



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 29, 2011

Mr. Michael M. Kelly
Assistant Criminal District Attorney
Victoria County
205 North Bridge Street, Suite 301
Victoria, Texas 77901

OR2011-14094

Dear Mr. Kelly:

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# 431525.

The Victoria County Sheriff’s Office (the “sheriff”) received a request for all photographs and a non-prosecution document pertaining to a specified incident. You claim the submitted information is excepted from disclosure under section 552.108 of the Government Code, and indicate the submitted information is protected under Texas Rule of Civil Procedure 192.5. We have considered your arguments and reviewed the submitted representative sample of information.¹

You generally assert the requested information is excepted from disclosure under section 552.108(b)(2) of the Government Code “and the other law as posed in” *Holmes v. Morales*, 924 S.W.2d 920 (Tex. 1996). In the *Holmes* decision, the Texas Supreme Court held the plain language of section 552.108 did not require a governmental body to show release of the information at issue would unduly interfere with law enforcement. *Holmes*, 924 S.W.2d at 925. The *Holmes* decision further held “[the predecessor 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.

section 552.108's plain language makes no distinction between a prosecutor's 'open' and 'closed' criminal litigation files" and concluded the Harris County District Attorney may withhold his closed criminal litigation files under that exception. *Id.* Subsequent to the interpretation of the predecessor of section 552.108 in the *Holmes* decision, the Seventy-fifth Legislature amended section 552.108 extensively. *See* Act of June 1, 1997, 75th Leg., R.S., ch. 1231, § 1, 1997 Tex. Gen. Laws 4697. As amended, section 552.108 now expressly requires a governmental body to explain, among other things, how release of the information would interfere with law enforcement. Accordingly, the court's ruling in *Holmes*, which construed former section 552.108, is superseded by the amended section 552.108.

Section 552.108(b)(2) of the Government Code provides:

(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:

...

(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[.]

Gov't Code § 552.108(b)(2). Section 552.108(b)(2) is applicable only if the information at issue relates to a concluded criminal case that did not result in a conviction or a deferred adjudication. Generally, a governmental body claiming section 552.108 must reasonably explain how and why this exception is applicable to the information the governmental body seeks to withhold. *See id.* § 552.301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). In this instance, you have not provided any explanation of how the requested information pertains to a closed criminal investigation or prosecution that did not result in a conviction or deferred adjudication. Consequently, we find you have failed to demonstrate the applicability of section 552.108(b)(2) of the Government Code to the requested information, and the sheriff may not withhold the requested information on that basis.

You also indicate the requested information is excepted from disclosure under rule 192.5 of the Texas Rules of Civil Procedure, which protects information only to the extent the information implicates the core work product aspect of the attorney work product privilege. Open Records Decision No. 677 at 9-10 (2002). In this instance, you have failed to demonstrate how rule 192.5 applies to any of the requested information. Consequently, the sheriff may not withhold any of the requested information under rule 192.5 of the Texas Rules of Civil Procedure. As you have not claimed any other exceptions to disclosure, the sheriff must release the requested information.

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,

A handwritten signature in cursive script that reads "Leah B. Wingerson".

Leah B. Wingerson
Assistant Attorney General
Open Records Division

LBW/dls

Ref: ID# 431525

Enc. Submitted documents

c: Requestor
(w/o enclosures)