



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

December 23, 2002

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

OR2002-7379

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# 174171.

The College Station Police Department (the "department") received a request for any and all "[e]lectronic communications (E-Mails) sent or received from all mobile computer equipped police patrol units" during a specified time interval. You advise that you have redacted some responsive information pursuant to a previous determination issued by this office. *See* Open Records Decision No. 670 (2001) (allowing governmental body to withhold the home address, home telephone number, personal cellular phone number, personal pager number, social security number, and information that reveals whether the individual has family members, of a peace officer without the necessity of requesting an Attorney General decision as to whether the exception under section 552.117(2) applies); *see also* Gov't Code § 552.301(a) (allowing governmental body to withhold information subject to previous determination). You further advise that you have redacted Texas license plate numbers pursuant to a previous determination issued in Open Records Letter No. 2001-5574 (2001). *See* Open Records Decision No. 673 (2001) (describing situations where governmental body may withhold information pursuant to a previous determination). You claim that the remainder of 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 claim and 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 section encompasses information that other statutes make confidential. You contend that the requested information is confidential under article 39.14 of the Code of Criminal Procedure because "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

determine, however, that article 39.14 does not make the requested information expressly confidential for purposes of section 552.101 of the Government Code. *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 the 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.

In addition, we note you raise Rule 612 and Rule 615 of the Texas Rules of Evidence. In raising rules 612 and 615, you cite to the Texas Supreme Court's decision in *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, Rule 612 and Rule 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 Rule 612 or Rule 615 of the Texas Rules of Evidence.

Next, you contend that the requested information is excepted from disclosure under section 552.103 of the Government Code, which provides in pertinent 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.

....

(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 was pending or reasonably anticipated on the date

the governmental body received the request for information, 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).

You represent to this office that the requested information relates to a pending criminal prosecution. You indicate that the prosecution was pending when the department received the present request for information. You do not inform us, however, that the department 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 "[t]he information being requested relates to our pending criminal litigation because it includes records related to the arrest of this individual for the alleged offense." The letter asks that the requested information be withheld from disclosure to protect the prosecutor's position in the pending litigation. We find that you have established that criminal litigation was pending when the department received this request for information. You state that the information is "related to the pending prosecution because anything [the arresting officer] did that evening as a College Station Police Officer will be under scrutiny at trial." Upon review, however, we find that none of the submitted communications pertain specifically to the arrest at issue. We therefore find that you have not established that the requested 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). Consequently, we determine that the department may not withhold the requested information pursuant to section 552.103 of the Government Code.

Next, you contend that the requested information is excepted from disclosure under section 552.108 of the Government Code. Section 552.108(a) of the Government Code excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime." Generally, a governmental body claiming section 552.108 must reasonably explain, if the information does not supply the explanation on its face, how and why the release of the requested information would interfere with law enforcement. See Gov't Code §§ 552.108(a)(1), (b)(1), .301(e)(1)(a); see also *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977).

You contend that the requested e-mail messages are “directly related to the pending prosecution because anything [the arresting officer] did that evening as a College Station Police Officer will be under scrutiny in trial, especially since he was the State’s main witness.” You further assert that the 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 do not reflect, however, how 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); *see also City of Fort Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App.--Austin 2002) (delineating types of information protected by sections 552.108(a)(1), (b)(1)). We therefore conclude that none of the requested information is excepted from disclosure under section 552.108 of the Government Code. Accordingly, we conclude that the department must release the submitted information to the requestor.

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,



David R. Saldivar
Assistant Attorney General
Open Records Division

DRS/seg

Ref: ID# 174171

Enc: Submitted documents

c: Mr. Cameron D. Reynolds
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(w/o enclosures)