OFFICE OF THE ATTORNEY GENERAL · STATE OF TEXAS
JOHN CORNYN

October 15, 2002

Ms. Angela M. DeLuca
Assistant City Attorney
City of College Station
P.O. Box 9960
College Station, Texas 77842

OR2002-5837

Dear Ms. DeLuca:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 170669.

The College Station Police Department (the "department") received a request for electronic communications sent or received from computer-equipped patrol units during a particular time interval beginning on July 11, 2002 and ending on July 12, 2002. The department claims that the requested information is excepted from disclosure under sections 552.101, 552.103, and 552.108 of the Government Code. We have considered the exceptions you raise and have reviewed the submitted information.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception encompasses information that other statutes make confidential. The department claims that the requested information is confidential under article 39.14 of the Code of Criminal Procedure. The department argues that under article 39.14, "the requested information is not available to criminal defense counsel except in cases where good cause and materiality is shown under the discovery provisions." We conclude, however, that article 39.14 does not make the requested information confidential. *See* Open Records Decision Nos. 658 at 4 (1998) (statutory confidentiality must be express, and confidentiality requirement will not be implied from statutory structure), 478 at 2 (1987) (statutory confidentiality requires express language making certain information confidential or stating that information shall not be released to public). Therefore, the requested information is not

excepted from disclosure under section 552.101 of the Government Code in conjunction with article 39.14 of the Code of Criminal Procedure.

The department also appears to contend that the requested information is confidential under rules 612 and 615 of the Texas Rules of Evidence. In raising rules 612 and 615, the department cites *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001) (concluding that Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' that makes information expressly confidential for purposes of Gov't Code § 552.022). We note, however, that section 552.022 of the Government Code is not applicable to the requested information. Furthermore, rules 612 and 615 of the Texas Rules of Evidence are not confidentiality provisions. *See In re City of Georgetown*, 53 S.W.2d at 337 ("We hold that if documents are privileged or confidential under the Texas Rules of Civil Procedure or Texas Rules of Evidence, they are within a 'category of information that is expressly made confidential under other law' within the meaning of section 552.022[.]"); Open Records Decision Nos. 658 at 4 (1998), 478 at 2 (1987). Therefore, the department may not withhold the requested information under Texas Rules of Evidence 612 or 615.

The department also raises section 552.103 of the Government Code. This exception provides in part:

> (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.
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> . . .
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> (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.

Gov't Code § 552.103(a), (c). The governmental body has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate: (1) that litigation was pending or reasonably anticipated on the date of its receipt of the request for information *and* (2) that the information at issue is related to that litigation. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App. – Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App. – Houston [1st Dist.] 1984, writ ref'd n.r.e.); *see also* Open Records Decision No. 551 at 4

(1990). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *Id.*

The department represents to this office that the requested information relates to a pending criminal prosecution. The department indicates that the prosecution was pending when the department received this request for information. The department has not demonstrated, however, that it is a party to the pending criminal litigation. *See* Gov't Code § 552.103(a); Open Records Decision No. 575 at 2 (1990). In such a situation, we require an affirmative representation from the prosecuting attorney representing the governmental body that is a party to the litigation that he or she wants the submitted information withheld from disclosure under section 552.103. You have submitted a letter from an Assistant County Attorney for Brazos County, stating that his office is prosecuting the pending case. The prosecutor states that the requested information relates to a case that "is actively being prosecuted as a criminal case." The letter asks that the requested information relating to the arrested individual be withheld from disclosure to protect the prosecutor's position in the pending litigation. We find that the department has established that criminal litigation was pending when it received this request for information. We also find, however, that only a small amount of the submitted information relates to the arrest and thus to the pending criminal litigation. *See* Open Records Decision Nos. 551 at 5 (1990) (attorney general will determine whether governmental body has reasonably established that information at issue is related to litigation). Therefore, based on your representations, the prosecutor's letter, and our review of the information at issue, we conclude that the information that relates to the officer and his arrest is excepted from disclosure at this time under section 552.103. We have marked the information that the department may withhold.

In reaching this conclusion under section 552.103, we assume that the opposing party to the criminal case has not seen or had access to the marked information. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to that litigation to obtain it through discovery procedures. *See* Open Records Decision No. 551 at 4-5 (1990). If the opposing party has seen or had access to information that relates to the pending litigation, through discovery or otherwise, then there is no interest in withholding that information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Furthermore, the applicability of section 552.103 ends once the related litigation concludes. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Next, we address the department's claims under section 552.108 with regard to the remaining information. Section 552.108(a)(1) excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]" A governmental body that raises section 552.108 must reasonably explain, if the requested information does not supply an explanation on its face, how and why section 552.108 is applicable to the information. *See* Gov't Code

§ 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986).

The department contends that the remaining e-mail messages are directly related to the pending prosecution because anything any officer did that evening as a College Station Police Officer will be under scrutiny in trial, and may be used to undermine the arresting officer who is the State's main witness. The department further asserts that the remaining information relates to the arresting officer's credibility as a witness, competency to testify, and qualification as an expert witness. The prosecutor generally contends that the release of this information would interfere with the prosecution. The submitted documents reflect, however, that the arresting officer sent or received only a small number of the remaining e-mail messages, and those messages do not relate to the arrest. Thus, neither the department nor the prosecutor has demonstrated how or why the release of this information would interfere with the detection, investigation, or prosecution of crime. *See* Gov't Code § 552.108(a)(1); *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177, 186-87 (Tex. Civ. App.--Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases); Open Records Decision No. 434 at 3 (unless records show on their face that disclosure would interfere with law enforcement or prosecution, law enforcement agency must explain how release of particular records or parts thereof will do so). We therefore conclude that none of the remaining information is excepted from disclosure under section 552.108(a)(1).

The department also raises section 552.108(b)(1), which excepts from disclosure "[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 . . . if . . . release of the internal record or notation would interfere with law enforcement or prosecution." We find, however, that the department has failed to show that the release of the remaining information would interfere with law enforcement or crime prevention under section 552.108(b)(1). *See* Gov't Code § 552.108(b)(1); Open Records Decision No. 508 at 4 (1988) (governmental body must demonstrate how release of particular information at issue would interfere with law enforcement efforts unless information does so on its face). Therefore, the department may not withhold the remaining information under section 552.108(b)(1).

A small portion of the remaining information is excepted from disclosure under section 552.117 of the Government Code. The department must withhold the home address, home telephone number, and social security number of a peace officer under section 552.117(2), as well as information that reveals whether a peace officer has family members, regardless of whether the officer has complied with section 552.024 of the Government Code.[1] We

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[1]Section 552.117(2) adopts the definition of peace officer found at article 2.12 of the Code of Criminal Procedure.

have marked the information that the department also must withhold under section 552.117(2).

In summary, we have marked information that the department may withhold at this time under section 552.103 of the Government Code. We have marked other information that the department must withhold under section 552.117(2). The rest of the requested information is not excepted from disclosure and must be released.

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 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 Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,

Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/jh

Ref: ID# 170669

Enc: Submitted documents

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