



March 21, 2001

Mr. James M. Kuboviak  
County Attorney  
Brazos County  
300 East 26<sup>th</sup>, Suite 325  
Bryan, Texas 77803

OR2001-1121

Dear Mr. Kuboviak:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 145147.

The Brazos County Constable's Office (the "county constable's office") received a request for information concerning an individual who works as a reserve deputy constable for Brazos County (the "county"). You claim that the requested information is excepted from disclosure under sections 552.026, 552.101, 552.103, 552.108, 552.114, 552.117, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

You state that all of the requested information is excepted from disclosure under section 552.103. The purpose of section 552.103 is to protect a governmental body's position in litigation by forcing parties to obtain information relating to the litigation through the discovery process. Open Records Decision No. 551 (1990). A governmental body that is a party to pending litigation has discretion to determine whether it should claim section 552.103 for information related to the litigation. *See id.*; Open Records Decision No. 511 (1988). You claim that the requested information is related to a pending criminal prosecution and should, therefore, be excepted from disclosure under section 552.103. However, the county constable's office is not a party to this litigation. Consequently, the county constable's office has no section 552.103 interest in information related to the litigation. *See* Open Records Decision No. 392 (1983).

In this type of situation, we require an affirmative representation from the prosecuting attorney representing the governmental body in the litigation that he or she wants the requested information withheld from disclosure under section 552.103. You did not properly state in your brief that the county attorney's office was the prosecuting entity. However, we were able to discern this information from the submitted court documents. Based on the language and purpose of section 552.103, it is incumbent upon the county attorney's office to specify which governmental body's litigation interests it is representing when requesting and open records ruling from this office. Here, because the county's litigation interests are implicated, we will address the county attorney's section 552.103 claim.

Section 552.103 provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature 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.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

A 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. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *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 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under 552.103(a).

As the county attorney, you state that criminal litigation that involves the county is currently pending and that the reserve deputy constable in question is one of two witnesses for the prosecution. Thus, you have met the first prong of the test under section 552.103. You also assert that the requested documents relate to that litigation. You explain that the requested information concerns the background and training of the constable in question, which can be used to determine his competency to testify at trial. Based on your representation and our review of the submitted documents, we agree that they relate to the pending litigation.

Therefore, you may withhold all of the submitted documents under section 552.103 of the Government Code.<sup>1</sup>

We note, however, that once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

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

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental

---

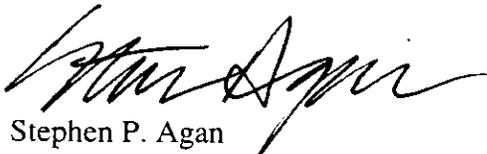
<sup>1</sup>Because section 552.103 is dispositive, we need not address your other claimed exceptions.

body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Stephen P. Agan  
Assistant Attorney General  
Open Records Division

SPA/seg

Ref: ID# 145147

Encl. Submitted documents

cc: Mr. Kyle Hawthorne  
Bruchez, Goss, Thornton, Meronoff & Hawthorne  
4343 Carter Creek Parkway, Suite 100  
Bryan, Texas 77802  
(w/o enclosures)