OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

April 16, 2003

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

OR2003-2581

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# 179508.

The College Station Police Department (the "department") received a request for copies of e-mails sent or received from all department mobile computer- equipped patrol units during a specified period of time. You state that you have withheld some responsive information from disclosure pursuant to a previous determination that our office granted all governmental bodies in Open Records Decision No. 670 (2001), and to previous determinations that our office granted to College Station in Open Records Letter Rulings 01-5847 (2001) and 02-2022 (2002). You claim, however, that the remaining requested information is excepted from disclosure pursuant to sections 552.101, 552.103 and 552.108 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information.

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.
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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 department maintains 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 from disclosure. To meet this burden, the department must demonstrate: (1) that litigation was pending or reasonably anticipated on the date of its receipt of the request 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. *See id.*

You represent to this office that the requested information relates to pending criminal prosecutions. You indicate that the prosecutions were pending when the department received this request. You do not inform us, however, that the department is a party to these pending criminal cases. *See* Gov't Code § 552.103(a); *see also* 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 letters from an Assistant County Attorney for Brazos County, stating that his office is prosecuting these pending cases. The prosecutor states that the requested information relates to cases that "[are] actively being prosecuted as criminal case[s]." The letters ask that the requested information be withheld from disclosure to protect the prosecutor's position in the pending cases. We find that the department has established that criminal litigation was pending when it received this request. We also find, however, that only a portion of the submitted information relates to one of the arrests 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), 511 at 2 (1988) (information "relates" to litigation under section 552.103 if its release would impair governmental body's litigation interests). Therefore, after carefully reviewing your representations, the prosecutor's letters, and the information at issue, we conclude that the department may only withhold the portion of the submitted information that we have marked from disclosure under section 552.103 of the Government Code.

Generally, however, 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).

You also argue that the submitted information is protected under section 552.108 of the Government Code. Section 552.108(a) provides in pertinent part that "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted... if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime[.]" Gov't Code § 552.108(a)(1). Section 552.108(b) provides in pertinent part that "[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 is excepted... if: (1) release of the internal record or notation would interfere with law enforcement or prosecution [.]" Gov't Code § 552.108(b)(1). A governmental body that raises section 552.108 must reasonably explain 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).

You state, and provide supporting documentation showing, that the county attorney seeks to have the requested information withheld from disclosure under section 552.108 because it relates to pending cases that are being prosecuted by the county attorney and because the release of the information would interfere with the prosecution of those cases. You also indicate that the submitted information is directly related to these pending cases because anything that the arresting officer in these matters did that evening as a department officer will be under scrutiny in trial, especially since he is the State's main witness. We disagree and find that the department has failed to establish that the submitted information not otherwise protected by section 552.103 relates to the arrests involved in these matters.

The department also argues that portions of the requested information may inform the public of the police department's investigative techniques. However, after reviewing the departments arguments and submitted information, we find that the department has not sufficiently demonstrated how and why the release of any portion of the remaining information would interfere with the detection, investigation, or prosecution of crime. *See* Gov't Code § 552.108(a)(1);*see also 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). Consequently, we conclude that the department may not withhold any portion of the remaining information under section 552.108 of the Government Code.

You also claim that the submitted information is excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with article 39.14 of the Code of Criminal Procedure. Section 552.101 of the Government Code excepts from disclosure

"information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *See* Gov't Code § 552.101. Section 552.101 encompasses information that is protected from disclosure by other statutes. We note that article 39.14 governs the discovery of information and the testimony of witnesses in criminal proceedings. Article 39.14 does not expressly make 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 the public). Consequently, we conclude that the department may not withhold any portion of the submitted information pursuant to section 552.101 of the Government Code in conjunction with article 39.14 of the Code of Criminal Procedure.

Finally, you claim that the submitted information is excepted from disclosure pursuant to section 552.101 in conjunction with the Texas Rules of Evidence. We note, however, that we generally do not address discovery and evidentiary rules that may or may not be applicable to information submitted to our office by a governmental body. *See* Open Records Decision No. 416 (1984) (finding that even if evidentiary rule specified that certain information may not be publicly released during trial, it would have no effect on disclosability under Act). Although you contend that the Texas Rules of Evidence constitute "other law" that makes the remaining submitted information confidential, we note that "[t]he Texas Rules of Civil Procedure and the Texas Rules of Evidence are 'other law' within the meaning of section 552.022." *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). The submitted information does not fall into one of the categories of information made expressly public by section 552.022 of the Government Code. Therefore, the Texas Rules of Evidence are not applicable in this instance. Accordingly, we conclude that the department may not withhold any portion of the submitted information pursuant to section 552.101 of the Government Code in conjunction with the Texas Rules of Evidence.

In summary, during the pendency of the litigation the department may withhold under section 552.103 the requested information we have marked, with the exception of any information to which all of the parties in the litigation have previously had access. The department 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,

Heather Pendleton Ross
Assistant Attorney General
Open Records Division

HPR/sdk

Ref: ID# 179508

Enc: Submitted documents

c: Mr. Cameron D. Reynolds
Law Office of Jim James
P.O. Box 1146
Bryan, Texas 77806
(w/o enclosures)