



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

December 20, 1995

Mr. Ron M. Pigott
Assistant General Counsel
Texas Department of Public Safety
P.O. Box 4087
Austin, Texas 78773-0001

OR95-1509

Dear Mr. Pigott:

Your predecessor asked whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. We assigned your request ID# 26983.

The Texas Department of Public Safety (the "department") received a request for information relating to a department investigation of a double murder. Specifically, the requestor seeks "all files, records and any other documents in the possession of the Texas Rangers pertaining to the arrest, investigation and prosecution of David Gibbs for capital murder." You seek to withhold the requested information under sections 552.103 and 552.108 of the Government Code.

Section 552.103(a) of the Government Code exempts from required public disclosure information

- (1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and
- (2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

For information to be excepted from public disclosure by section 552.103(a), litigation must be pending or reasonably anticipated and the information must relate to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. You advise us that

the requested information relates to habeas corpus litigation filed by the Texas Resource Center and opposed by the Montgomery County District Attorney's Office. On the basis of this litigation, you claim that the department may withhold the requested information under section 552.103. Section 552.103, however, applies only when the litigation asserted as the basis for withholding the information involves or is expected to involve the governmental body which is claiming the exception. Open Records Decision Nos. 392 (1983) at 3, 132 (1976) at 2, 7 (1973) at 2.¹ You have not explained, nor are we otherwise aware, that the department is or expects to be a party to the habeas corpus litigation filed by the Texas Resource Center. Accordingly, the department may not withhold the requested information under section 552.103 of the Government Code.²

Section 552.108 of the Government Code exempts from disclosure (a) records of a law enforcement agency or prosecutor that deal with the detection, investigation, or prosecution of crime and (b) internal records or notations of a law enforcement agency or prosecutor that are maintained for internal use in matters relating to law enforcement or prosecution. In an open criminal case, section 552.108 exempts from disclosure all information except that normally found on the first page of the offense report.

¹In Open Records Decision No. 469 (1987) at 2, this office held that the University of Texas could withhold under section 552.103(a) information that it had made available to the Travis County District Attorney's Office. In that decision, this office determined that in instances involving criminal litigation, the district attorney or other prosecutor is authorized to make the initial determination that information is related to litigation, even though another governmental body not involved in the litigation may be in possession of the requested information. *Id.*; see also Open Records Decision Nos. 141 (1976), 121 (1976). Habeas corpus, however, is not a *criminal* action. Habeas corpus proceedings have been characterized as civil in nature, see *Ex parte Tong*, 108 U.S. 556, 560 (1883); *Ex parte Morris*, 349 S.W.2d 99, 100-01 (Tex. 1961); *Harbison v. McMurray*, 158 S.W.2d 284, 287 (Tex. 1942), and sometimes as *sui generis*, see *In re Moy Chee Kee*, 33 F. 377, 379 (C.C.N.D. Cal. 1887), or an exercise of special constitutional and statutory jurisdiction, see *McFarland v. Johnson*, 27 Tex. 105, 109 (1863); *Garza v. Schilling*, 576 S.W.2d 147, 151 (Tex. Civ. App.—Corpus Christi 1978, no writ). See also Attorney General Opinion DM-295 (1994) at 11. We are unaware of any authority, however, that characterizes habeas corpus proceedings as criminal in nature. Accordingly, Open Records Decision No. 469 (1987) is inapplicable in this instance.

²We also note that section 552.103(b) of the Government Code provides no authority for withholding the requested information in this instance. Section 552.103(b) provides:

For purposes of this section, the state or a political subdivision is considered to be a party to litigation of a criminal nature until the applicable statute of limitations has expired or until the defendant has exhausted all appellate and postconviction remedies in state and federal court.

In a previous open records decision, this office determined that the statutory predecessor to section 552.103(b), V.T.C.S. 6252-17a, section 3(e), was not a separate exception to disclosure and that it merely provided a time frame within which the litigation exception exempts information from disclosure. Open Records Decision No. 518 (1989) at 5. Former section 3(e) was not included among the specific exceptions to disclosure set forth in the act. Although former section 3(e) has been codified as section 552.103(b) of the Government Code, this is not significant to its construction because the codification of the Open Records Act in the Government Code is a nonsubstantive revision. See Acts 1993, 73d Leg., ch. 268, § 47.

See generally 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); Open Records Decision No. 127 (1976). You have not demonstrated to this office, however, that this information concerns an open criminal case. Once a case is closed, information may be withheld under section 552.108 only if its release "will unduly interfere with law enforcement or crime prevention." Open Records Decision No. 553 (1990) at 4 (and cases cited therein). Moreover, the governmental body asserting section 552.108 has the burden of explaining how release of the information would unduly interfere with law enforcement or crime prevention if the information does not reveal that on its face. Open Records Decision No. 518 (1989) at 6. You have not provided an explanation, nor is it apparent to this office, how release of this information would unduly interfere with law enforcement or crime prevention. Accordingly, you may not withhold the requested information under section 552.108.

In summary, you must release the requested information in its entirety.³ We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Todd Reese
Assistant Attorney General
Open Records Division

RTR/rho

Ref: ID# 26983

³We note that a portion of the responsive documents makes reference to information acquired from a polygraph examination. V.T.C.S. article 4413(29cc), section 19A provides in pertinent part:

(b) Except as provided by Subsection (d) of this section, a person for whom a polygraph examination is conducted or an employee of the person may not disclose to another person information acquired from the examination.

Subsection (d), which specifies persons to whom information acquired from a polygraph examination may be disclosed, permits disclosure to the examinee or any other person specifically designated in writing by the examinee. Unless the examinee has specifically designated in writing the requestor as a person to whom information acquired from his polygraph examination may be disclosed, the department must withhold from the requestor the polygraph examinations and any information acquired from the examinations under V.T.C.S. article 4413(29cc), section 19A(b). We have marked the documents accordingly.

Enclosures: Marked documents

cc: Ms. Annette Lambreaux
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(w/o enclosures)