



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

November 7, 1997

Ms. Tracy B. Calabrese  
Assistant City Attorney  
City of Houston  
Legal Department  
P.O. Box 1562  
Houston, Texas 77251-1562

OR97-2467

Dear Ms. Calabrese:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 110398.

The City of Houston (the "city") received a request for a variety of information "concerning a robbery of K & R grocery store, at 6902 North Wayside Drive, on March 30, 1985," an incident involving the requestor's client.<sup>1</sup> You have submitted the information which you contend is responsive to the request. You state that "[t]he Houston Police Department will make the 'front page offense report information' available to the requestor."<sup>2</sup> However, you assert that the remaining information may be withheld from disclosure pursuant to sections 552.027, 552.103, and 552.108 of the Government Code. We have considered the exceptions and arguments you have raised and reviewed the submitted information.

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<sup>1</sup>We note that the requestor's letter is dated August 13, 1997, while your request for ruling is dated August 28, 1997. You have submitted information to support that the Houston Police Department received the open records request on August 19, 1997. We note that Chapter 552 of the Government Code imposes a *duty* on governmental bodies seeking an open records decision pursuant to section 552.301 to submit that request to the attorney general, not later than the tenth calendar day after the date of receiving the written request. *See* Act of May 29, 1997, H.B. 951, § 5, 75th Leg., R.S. (act amending Tex. Gov't Code Ann. § 552.301, effective September 1, 1997). We will rely on your assertion that the requestor's letter was received on August, 19, 1997, therefore, your request for ruling from our office is considered timely.

<sup>2</sup>We note that generally front page incident report information may not be withheld from disclosure under either section 552.103 or section 552.108. *See* Open Records Decision No. 597 (1991) (concluding that statutory predecessor to section 552.103 did not except basic information in incident report); *see also 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); Open Records Decision No. 127 (1976) (information normally found on front page of offense report is generally considered public).

Initially, we note that the requestor, an attorney for ACLU of Texas, apparently has obtained and provided to the city "a general release signed by Larry Henson-El, who was convicted for this crime."<sup>3</sup> Section 552.027 of the Government Code provides:

(a) A governmental body is not required to accept or comply with a request for information from an individual who is imprisoned or confined in a correctional facility.

(b) Subsection (a) does not prohibit a governmental body from disclosing to an individual described by that subsection information held by a governmental body pertaining to that individual.

(c) In this section, "correctional facility" has the meaning assigned by Section 1.07(a), Penal Code.<sup>4</sup>

Gov't Code § 552.027 (as added by Acts 1995, 74th Leg., ch. 302, § 1) (footnote added).

By enacting section 552.027, the legislature intended to prevent inmates from using information obtained through the Open Records Act "to file bogus income tax returns on correctional officers, harass nurses at their home addresses, and send mail to the homes of Texas Department of Criminal Justice employees." Tex. Sen. Criminal Justice Comm., Bill Analysis, Tex. H.B. 949, 74th Leg., R.S. (1995) (quoting from "Background") (available through the Senate Research Center). After careful consideration and given the stated purpose of section 552.027, we do not believe that the legislature intended to prevent an attorney, who is subject to rules of professional responsibility, from requesting information

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<sup>3</sup>You have not submitted a copy of the release to our office. In this ruling, we will assume that the requestor is the attorney for the incarcerated person.

<sup>4</sup>Section 1.07(a)(14) of the Penal Code provides:

"Correctional facility" means a place designated by law for the confinement of a person arrested for, charged with, or convicted of a criminal offense. The term includes:

(A) a municipal or county jail;

(B) a confinement facility operated by the Texas Department of Criminal Justice;

(C) a confinement facility operated under contract with any division of the Texas Department of Criminal Justice; and

(D) a community corrections facility operated by a community supervision and corrections department.

on behalf of an inmate whom he is representing. Accordingly, we conclude that section 552.027 does not relieve a governmental body of its obligation to accept and comply with an open records request from an attorney who is representing an inmate.

We now consider whether section 552.103 excepts from required public disclosure any of the submitted information. Section 552.103(a), known as the litigation exception, excepts 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

When asserting section 552.103(a), a governmental body must establish that the requested information relates to pending or reasonably anticipated litigation. Thus, under section 552.103(a) a governmental body's burden is two-pronged. The governmental body must establish that (1) litigation is either pending or reasonably anticipated, and that (2) the requested information relates to that litigation. *See 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.

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 (1986) at 4. Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 (1989) at 5 (litigation must be "realistically contemplated"). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 (1986).

You state that "Mr. Henson-El is incarcerated and has not yet exhausted all post-conviction remedies available to him." You contend that conviction for the crime which Mr. Henson-El has been incarcerated is not final. You also note that section 552.103(b) provides that "[f]or 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." However, based on the submitted information, there is no indication that there is an active or pending appeal, which would implicate section 552.103. We conclude that you have failed to meet the requisite showing necessary for section 552.103. Therefore, you may not rely on section 552.103 to withhold the information from the requestor.

We next consider the application of the remaining exception you claim for the submitted information. The Seventy-Fifth Legislature amended section 552.108 of the Government Code to read as follows:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of 552.021 if:

(1) release of the information would interfere with the detection, investigation or prosecution of crime;

(2) 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; or

(3) it is information that:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

....

(c) This section does not except from the requirements of Section 552.021 information that is basic information about an arrested person, an arrest, or a crime.

See Gov't Code § 552.108. Prior to its amendment, section 552.108 excepted from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime" and "[a]n 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." Because your request for a decision was submitted to this office prior to September 1, 1997, the effective date of the amendment to section 552.108, this office gave the city the opportunity to supply additional briefing concerning the applicability of the amended statute to the information at issue. You have not supplied to this office necessary information showing the applicability of section 552.108, as amended, to the requested records.

You assert that "it is the City's position that the Texas Supreme Court's ruling in *Holmes v. Morales*, 924 S.W.2d 920 (Tex. 1996), to be controlling, and that no additional briefing is required by the Act." We disagree. In *Houston I.S.D. v. Houston Chronicle Pub. Co.*, 798 S.W.2d 580 (Tex.App.--Houston [1st Dist.] 1990), the court determined that the

Houston Chronicle's right to requested information did not vest until a final determination was rendered about information requested under the Open Records Act. *See* Gov't Code § 552.303(a) (when governmental body seeks decision from attorney general, "final determination" occurs when attorney general or court renders decision). Because a final determination about the information at issue came after the Open Records Act was amended, the amended statute was the appropriate law to apply. *Houston I.S.D. v. Houston Chronicle Pub. Co.*, 798 S.W.2d 580 (Tex.App.--Houston [1st Dist.] 1990).

In your original brief to this office, you stated that "the requested information relates to criminal investigation and the accused has not yet exhausted his appeals remedies." Since the offense at issue occurred in 1985, we assume that the investigation has concluded, and you offer no support that "release of the information would interfere with the detection, investigation or prosecution of crime;" thus, we find that section 552.108(a)(1) is not applicable in this case. Further, as the requestor's client has been convicted in the case at issue, section 552.108(a)(2) is not applicable for the requested information. We conclude that you have not shown that section 552.108, as amended, or any other exception to disclosure under chapter 552 of the Government Code protects the requested information from disclosure. Therefore, based on the facts presented, the claimed exceptions to disclosure, and the preceding analysis, we conclude that the submitted information may not be withheld from the requestor.

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,



Sam Haddad  
Assistant Attorney General  
Open Records Division

SH/rho

Ref.: ID# 110398

Enclosures: Submitted documents

cc: Mr. Michael Palmer  
ACLU of Texas  
P.O. Box 132047  
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(w/o enclosures)