77002-6760
(w/o enclosures)