



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

March 17, 2003

Mr. Jaime Esparza
District Attorney
Thirty-Fourth Judicial District
500 East San Antonio Avenue, Room 201
El Paso, Texas 79901

OR2003-1799

Dear Mr. Esparza:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 177995.

The Office of the District Attorney, 34th Judicial District, (the "district attorney") received a request for files pertaining to the arrest, investigation, and trial of four cause numbers, 930D10816, 72739, 20010D04446, and 20010C10270. You state that the file associated with cause number 930D010816 is the same as the file associated with cause number 72739. You claim that portions of the requested information are excepted from disclosure pursuant to sections 552.101, 552.108, and 552.130 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information.

Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. *See Gov't Code § 552.101.* Section 552.101 encompasses information that is protected from disclosure by other statutes. Section 261.201 of the Family Code provides in part:

(a) The following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

- (1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and
- (2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or

developed in an investigation under this chapter or in providing services as a result of an investigation.

Fam. Code § 261.201(a). Portions of the submitted information, which we have marked, concern reports and investigations of alleged or suspected abuse made under chapter 261. We, therefore, conclude that the district attorney must withhold this information pursuant to section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code. *See* Open Records Decision No. 440 at 2 (1986) (applying predecessor statute).

You claim that a portion of the remaining submitted information is excepted from disclosure pursuant to section 552.108(a)(2) of the Government Code. Section 552.108(a)(2) protects records pertaining to criminal investigations or prosecutions that have concluded in a final result other than conviction or a deferred adjudication. *See* Gov't Code § 552.108(a)(2). You state, and provide documentation showing, that the case associated with cause number 20010C10270 was concluded in a dismissal of the charges against the individual who is the subject of this request. Therefore, we understand from your representations that the district attorney contends that the submitted information associated with this particular cause number relates to a case that has concluded in a final result other than conviction or deferred adjudication. Accordingly, we agree that section 552.108(a)(2) is applicable to this information.

We note, however, that the protection offered to information under section 552.108 can be waived by a governmental body. *See* Open Records Decision No. 177 (1977) (governmental body may waive statutory predecessor to section 552.108); *see also* Open Records Decision No. 522 at 4 (1989) (discretionary exceptions in general). The requestor argues that the district attorney has already disclosed this information to the defense attorneys who previously represented the individual who is the subject of this request. The requestor indicates that information that has already been disclosed to defense attorneys is no longer protected from disclosure. You argue, however, that your office allowed the defendant's previous defense attorneys to review the state's case file in compliance with court-ordered discovery and/or the United States Supreme Court ruling in *Brady v. Maryland*. You further state that your office allows a defendant's defense attorneys to review the state's case file in order to preclude allegations of suppression of *Brady* material.

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."). Based on your representations, we understand the district attorney to contend that its intent in granting access to this information was simply to comply with the constitutional requirements of due process. Accordingly, we do not find that granting previous defense counsel access under these circumstances was a waiver of the protection offered to information under section 552.108 of the Government Code. *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 Public Information Act), 454 at 2 (1986) (where governmental body disclosed information because it reasonably concluded it had constitutional obligation to do so, it could still invoke law enforcement exception).

We note, however, that section 552.108 does not except from disclosure basic information about an arrested person, an arrest, or a crime. *See* Gov't Code § 552.108(c). We believe such basic information refers to the information held to be public in *Houston Chronicle Publishing Company 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). *See* Open Records Decision No. 127 (1976) (summarizing types of basic information that must be made available to public). Accordingly, with the exception of basic information that must be released to the requestor, we conclude that the district attorney may withhold the information that we have marked pursuant to section 552.108(a)(2) of the Government Code. Because we base our ruling on sections 552.101 and 552.108 of the Government Code, we need not address your other remaining claimed exception to disclosure.

In summary, the district attorney must withhold the information that we have marked pursuant to section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code. With the exception of basic information that must be released to the requestor, the district attorney may withhold the remaining submitted information pursuant to section 552.108(a)(2) of the Government Code.

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 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, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, 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); *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 Texas Building and Procurement Commission 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/lmt

Ref: ID# 177995

Enc. Marked documents

c: Mr. Charles Louis Roberts
Attorney and Counselor at Law
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(w/o enclosures)