



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

October 14, 2003

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

OR2003-7287

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# 189417.

The College Station Police Department (the "department") received a request for "[e]lectronic communications (E-Mails) sent or received from all mobile computer equipped police patrol units" during a specified time interval. You state that the department has redacted some responsive information pursuant to a previous determination issued by our office. *See* Open Records Decision No. 670 (2001). You contend that the remaining requested information is excepted from required public disclosure pursuant to 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 exception 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 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 the public); *see also* Open Records Decision No. 575 at 2 (1990) (stating explicitly that discovery privileges

are not covered under statutory predecessor to section 552.101). 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.

You also appear 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, you cite *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.

We now discuss the applicability of the other exceptions you raised. 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 [1<sup>st</sup> 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 two pending criminal prosecutions. You indicate that the prosecutions were pending when the department received this request for information. However, the department is not a party to the pending criminal litigation and therefore has no litigation interest in the pending case. *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 one of the pending cases. The prosecutor states that "[t]he information being requested relates to pending criminal litigation because it includes records related to the arrest of the individual for the alleged offense." The letter asks that the requested information be withheld from disclosure to protect the prosecutor's position in that criminal prosecution. We find that you have established that criminal litigation was pending when the department received this request for information. We also find, however, that only a small amount of the submitted information relates to the arrest referenced in the Assistant County Attorney's letter and thus to that 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 the information that relates to the arresting 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 pursuant to section 552.103 of the Government Code.

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 your claims under section 552.108 with regard to the remaining information. Section 552.108(a)(1) of the Government Code excepts from required public

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.” Section 552.108(a)(1) protects information pertaining to a pending criminal investigation or prosecution because it is presumed that the release of such information 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 [14<sup>th</sup> Dist.] 1975), *writ ref’d n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). You state that portions of the submitted records directly pertain to the other arrest that resulted in criminal prosecution. Based on our review of the information at issue and your arguments, we conclude that you have met your burden of establishing that Exhibits C-8 and C-9 are excepted from required public disclosure in their entirety pursuant to section 552.108(a)(1) of the Government Code.

You also contend that the remaining 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 she is the State’s main witness.” The submitted documents do not reflect, however, why such would be the case. Consequently, you have not demonstrated how or why the release of the remaining information would interfere with the detection, investigation, or prosecution of crime. *See 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, 327 (Tex. App.—Austin 2002, no pet.). (delineating types of information protected by sections 552.108(a)(1), (b)(1)). We therefore conclude that none of the remaining information is excepted from disclosure under section 552.108. Accordingly, the department must release the remaining submitted information to the requestor.

In summary, the department may withhold the information we have marked pursuant to sections 552.103 and 552.108(a)(1) of the Government Code. The remaining submitted information 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 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,



David R. Saldivar  
Assistant Attorney General  
Open Records Division

DRS/RWP/seg

Ref: ID# 189417

Enc: Submitted documents

c: Mr. Jim W. James  
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(w/o enclosures)