



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 16, 2010

Mr. Scott A. Durfee
Assistant General Counsel
Harris County District Attorney
1201 Franklin, Suite 600
Houston, Texas 77002-1901

OR2010-08817

Dear Mr. Durfee:

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# 382847.

The Harris County District Attorney's Office (the "district attorney") received a request for nine categories of information pertaining to the death of an individual. 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 We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit written comments regarding availability of requested information).

Initially, we address the requestor's argument that the district attorney failed to meet its obligations under section 552.301 of the Government Code. This section prescribes procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(b) requires the governmental body to ask for the attorney general's decision and state the exceptions to disclosure that it claims not later than the tenth business day after the date of its receipt of

¹We assume 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 those records contain substantially different types of information than that submitted to this office.

the written request for information. *See* Gov't Code § 552.301(b). Section 552.301(d) requires the governmental body to provide the requestor with a written statement that the governmental body wishes to withhold the requested information and a copy of the governmental body's written communication to the attorney general asking for a decision not later than the tenth business day after the date of its receipt of the written request for information. *See* Gov't Code § 552.301(d).

The district attorney received the request for information on March 24, 2010.² The district attorney timely requested a decision from this office on April 8, 2010. Additionally, the district attorney states, and provides supporting documentation in the form of a certified mail receipt showing, that the district attorney mailed a copy of the brief to the requestor on April 8, 2010. The requestor states that he never received this brief. Whether the requestor was actually provided with a copy of the district attorney's brief on April 8, 2010 is a question of fact. This office is unable to resolve disputes of fact in the open records ruling process. Accordingly, we must rely upon the facts alleged to us by the governmental body requesting our opinion, or upon those facts that are discernable from the documents submitted for our inspection. *See* Open Records Decision No. 522 at 4 (1990). The district attorney has provided documentation to support its contention that the requestor was provided a copy of its written statement on April 8, 2010. Therefore, we conclude that the district attorney complied with the procedural requirements of section 552.301(d).

We note the requestor argues the requested autopsy report has been previously disclosed to the public. The requestor also states that the Houston Police Department (the "department") has previously released copies of its offense reports related to this investigation to the requestor. The Act does not permit the selective disclosure of information to the public. *See* Gov't Code §§ 552.007(b), .021; Open Records Decision No. 463 at 1-2 (1987). Information that has been voluntarily released to a member of the public by a governmental body may not subsequently be withheld from another member of the public by the same governmental body, unless public disclosure of the information is expressly prohibited by law or the information is confidential under law. *See* Gov't Code § 552.007(a); Open Records Decision Nos. 518 at 3 (1989), 490 at 2 (1988); *but see* Open Records Decision Nos. 579 (1990) (exchange of information among litigants in "informal" discovery is not "voluntary" release of information for purposes of statutory predecessor to section 552.007), 454 at 2 (1986) (governmental body that disclosed information because it reasonably concluded that it had constitutional obligation to do so could still invoke statutory predecessor to section 552.108). However, the Act does not preclude a governmental body from invoking the Act's exceptions to protect from further public disclosure information which has been released on a limited basis through no official action, and against the wishes and policy of, the governmental body. *See* Open Records Decision No. 387 (1983). The requestor states that the department, not the district attorney, released the offense reports at issue. The department's release of certain

²The district attorney states April 2, 2010 was a Harris County holiday.

information does not constitute a voluntary release of information held by the district attorney for purposes of section 552.007 of the Government Code. We note that the requestor does not assert who previously released the autopsy report at issue. However, section 552.108 is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 177 at 3 (1977) (statutory predecessor to section 552.108 subject to waiver). As such, section 552.108 neither prohibits public disclosure of information nor makes information confidential under law. Therefore, if the district attorney previously released the autopsy report at issue to the public, then the autopsy report may not be withheld from the present requestor under section 552.108.

Next, we note that some of the submitted information consists of completed reports, which are subject to section 552.022(a)(1) of the Government Code. Section 552.022(a)(1) provides for the required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108." Gov't Code § 552.022(a)(1). Pursuant to section 552.022(a)(1), a completed report is expressly public unless it is either excepted under section 552.108 of the Government Code or is expressly confidential under other law. Although you raise section 552.103 of the Government Code, section 552.103 is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See id.* § 552.007; *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); Open Records Decision No. 665 at 2 n.5 (discretionary exceptions generally), 663 (1999) (governmental body may waive section 552.103). As such, section 552.103 is not "other law" that makes information confidential for the purposes of section 552.022. Therefore, the district attorney may not withhold any of the completed reports under section 552.103 of the Government Code. You also raise sections 552.101 and 552.108 of the Government Code as exceptions to disclosure of the requested information, including the completed reports. We note that section 552.101 of the Government Code, is "other law" that makes information confidential for purposes of section 552.022. Additionally, the information subject to section 552.022 of the Government Code may be withheld under section 552.108. Accordingly, we will address your arguments under these exceptions for the completed reports, as well as the remaining information.

Section 552.108 excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication[.]" *See* Gov't Code § 552.108(a)(2). A governmental body claiming section 552.108(a)(2) must demonstrate the requested information relates to a criminal investigation that concluded in a final result other than a conviction or deferred adjudication. *See id.* § 552.301(e)(1)(A) (governmental body must provide comments explaining why exceptions raised should apply to information requested). You state the submitted information pertains to a closed criminal

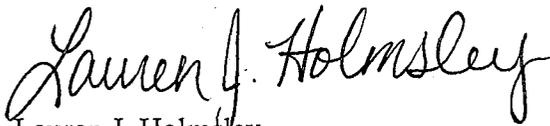
investigation that did not result in a conviction or deferred adjudication. The requestor argues the district attorney failed to prove the closed criminal investigation into the officer who shot the deceased was "no billed" by the grand jury. We note, however, the district attorney submitted information showing the grand jury "no billed" the officer on February 27, 2009; thus, the criminal investigation into the officer's conduct ended in a result other than conviction or deferred adjudication. Accordingly, based on your representations and our review, we agree section 552.108(a)(2) is applicable to the submitted information.

However, section 552.108 does not except from disclosure basic information about an arrested person, an arrest, or a crime. *Id.* § 552.108(c). Basic information refers to the 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). Basic information includes the identification and description of the complainant. *See Houston Chronicle Publ'g Co.*, 531 S.W.2d at 186–87; Open Records Decision No. 127 (1976) (summarizing types of information made public by *Houston Chronicle*). Accordingly, with the exception of any information that has previously been voluntarily released to the requestor and basic information, the district attorney may withhold the submitted information under section 552.108(a)(2).³

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free at (888) 672-6787.

Sincerely,



Lauren J. Holmsley
Assistant Attorney General
Open Records Division

LJH/jb

³As our ruling is dispositive for this information, we need not address your remaining arguments against disclosure.

Ref: ID# 382847

Enc. Submitted documents

c: Requestor
(w/o enclosures)