



## Office of the Attorney General

State of Texas

July 3, 1997

DAN MORALES  
ATTORNEY GENERAL

Mr. James R. Thompson  
City Attorney  
P.O. Box 246  
Copperas Cove, Texas 76522

OR97-1522

Dear Mr. Thompson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 107079.

The City of Copperas Cove (the "city") received a request for all records concerning "the arson of a residential home located at 1507 Virginia Avenue . . . on August 3, 1996." You claim that the requested records are excepted from required public disclosure by section 552.103 of the Government Code. We have considered the exception you claim and have reviewed the records at issue.

Pursuant to section 552.303(c) of the Government Code, this office notified you by facsimile dated May 27, 1997 that we required additional, specific information necessary to render a decision. We requested that you provide this information to our office within seven days from the date of receiving the notice. The notice further stated that under section 552.303(e) failure to comply would result in the legal presumption that the information at issue was presumed public.

We believe that the additional information requested was necessary to render a decision because of our analysis under your stated exception to disclosure. Section 552.103(a) excepts from 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.

The governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. The governmental body must meet both prongs of this test for information to be excepted under 552.103(a).

In this instance, you state that the city investigated the subject matter of this request, an August 3, 1996 arson. You also state that the investigation "resulted in the defendant's conviction." You assert, however, that other criminal charges may be filed by civilian or military authorities. However, absent a letter or other documentation from the District Attorney's Office or the prosecuting attorney with the litigation interest stating that the information should not be released, we conclude that you have not met your section 552.103 burden. See Open Records Decision No. 469 (1987) at 2. From the submitted documentation, the city has not shown that it has a litigation interest. Therefore, the requested documents may not be withheld pursuant to section 552.103.

Moreover, you have not provided our office with the additional information that was requested by our office. Therefore, as provided by section 552.303(e), the information that is the subject of this request for information is presumed to be public information. Information that is presumed public must be released unless a governmental body demonstrates a compelling interest to withhold the information to overcome this presumption. See *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 Gov't Code § 552.302); Open Records Decision No. 319 (1982).

The submitted information includes a video tape that depicts several unclothed individuals. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision" and provides a compelling reason to overcome the presumption of openness. Section 552.101 encompasses common-law privacy and excepts from disclosure private facts about an individual. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Therefore, information may be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 (1992) at 1. We find that you must withhold the submitted video tape in its entirety based on common-law privacy. In the absence of a demonstration that the remaining information is confidential by law or that other compelling reasons exist as to why the information should not be made public, you must release the remaining information. Open Records Decision No. 195 (1978). See also Gov't Code § 552.352 (the distribution of confidential information is a criminal offense).

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,



Don Ballard  
Assistant Attorney General  
Open Records Division

JDB/ch

Ref: ID# 107079

Enclosures: Submitted documents

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(w/o enclosures)

