



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 7, 2005

Ms. Shelly O'Brien Yeatts
Assistant District Attorney
Dallas County
133 North Industrial Boulevard, LB-19
Dallas, Texas 75207-4399

OR2005-00273

Dear Ms. Yeatts:

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# 216688.

The Dallas County District Attorney's Office (the "district attorney") received a request for eleven categories of information. You state that the district attorney has released information responsive to items 3, 5, 8, 9 and 10, but does not have any documents responsive to items 2 or 11.¹ You also claim that the district attorney has requested clarification from the requestor with respect to item 7.² You claim that you have also released some of the requested

¹ The Act does not require a governmental body to answer questions or perform legal research. *See* Open Records Decision No. 555 at 1-2 (1990). However, a governmental body must make a good faith effort to relate a request for information to any responsive information that is within its custody or control. *See* Open Records Decision No. 561 at 8-9 (1990).

² *See* Gov't Code § 552.222; *see also* Open Records Decision No. 31 (1974) (stating that when governmental bodies are presented with broad requests for information rather than for specific records, governmental body may advise requestor of types of information available so that request may be properly narrowed). Thus, the ten business day time period to request a decision from this office under section 552.301(b) with regard to this item was tolled on the date that the district attorney sought clarification of the request from the requestor. *See* Gov't Code § 552.301(b); *see also* Open Records Decision No. 663 at 5 (1999) (providing that ten-day period is tolled during the clarification process). *But see* Gov't Code § 552.222 (although deadline tolled for portion of request for which clarification is sought, governmental body must timely request decision regarding information for which it does not seek clarification). We note that the ten business day time period resumes for this information once the requestor has clarified the request to the district attorney in this regard.

information relating to items 1 and 6, but claim that the submitted information relating to items 1, 4 and 6 is excepted from disclosure under sections 552.101, 552.103, 552.108 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.³

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information protected by other statutes. You contend that the Exhibit G is made confidential under Title I of the Americans with Disabilities Act of 1990 (the "ADA"), 42 U.S.C. §§ 12101 *et seq.*, and thus must be withheld pursuant to section 552.101. The ADA provides that information about the medical conditions and medical histories of applicants or employees must be 1) collected and maintained on separate forms, 2) kept in separate medical files, and 3) treated as a confidential medical record. In addition, information obtained in the course of a "fitness for duty examination," conducted to determine whether an employee is still able to perform the essential functions of his job, is to be treated as a confidential medical record. 29 C.F.R. § 1630.14(c). *See also* Open Records Decision No. 641 (1996). Furthermore, the federal Equal Employment Opportunity Commission (the "EEOC") has determined that medical information for the purposes of the ADA includes "specific information about an individual's disability and related functional limitations, as well as general statements that an individual has a disability or that an ADA reasonable accommodation has been provided for a particular individual." *See* Letter from Ellen J. Vargyas, Legal Counsel, EEOC, to Barry Kearney, Associate General Counsel, National Labor Relations Board, 3 (Oct. 1, 1997). Upon review, we agree that the information in Exhibit G is confidential and must be withheld in its entirety under section 552.101 in conjunction with the ADA.

You claim that the remaining submitted information in Exhibits C, D and E is subject to section 552.108(b) of the Government Code, providing, in relevant part:

(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:

(1) release of the internal record or notation would interfere with law enforcement or prosecution;

(2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication; or

³ 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.

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

Gov't Code § 552.108(b). You state that the information in Exhibit C was generated in response to an allegation that a state prosecutor had failed to provide exculpatory information, and that this information pertains to the district attorney's investigation into the allegation and therefore constitutes privileged attorney work product. Upon review, we agree that this information reflects the mental processes or legal reasoning of an attorney representing the state. Therefore, we conclude that Exhibit C may be withheld from disclosure under section 552.108(b)(3).

You also state that the district attorney "utilizes the information contained in [Exhibits D and E] to develop trial strategies, to effectively prosecute crime, and specifically to select future jurors. [This] information reveal[s] the trial strategy of individual prosecutors and of this office." Upon review, we agree that the information submitted as Exhibits D and E may be withheld under section 552.108(b)(1) of the Government Code.⁴ *See* Open Records Decision No. 369 (1983) (disclosure of prosecutors' subjective comments about former jurors would tend to indicate the state's possible strategy in future prosecutions, and, in doing so, would compromise state's effectiveness in prosecuting criminal matters).

In summary, the district attorney must withhold Exhibit G under section 552.101 in conjunction with the ADA. The district attorney may withhold Exhibit C under section 552.108(b)(3), and Exhibits D and E under section 552.108(b)(1).

Although you ask this office to issue a previous determination that all information in the juror evaluation forms and the internal juror database are excepted from disclosure pursuant to section 552.108, we decline to issue such a previous determination at this time. Accordingly, 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

⁴ Because we reach these conclusions under section 552.108, we need not address your remaining arguments against the disclosure of Exhibits C, D or E.

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,


Marc A. Barenblat
Assistant Attorney General
Open Records Division

MAB/sdk

Ref: ID# 216688

Enc. Submitted documents

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(w/o enclosures)