ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 11, 2009

Mr. Michael M. Kelly
Assistant Criminal District Attorney
Victoria County
205 North Bridge Street, Suite 301
Victoria, Texas 77901

OR2009-12873

Dear Mr. Kelly:

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# 353535.

The Criminal District Attorney of Victoria County (the "district attorney") received a request for documents relating to services rendered or to be rendered to the district attorney's office by named individuals from January 1, 2007 to the present. You state you do not have information responsive to portions of the request.[1] You state you have released some of the responsive information. You claim a portion of the submitted information is subject to section 552.027 of the Government Code. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.108 of the Government Code, and privileged under Texas Rule of Evidence 503, Texas Rule of Civil Procedure 192.5, and Texas Disciplinary Rule of Professional Conduct 1.05. We have considered your arguments and reviewed the submitted information.

Initially, we note a portion of the submitted information, which we have marked, is not responsive because it was created after the date of the request. The district attorney need not release non-responsive information in response to this request, and this ruling will not address that information.

Next, we address your assertion that a portion of the submitted information is not subject to disclosure under the Act because it is commercially available to the requestor. Section 552.027 of the Government Code provides as follows:

[1]We note 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 dism'd); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

> (a) A governmental body is not required under this chapter to allow the inspection of or to provide a copy of information in a commercial book or publication purchased or acquired by the governmental body for research purposes if the book or publication is commercially available to the public.
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> (b) Although information in a book or publication may be made available to the public as a resource material, such as a library book, a governmental body is not required to make a copy of the information in response to a request for public information.
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> (c) A governmental body shall allow the inspection of information in a book or publication that is made part of, incorporated into, or referred to in a rule or policy of a governmental body.

Id. § 552.027. Section 552.027 is designed to alleviate the burden of providing copies of commercially available books, publications, and resource materials maintained by governmental bodies, such as telephone directories, dictionaries, encyclopedias, statutes, and periodicals.

You state portions of the submitted information have been published by the Victoria Advocate and are commercially available to the public. You argue because this information is commercially available, it is subject to section 552.027. However, section 552.027 applies to commercially available information purchased or acquired by a governmental body. Although you assert the information has been incorporated into a newspaper article by the Victoria Advocate, you do not inform us the district attorney maintains a copy of the relevant article, and you have not submitted a copy of the article for our review. Thus, you have failed to demonstrate the information at issue was purchased or acquired by the district attorney for research purposes. Accordingly, the information at issue is not subject to section 552.027 of the Government Code and it may not be withheld on that basis.

Next, we must address the district attorney's obligations under section 552.301 of the Government Code, which prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(b) requires the governmental body to ask for the attorney general's decision and state the exceptions to disclosure not later than the tenth business day after the date of its receipt of the written request for information. *See id.* § 552.301(b). You inform us the district attorney received the request for information on June 5, 2009. Thus, the tenth business day after the district attorney's receipt of the request was June 19, 2009. However, the envelope in which the district attorney's request for a ruling was submitted to this office bears a postmark date of June 22, 2009. *See* Gov't Code § 552.308(b) (prescribing standards for timeliness of action by United States or interagency mail or common or contract carrier). Thus, the district attorney failed to comply with the procedural requirements mandated by section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released, unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *City of Dallas v. Abbott*, 279 S.W.3d 806, 811 (Tex. App.—2007, pet. granted); *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); *see also* Open Records Decision No. 630 (1994). Generally, a governmental body may demonstrate a compelling reason to withhold information by a showing that the information is made confidential by another source of law or affects third party interests. *See* Open Records Decision No. 630 (1994).

Although you raise sections 552.103, 552.107, and 552.108 of the Government Code, Texas Rule of Evidence 503, and Texas Rule of Civil Procedure 192.5, these exceptions and privileges are discretionary in nature. They serve only to protect a governmental body's interests and may be waived; as such, they do not constitute compelling reasons to withhold information for purposes of section 552.302. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 677 at 10 (2002) (attorney work-product privilege under rule 192.5 is not compelling reason to withhold information under section 552.302), 676 at 12 (2002) (claim of attorney-client privilege under section 552.107 or rule 503 does not provide compelling reason to withhold information under section 552.302 if it does not implicate third-party rights), 663 at 5 (1999) (governmental body may waive section 552.107), 177 at 3 (1977) (statutory predecessor to Gov't Code § 552.108 subject to waiver); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions in general). In failing to comply with section 552.301, the district attorney has waived its claims under sections 552.103, 552.107, and 552.108 of the Government Code, Texas Rule of Evidence 503, and Texas Rule of Civil Procedure 192.5, and may not withhold any of the submitted information based upon these exceptions and privileges. With regards to rule 1.05 of the Texas Disciplinary Rules of Professional Conduct, which you also raise, we note that rule 1.05 concerns the confidentiality of client information. *See* Tex. Disciplinary R. Prof'l Conduct Rule 1.05(a)(1). This office has concluded that in the open records context, an attorney's duty of confidentiality is limited to attorney-client privileged material. *See* Open Records Decision No. 574 at 2-5 (1990) (discussing rule 1.05(a)(1) in the context of predecessor provision of section 552.107(1)). Thus, given its limitation in the open records context, the applicability of rule 1.05 also cannot overcome the presumption of openness of section 552.302. However, as section 552.101 of the Government Code can provide a compelling reason to overcome the presumption of openness, we will consider your arguments under this section.

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. You raise section 552.101 in conjunction with section 154.073 of the Civil Practice and Remedies Code, which provides in part:

> (a) Except as provided by Subsections (c), (d), (e), and (f) a communication relating to the subject matter of any civil or criminal dispute made by a participant in an alternative dispute resolution procedure, whether before or after the institution of formal judicial proceedings, is confidential, is not subject to disclosure, and may not be used as evidence against the participant in any judicial or administrative proceeding.[2]
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> (b) Any record made at an alternative dispute resolution procedure is confidential, and the participants or the third party facilitating the procedure may not be required to testify in any proceedings relating to or arising out of the matter in dispute or be subject to process requiring disclosure of confidential information or data relating to or arising out of the matter in dispute.
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> . . .
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> (d) A final written agreement to which a governmental body, as defined by Section 552.003, Government Code, is a signatory that is reached as a result of a dispute resolution procedure conducted under this chapter is subject to or excepted from required disclosure in accordance with Chapter 552, Government Code.

Civ. Prac. & Rem. Code § 154.073(a)-(b), (d). You state section 154.073 applies to portions of the submitted information. Upon review, however, we find the district attorney has not demonstrated the applicability of section 154.073 to the information at issue. We therefore conclude the information is not confidential under section 154.073 of the Civil Practice and Remedies Code and may not be withheld under section 552.101 of the Government Code on that basis.

Section 552.101 also encompasses article 20.02 of the Code of Criminal Procedure. Article 20.02(a) provides that "[t]he proceedings of the grand jury shall be secret." Crim. Proc. Code art. 20.02(a). When construing article 20.02 of the Code of Criminal Procedure, the types of "proceedings" Texas courts have generally stated are secret are testimony presented to the grand jury and the deliberations of the grand jury. *In re Reed*, 227 S.W.3d273, 276 (Tex. App.—San Antonio 2007, no pet.); *see also Stern v. State*, 869 S.W.2d 614 (Tex. App.—Houston [14th Dist] 1994, no writ) (stating that anything that takes place before the bailiffs and grand jurors, including deliberations and testimony, is secret). Upon review, we conclude you have not demonstrated, and we are unable to determine, how the submitted memos, forms, and e-mail communications reveal grand jury testimony or deliberations of the grand jury. Accordingly, the district attorney may not withhold the submitted information under section 552.101 of the Government Code in conjunction with article 20.02 of the Code of Criminal Procedure.

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[2]We note that subsections 154.073(c), (e), and (f) are not applicable in this instance.

We note portions of the remaining information may be excepted from disclosure under section 552.1175 of the Government Code.[3] Section 552.1175 provides in part:

> (a) This section applies only to:
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> (1) peace officers as defined by Article 2.12, Code of Criminal Procedure;
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> . . .
>
> (b) Information that relates to the home address, home telephone number, or social security number of an individual to whom this section applies, or that reveals whether the individual has family members is confidential and may not be disclosed to the public under this chapter if the individual to whom the information relates:
>
> (1) chooses to restrict public access to the information; and
>
> (2) notifies the governmental body of the individual's choice on a form provided by the governmental body, accompanied by evidence of the individual's status.

Gov't Code § 552.1175(a)(1), (b). We have marked information which appears to be subject to section 552.1175. You do not inform this office, nor does any of the submitted information indicate, whether the individual to whom the marked information relates is currently a licensed peace officer who has notified the district attorney of his election of confidentiality for this information in accordance with the above-cited subsections 552.1175(b)(1) and (2). *See, e.g.*, Open Records Decision No. 678 (2003) (concluding that county voter registrar was authorized to release voter information made confidential under section 552.1175 of Government Code to another governmental entity, but that transferred information would not be confidential in possession of transferee until recipient governmental entity receives a section 552.1175 notification). If this individual is currently a licensed peace officer who complies with section 552.1175(b), the district attorney must withhold the information we have marked under section 552.1175. If this individual is not currently a licensed peace officer who complies with section 552.1175(b), the district attorney may not withhold the information we have marked under section 552.1175.

In summary, if the individual whose information at issue is currently a licensed peace officer and has complied with 552.1175(b), the information we have marked must be withheld

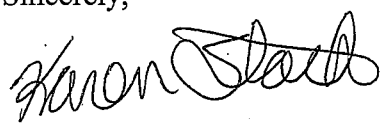
[3]The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

pursuant to section 552.1175 of the Government Code. The remaining submitted information must be released.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Karen E. Stack
Assistant Attorney General
Open Records Division

KES/jb

Ref: ID# 353535

Enc. Submitted documents

c: Requestor
(w/o enclosures)