OFFICE OF THE ATTORNEY GENERAL · STATE OF TEXAS
JOHN CORNYN

August 18, 1999

Ms. Susanna K. Holt
Assistant Attorney General
Executive Administration
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

OR99-2337

Dear Ms. Holt:

You have asked 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# 126637.

The Office of the Attorney General (the "OAG") received a request for "[a] transcript of the Dec. 5, 1998 arbitration proceedings dealing with settlement of the Tobacco lawsuit. Specifically, that portion detailing testimony and discussion of the submissions in support of the award to Marc D. Murr as well as those portions pertaining to the five plaintiff's attorneys who represented the state of Texas." In your initial letter to this office, you state that you seek to withhold the requested information under sections 552.101, 552.103, 552.107 and 552.111 of the Government Code.[1] In subsequent correspondence to this office, you also claim that the requested transcripts are subject to exception from required disclosure under section 552.108 of the Government Code.[2] We have considered the exceptions and arguments you raise, and have reviewed the information submitted.

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[1]Although you cite to sections 552.101, 552.107, and 552.111, you did not explain how the claimed exceptions apply to the information at issue, thus we are unable to consider these exceptions. *See* Gov't Code § 552.301(b); Open Records Decision No. 363 (1983). We note that chapter 552 of the Government Code places on the custodian of public records the burden of establishing that records are excepted from public disclosure. Attorney General Opinion H-436 (1974). Therefore, in this ruling we only consider the exceptions for which your have offered support.

[2]In this instance, you did not timely raise section 552.108. However, you have presented this office with a compelling demonstration as to why the requested information should be withheld pursuant to section 552.108.

Section 552.108, the "law enforcement," exception excepts from required public disclosure

> (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:
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> > (1) release of the information would interfere with the detection, investigation, or prosecution of crime;
> >
> > (2) 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; or
>
> . . . .
>
> (c) This section does not except from the requirements of section 552.021 information that is basic information about an arrested person, an arrest, or a crime.

Gov't Code § 552.108. Generally, a governmental body that seeks to avail itself of an exception from disclosure must assert that exception within ten business days of receiving the request for information.[3] Gov't Code §552.301. The failure to timely raise an exception results in the presumption that the information is public. Gov't Code § 552.302. The presumption that the information is public is "overcome only by a compelling demonstration that the requested information should not be made public." *Hancock v. State Bd. of Ins.* 797 S.W. 2d 379 (Tex. App –Austin 1990, no writ). Although you did not timely raise section 552.108, you have presented this office with a compelling demonstration as to why the requested information should be withheld pursuant to section 552.108.

In addressing the release of information excepted under the predecessor statute to section 552.108, this office held that "the need of a governmental body, other than the body that has failed to timely seek an open records decision, may, in appropriate circumstances be a compelling reason for non-disclosure." Open Records Decision No. 586 (1991). You have informed this office that the responsive information relates to an investigation being conducted by the Federal Bureau of Investigation (FBI) and that both the FBI and the United

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[3]A governmental body may waive a claim under section 552.108 of the Government Code. *See* Open Records Decision No. 177 (1977).

States Attorney have requested that the information not be released. In this case, although you did not timely raise section 552.108 on your own behalf, you assert that the subject information is related to an ongoing criminal investigation and that the investigating agency has requested that the information be withheld from public disclosure. Based upon your representations, we conclude that the subject information may be withheld under section 552.108(a)(1) of the Government Code.

We are resolving this matter with an informal letter ruling rather than with a published open records decision.[4] This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,

Sam Haddad
Assistant Attorney General
Open Records Division

SH/nc

Ref.: ID#126637

encl: Submitted documents

cc: Ms. Laylan Copelin
Austin American Statesman
P.O. Box 670
Austin, Texas 78767-0670
(w/o enclosures)

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[4]In reaching our conclusion, 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.