ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 22, 2005

Ms. Holly C. Lytle
Assistant County Attorney
El Paso County
500 East San Antonio, Room 503
El Paso, Texas 79901

OR2005-11572

Dear Ms. Lytle:

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# 238929.

The El Paso District Attorney's Office (the "district attorney") received a request for all information related to a specified cause number. You state that you were unable to locate the responsive trial file. You state that you will release some of the remaining requested information, but you claim that the submitted information is excepted from disclosure under sections 552.101, 552.108, and 552.111 of the Government Code and privileged under rule 192.5 of the Texas Rules of Civil Procedure. We have considered your arguments and reviewed the submitted information.

Initially, we must address the district attorney's procedural obligations under section 552.301 of the Government Code. Pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See* Gov't Code § 552.301(e)(1)(D). You state that the district attorney was unable to locate the responsive trial file in the archives. Because you did not submit to this office a copy or representative sample of the responsive trial file, you failed to comply with the procedural requirements of section 552.301 with respect to such information.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.*

§ 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.–Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). A compelling reason exists when third-party interests are at stake or when information is confidential under other law. Open Records Decision No. 150 (1977). In this instance, as you have neither asserted any exceptions to disclosure for the trial file at issue nor submitted it for our review, we conclude that you have not demonstrated a compelling interest to withhold this information and it must therefore be released to the requestor to the extent that it exists. *See* Gov't Code §§ 552.301, .302; Open Records Decision No. 664 (2000) (concluding that section 552.221(a) requires that information not excepted from disclosure must be released as soon as possible under the circumstances). We note that the Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request for information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dism'd); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

Next, we address the requestor's assertion that he and the former attorney representing the criminal defendant in this case previously inspected many of the requested documents and papers. Whether information has previously been voluntarily released is a fact question that cannot be addressed in the ruling process. *See* Attorney General Opinion JC-0534 at 1 (2002) (this office does not make factual determinations in opinion process). We therefore must rely on a governmental body's representations with regard to such issues. The district attorney informs us that, while the requestor and the former attorney may have viewed parts of the trial and appellate files, they were not allowed to view the submitted information, which consists of handwritten notes by the attorney representing the state. Based on the district attorney's representation, we conclude that the district attorney has not previously released to a member of the public any of the requested information that you now seek to withhold. *See generally* Gov't Code § 552.007 (if governmental body voluntarily releases information to member of public, such information may not later be withheld unless confidential under law). Therefore, we will address the district attorney's claims against disclosure.

We note that the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides in part that

> the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:
>
> > (1) a completed report, audit, evaluation, or investigation made of, or, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). In this instance, the submitted information is part of a completed investigation made by the district attorney. A completed investigation must be released under section 552.022(a)(1), unless the information is excepted from disclosure under section 552.108 or expressly confidential under "other law." Section 552.111 of the Government Code is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See* Gov't Code § 552.007; Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 470 at 7 (1987) (statutory predecessor to section 552.111 was subject to waiver). Section 552.111 is therefore not "other law" that makes information confidential for the purposes of section 552.022. Thus, the district attorney may not withhold any of the submitted information under section 552.111. You also claim that the submitted information is privileged under rule 192.5 of the Texas Rules of Civil Procedure. The Texas Supreme Court has held that the Texas Rules of Civil Procedure are "other law" for purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). However, the Texas Rules of Civil Procedure only apply to "actions of a civil nature." *See* TEX. R. CIV. P. 2. Accordingly, we find that the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure does not apply to any portion of the submitted information. However, since section 552.022(a)(1) provides that information made public under that section may be excepted from disclosure under section 552.108 of the Government Code, we will address the district attorney's section 552.108 claim. Furthermore, because section 552.101 of the Government Code constitutes "other law" for purposes of section 552.022, we will also consider the district attorney's section 552.101 claim.

Section 552.108 of the Government Code 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). Sections 552.108(a)(4) and 552.108(b)(3) are applicable to information that was prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation or that reflects the mental impressions or legal reasoning of an attorney representing the state. 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). You argue that the submitted information consists of the district attorney's work product. Upon review, we agree that this information was either prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation or reflects the mental processes or legal reasoning of an attorney representing the state. Therefore, we conclude that submitted information may be withheld from disclosure under sections 552.108(a)(4) and 552.108(b)(3).[1]

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).

---

[1]As our ruling is dispositive, we need not address your remaining claim against disclosure.

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Office of the Attorney General 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. 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,

Caroline E. Cho
Assistant Attorney General
Open Records Division

CEC/segh

Ref: ID# 238929

Enc. Submitted documents

c: Mr. James D. Lucas
303 Texas Avenue, Suite 806
El Paso, Texas 79901
(w/o enclosures)