



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 17, 2003

Mr. Brian L. Rose
Assistant General Counsel
County of Harris
1201 Franklin Street, Suite 600
Houston, Texas 77002

OR2003-6517

Dear Mr. Rose:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 189848.

The Harris County District Attorney's Office (the "DA") received a request for "copies of the testimony which the State ordered and paid for during the Yates prosecution." You claim that the requested information is excepted from disclosure under sections 552.027, 552.103, and 552.110 of the Government Code. We have considered the exceptions you claim and reviewed the submitted sample of information.¹ We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing for submission of public comments).

Initially, we note that the submitted information includes a partial transcript of grand jury testimony. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."² This exception encompasses information that is made confidential by another statute. Article 20.02(a) of the Code of Criminal Procedure provides that "[t]he proceedings of the

¹We 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.

²The Office of the Attorney General will raise mandatory exceptions including section 552.101 on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

grand jury shall be secret.” The transcript of the testimony of grand jury witnesses is part of the record of the grand jury proceeding.³ See *Stern v. State*, 869 S.W. 2d 614 at 621 (Tex. App.– Houston [14th Dist.] 1994, writ denied); see also Open Records Decision No. 398 (1983). Therefore, we conclude that the submitted grand jury testimony is confidential under article 20.02(a) of the Code of Criminal Procedure. The DA must withhold that information under section 552.101 of the Government Code. See also Open Records Decision No. 513 at 4 (1988) (stating that information should be withheld if its release would reveal grand jury’s deliberations).

Next, we address your contention that the DA need not provide the requested information under section 552.027 of the Government Code, which provides:

(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.

(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.

(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.

Gov’t Code § 552.027. This section 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 that the submitted information was “requested and paid for by the

³Release of such information is governed by article 20.02(c) of this code, which provides:

[a] disclosure of a record made under Article 20.012, a disclosure of a typewritten transcription of that record, or a disclosure otherwise prohibited by Subsection (b) or Article 20.16 may be made by the attorney representing the state in performing the attorney’s duties to a grand juror serving on the grand jury before whom the record was made, another grand jury, a law enforcement agency, or a prosecuting attorney, as permitted by the attorney representing the state and determined by the attorney as necessary to assist the attorney in the performance of the attorney’s duties. The attorney representing the state shall warn any person the attorney authorizes to receive information under this subsection of the person’s duty to maintain the secrecy of the information. Any person who receives information under this subsection and discloses the information for purposes other than those permitted by this subsection is subject to punishment for contempt in the same manner as persons who violate Subsection (b).

[DA] for the purpose of researching and documenting testimony relevant to the ongoing litigation in the Andrea Yates capital murder trial.” However, we find you have failed to demonstrate that the information came from the type of commercial book or publication contemplated by section 552.027. *See* Gov’t Code § 552.027. Accordingly, we conclude that the submitted information is “public information” and, therefore, subject to the Public Information Act (the “Act”). *See* Gov’t Code § 552.002.

Next, we address your argument under section 552.103 for the remaining submitted information. This section provides:

(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.

(b) For purposes of this section, the state or political subdivision is considered to be a party to litigation of a criminal nature until the applicable statute of limitations has expired or until the defendant has exhausted all appellate and postconviction remedies in state and federal court.

(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 has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate: (1) that litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) that the information at issue is related to that litigation. *See University of Tex. Law Sch. v. Texas 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.); *see also* Open Records Decision No. 551 at 4 (1990). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *Id.*

You state that Andrea Yates was prosecuted pursuant to indictments for capital murder and, on March 18, 2002, found guilty and sentenced to life confinement in the Institutional Division of the Texas Department of Criminal Justice.⁴ You further state that Yates has filed

⁴*See State of Texas v. Andrea Yates*, Cause Nos. 880205 and 883590, in the 230th District Court, Harris County, Texas.

a direct appeal and that this appeal is currently pending before the First Court of Appeals. Furthermore, you state that the requested materials are related to the pending litigation between the State of Texas and Andrea Yates in that they “were requested for, and are a part of, the State’s litigation file in the Andrea Yates case.” Based on your statements and our review, we agree that the submitted information relates to pending litigation.

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). Thus, while you may generally withhold the submitted information under section 552.103, you must release any information that has already been seen by all of the other parties to the pending litigation, including any information that may have been introduced in or transcribed from open court. We note that the submitted information contains testimony from the Yates trial itself. Because such testimony was made in open court, these transcripts may not be withheld under section 552.103. In addition, we note that the applicability of section 552.103(a) ends once the litigation has concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

To the extent the submitted information has been seen by other parties or was introduced in open court, we will address your remaining argument. Section 552.110(b) protects “[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]” Gov’t Code § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. Gov’t Code § 552.110(b); *see also National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). You state that “the court reporters have a proprietary interest in the transcripts in question” and that “[r]elease of requested information could cause the court reporters substantial competitive and financial harm.” After reviewing your arguments, we find that the DA has made only conclusory allegations and has made no specific factual or evidentiary showing that release of any specific portion of the submitted information would likely cause substantial commercial harm to any third party.

You also state that the court reporters who created the requested transcripts may have a proprietary interest in the submitted information. You state that you have notified “the three certified court reporters that produced the requested information” of the request for information. *See* Gov’t Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Act in certain circumstances). Under section 552.305(d), an interested third party has ten business days after the date of its receipt of the governmental body’s notice to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov’t Code § 552.305(d)(2)(B). As of the date of this letter, this

office has not received correspondence from any of the notified court reporters with reasons explaining why the submitted information should not be released. Therefore, the third parties have provided us with no basis to conclude that the release of the submitted information would implicate their proprietary interests. See Gov't Code § 552.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure); Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Consequently, we find that none of the submitted information would be excepted from disclosure under section 552.110.

To summarize, we conclude that grand jury testimony is confidential under article 20.02(a) of the Code of Criminal Procedure, and must be withheld under section 552.101 of the Government Code. The remaining information may be withheld under section 552.103 of the Government Code with the following exceptions: any testimony from the Yates trial itself was made in open court and may not now be withheld under section 552.103. Such transcripts must be released to the requestor. Furthermore, to the extent that any of the remaining requested information has been seen by all other parties to the litigation or was introduced in open court, it must also be released to the requestor.

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,



Sarah I. Swanson
Assistant Attorney General
Open Records Division

SIS/lmt

Ref: ID# 189848

Enc. Submitted documents

c: Ms. Suzanne O'Malley
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(w/o enclosures)