



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 30, 2008

Ms. Pamela Smith
Assistant General Counsel
Texas Department of Public Safety
P.O. Box 4087
Austin, Texas 78773-0001

OR2008-13396

Dear Ms. Smith:

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# 323120.

The Texas Department of Public Safety (the "department") received a request for three specified DNA report files. You claim that some of the responsive information is not subject to the Act. You claim that the submitted information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have considered your arguments and reviewed the submitted information.

Initially, you claim that one of the requested file numbers identifies only frozen samples of DNA that are not subject to the Act. This office has ruled that tangible physical items are not the type of information contemplated under the Act. *See* Attorney General Opinion JM-640 (1987) (Open Records Act applies only to tangible items such as documents and other "developed materials"). Thus, we agree that the frozen samples comprise tangible physical evidence collected by the department and are not public information as that term is defined in section 552.002 of the Government Code.

Next, we note that the submitted information contains subpoenas that have been filed with a court. Court-filed documents are expressly public under section 552.022(a)(17) of the Government Code. *See* Gov't Code § 552.022(a)(17). Such information must be released unless it is expressly confidential under other law. *See id.* You claim that the submitted

information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. Section 552.108 is a discretionary exception, however, that protects a governmental body's interests and is therefore not "other law" for purposes of section 552.022(a)(17). *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 586 (1991) (governmental body may waive section 552.108). Therefore, the department may not withhold the subpoenas under section 552.108. Section 552.101, however, does constitute other law for purposes of section 552.022; therefore, we will address whether that exception is applicable to the subpoenas.

Section 552.101 of the Government Code 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 statutes. Section 552.101 encompasses section 411.153 of the Government Code, which provides as follows:

- (a) A DNA record stored in the DNA database is confidential and is not subject to disclosure under the public information law, Chapter 552.
- (b) A person commits an offense if the person knowingly discloses to an unauthorized recipient information in a DNA record or information related to a DNA analysis of a sample collected under this subchapter.
- (c) An offense under this section is a state jail felony.
- (d) A violation under this section constitutes official misconduct.

Gov't Code § 411.153. A "DNA record" means the results of a forensic DNA analysis performed by a DNA laboratory. *See id.* §§ 411.141(6), (7). "Forensic analysis" is defined as "a medical, chemical, toxicologic, ballistic, or other expert examination or test performed on physical evidence, including DNA evidence, for the purpose of determining the connection of the evidence to a criminal action." *See* Crim. Proc. Code art. 38.35(4); *see also* Gov't Code § 411.141(10) (providing that "forensic analysis" has meaning assigned by Crim. Proc. Code art. 38.35). A "DNA database" means "one or more databases that contain forensic DNA records maintained by the director of the [DPS]." Gov't Code § 411.141(5); *see id.* § 411.001(3).

The submitted subpoenas are not the result of a forensic DNA analysis performed by a DNA laboratory. Therefore, they are not DNA records as defined by section 411.141(7) of the Government Code. Accordingly, the submitted subpoenas are not confidential under section 552.101 of the Government Code in conjunction with section 411.153 of the Government Code. As you have not raised any additional arguments against disclosure of the subpoenas, they must be released.

We will now address your arguments under section 552.108 of the Government Code for the remaining information. Section 552.108(a)(1) excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]” Gov’t Code § 552.108(a)(1). Generally, a governmental body claiming section 552.108(a)(1) must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state the remaining documents pertain to an ongoing prosecution and that their release would interfere with the prosecution of that case. Thus, we find that section 552.108(a)(1) is applicable to these documents. *See Houston Chronicle Publ’g 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) (court delineates law enforcement interests that are present in active cases). The remaining information may be withheld pursuant to section 552.108 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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3). If the governmental body does not file suit over 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, 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 challenge 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,



Olivia A. Maceo
Assistant Attorney General
Open Records Division

OM/eeg

Ref: ID# 323120

Enc. Submitted documents

c: Mr. Jon Evans
Attorney at Law
806 West 11th Street
Austin, Texas 78701
(w/o enclosures)