



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 7, 2003

Mr. Lawrence G. Provins
Assistant City Attorney
City of Pearland
3519 Liberty Drive
Pearland, Texas 77581

OR2003-2328

Dear Mr. Provins:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 178977.

The City of Pearland Police Department (the “department”) received a request for ten categories of information relating to a specified officer, as well as the department’s policies, procedures, and manuals, and all dispatch records for a specified time period. You claim that the requested information is excepted from disclosure under sections 552.101, 552.102, 552.103, and 552.108 of the Government Code as well as certain provisions of federal law. We have considered the exceptions you claim and reviewed the submitted sample of information.¹

Initially, we note that the submitted information contains a completed evaluation. Section 552.022(a)(1) of the Government Code provides that “a completed report, audit, evaluation, or investigation made of, for, or by a governmental body” is excepted from required public disclosure unless made confidential by other law or excepted under section 552.108. You do not claim that the completed evaluation in Exhibit I is excepted under section 552.108. Section 552.103, which excepts information relating to litigation, is a discretionary exception

¹ We assume that the “representative sample” of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

under the Public Information Act and does not constitute "other law" for purposes of section 552.022. *See* Open Records Decision No. 473 (1987) (governmental body may waive section 552.103). Thus, the department may not withhold Exhibit I under section 552.103 of the Government Code. As you do not claim any other exception, Exhibit I must be released.

You argue that the requested information is excepted in its entirety by section 552.103 of the Government Code. Section 552.103 of the Government Code 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.

...

(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.*

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 this request for information. The department, however, is not 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. We have received a letter from an Assistant County Attorney for Brazoria County stating that her office is prosecuting the pending case and that the specified officer is a witness in that case. The

prosecutor states that “[t]he request for information is directly related to the pending criminal charge.” We find that the department has established that criminal litigation was pending when it received this request for information. We also find that Exhibits B through L of the submitted information relate 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), 511 at 2 (1988) (information “relates” to litigation under section 552.103 if its release would impair governmental body’s litigation interests). Therefore, based on your representations, the prosecutor’s letter, and our review of the information at issue, we conclude that Exhibits B through L, with the exception of Exhibit I, are excepted from disclosure at this time under section 552.103.

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).

We now turn to your arguments regarding the remaining information. Section 552.108(a) 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 state that Exhibits M, O, and P relate to pending criminal investigations. Based upon your representation that Exhibit M relates to a pending criminal investigation and our review of the documents, we conclude that release of the information in Exhibit M would interfere with the detection, investigation, or prosecution of crime. *See 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) (court delineates law enforcement interests that are present in active cases).

However, you indicate that Exhibit P consists of the message history for the time period specified in the request. The submitted documents do not reflect, however, that the arresting officer either sent or received any of the submitted messages. 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 information in Exhibit P is excepted from disclosure under section 552.108(a)(1). Furthermore, upon review of the documents in Exhibit O, we conclude that you have not demonstrated that the information relates to pending criminal investigations. Therefore, you may not withhold Exhibit O 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.” This office has stated that certain procedural information may be withheld under section 552.108 of the Government Code, or its statutory predecessors. *See, e.g.*, Open Records Decision Nos. 531 (1989) (detailed use of force guidelines), 456 (1987) (forms indicating location of off-duty police officers), 413 (1984) (security measures to be used at next execution), 143 (1976) (specific operations or specialized equipment directly related to investigation or detection of crime). To claim this aspect of section 552.108 protection, however, a governmental body must meet its burden of explaining, if the requested information does not supply the explanation on its face, how and why release of the requested information would interfere with law enforcement and crime prevention. Open Records Decision No. 562 at 10 (1990). Further, commonly known policies and techniques may not be withheld under section 552.108. *See, e.g.*, Open Records Decision Nos. 531 at 2-3 (1989) (Penal Code provisions, common law rules, and constitutional limitations on use of force are not protected under section 552.108), 252 at 3 (1980) (governmental body did not meet burden because it did not indicate why investigative procedures and techniques requested were any different from those commonly known with law enforcement and crime prevention).

You state that Exhibit N contains a sample of the department’s “Standard Operating Procedure for DWI offenses.” You further state that release of this information would “unduly interfere with law enforcement and crime prevention by disclosing law enforcement methods, techniques, and strategies to the public which could then be used to prevent officers from conducting thorough and proper investigations.” Based on these representations and careful review of the information at issue, we conclude that the department may withhold pages two through six of Exhibit N under section 552.108(b)(1). We find, however, that you have not met your burden of explaining how or why release of page one in Exhibit N would interfere with law enforcement or crime prevention. Nor are we able to determine from a review of the submitted information how or why release of page one of Exhibit N would interfere with law enforcement and crime prevention. Thus, the department must release page one of Exhibit N.

In summary, you may withhold Exhibits B through L, with the exception of Exhibit I, under section 552.103. You may withhold Exhibit M under section 552.108(a)(1). You may withhold pages two through six of Exhibit N under section 552.108(b)(1). You must release the remaining 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 Dep't of Pub. 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,

A handwritten signature in cursive script that reads "Jennifer E. Berry".

Jennifer E. Berry
Assistant Attorney General
Open Records Division

JEB/sdk

Ref: ID# 178977

Enc: Submitted documents

c: Mr. John W. Armstrong, III
16826 Titan Drive
Houston, Texas 77058
(w/o enclosures)