



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 25, 2003

Mr. John S. Holleman
Criminal District Attorney
County of Polk
P. O. Box 1717
Livingston, Texas 77351

OR2003-8521

Dear Mr. Holleman:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 191654.

The Polk County Criminal District Attorney (the "district attorney") received a request for "the opportunity to view and copy files maintained by [the district attorney] or under [the district attorney's control] in the case of *The State of Texas v. Johnny Paul Penry*, Polk County trial court number 10,222." The requestor further specified that the records "should include all records and documents pertaining to or arising from (1) All investigations of the criminal incident, (2) the trial of the underlying matter, and (3) the investigation or prosecution of any proceedings after trial, including motions for new trial, and the direct appeal." You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

¹We assume that the "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.

Initially, we note that the submitted information includes several court-filed documents, which are expressly public under section 552.022 of the Government Code and may not be withheld unless confidential under other law. *See* Gov't Code § 552.022(a)(17). Sections 552.103 and 552.108 are discretionary exceptions that protect a governmental body's interests and may be waived. As such, they are not *other law* that makes information confidential for the purposes of section 552.022. *See 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 section 552.103); 177 (1977) (law enforcement exception may be waived by governmental body); *see also* Open Records Decision No. 522 (1989) (discretionary exceptions in general). Therefore, the court-filed documents, which we have marked, may not be withheld pursuant to these exceptions. You also raise section 552.101 as a possible exception to disclosure. Although this exception does constitute other law for purposes of section 552.022, you do not direct us to any law under which any of the court-filed documents are deemed confidential for purposes of section 552.101, nor are we aware of any such law. Therefore, in accordance with section 552.022, you must release the court-filed documents, which we have marked.

We now address your argument under section 552.108 of the Government Code for the remaining information not subject to section 552.022. Section 552.108 provides in part:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:

...

(4) it is information that:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) represents the mental impressions or legal reasoning of an attorney representing the state.

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from [required public disclosure] if:

...

(3) the internal record or notation:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) represents the mental impressions or legal reasoning of an attorney representing the state.

Gov't Code § 552.108(a)(4), (b)(3). 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 that the governmental body seeks to withhold. *See* Gov't Code § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986).

In *Curry v. Walker*, 873 S.W.2d 379 (Tex. 1994), the Texas Supreme Court held that a request for a district attorney's "entire litigation file" was "too broad" and, quoting *National Union Fire Insurance Co. v. Valdez*, 863 S.W.2d 458 (Tex. 1993, orig. proceeding), held that "the decision as to what to include in [the file] necessarily reveals the attorney's thought processes concerning the prosecution or defense of the case." *Curry*, 873 S.W.2d at 380. You state that "[a]s a practical matter, the WHOLE FILE could be construed as 'pertaining to or arising from' [(1) All investigations of the criminal incident, (2) the trial of the underlying matter, and (3) the investigation or prosecution of any proceedings after trial, including motions for new trial, and the direct appeal]." Therefore, you indicate that your office interprets the present request for information as a request for the district attorney's entire criminal litigation file in the cause that the requestor specifies. You assert that the submitted information reflects the attorney work product of the attorneys involved in the specified case. Based on your representations and our review of the remaining submitted information, we agree that most of the information at issue is excepted from disclosure under section 552.108(a)(4) and (b)(3) of the Government Code.

We note, however, that section 552.108 does not except from disclosure "basic information about an arrested person, an arrest, or a crime." Gov't Code § 552.108(c). Section 552.108(c) refers to the basic front-page information held to be public in *Houston Chronicle Publishing 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). The district attorney must release basic front-page information under section 552.108(c), including a detailed description of the offense, even if that information does not literally appear on the front page of an offense or arrest report. *See Houston Chronicle*, 531 S.W.2d at 186-187; Open Records Decision No. 127 at 3-4 (1976) (summarizing types of information deemed public by Houston Chronicle). The district attorney may withhold the rest of the submitted

information, with the exception of the court-filed documents we have marked, under section 552.108(a)(4) and (b)(3).²

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.

²Because we reach this conclusion, we need not reach your remaining argument.

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,

A handwritten signature in black ink, appearing to read "Sarah Swanson", with a long horizontal flourish extending to the right.

Sarah I. Swanson
Assistant Attorney General
Open Records Division

SIS/lmt

Ref: ID# 191654

Enc. Submitted documents

c: Mr. Stephen Morris
Attorney at Law
1314 Texas Avenue, Suite 1206
Houston, Texas 77002
(w/o enclosures)