



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 24, 2003

Mr. Charles J. Breaux, Jr.
Assistant District/County Attorney
349th Judicial District Attorney
P.O. Box 1076
Crockett, Texas 75835

OR2003-8445

Dear Mr. Breaux:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 191768.

The Houston County Sheriff (the "sheriff") received a request for a particular 9-1-1 audiotape. You claim that the requested information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information.

Section 552.101 of the Government Code protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," and encompasses the common-law right to privacy. The common-law right to privacy excepts from disclosure private facts about an individual. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information must be withheld from the public under common-law privacy when (1) it is highly intimate and embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *See id.* at 685; *see also* Open Records Decision No. 611 at 1 (1992). The types of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. This office has also found that the following types of information are excepted from required public disclosure under common-law privacy: some kinds of medical information or information indicating disabilities or specific illnesses; *see* Open

Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (types of prescription drugs, illnesses, operations, and physical handicaps).

To demonstrate the applicability of this exception under section 552.101, a person must affirmatively establish *both* prongs of the test articulated in *Industrial Foundation*. 540 S.W.2d at 681-82. The first prong of the privacy test requires a showing that the disclosure is of highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person. *Id.* at 683. Upon review of the submitted audiotape, we find that it does not contain any factual information that is highly intimate or embarrassing. We conclude that the submitted information does not meet the first prong of the *Industrial Foundation* test, and thus, it is not protected under section 552.101 in conjunction with the right to common-law privacy.

We now turn to your claim under section 552.103 of the Government Code. Section 552.103 provides as follows:

(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 is 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 section 552.103(a). Further, section 552.103 only applies where the litigation involves or is expected to involve the governmental body which is claiming the exception. *See* Open Records Decision No. 392 (1983) (finding predecessor to section 552.103 only applicable to governmental body that has litigation interest).

You claim that the submitted audiotape is related to a pending criminal prosecution and should, therefore, be excepted from disclosure under section 552.103. You do not inform us, however, that the sheriff is a party to the pending criminal litigation. *See* Gov't Code § 552.103(a); Open Records Decision No. 575 at 2 (1990). Under such circumstances, 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 information withheld from disclosure under section 552.103. You have failed to provide this office with an affirmative representation from the prosecuting entity that it wants the submitted information withheld from public disclosure. Thus, the submitted audiotape may not be withheld under section 552.103 of the Government Code.

However, we note that the submitted audiotape contains information that may be excepted from disclosure under section 552.130. Section 552.130 excepts from disclosure information relating to a driver's license or motor vehicle title or registration issued by an agency of this state. Therefore, the license plate number recited in the audiotape must be redacted pursuant to section 552.130 if this information was issued in Texas. If the license plate number was not issued by a Texas agency, it may not be withheld under section 552.130.

In summary, if the license plate number recited in the audiotape was issued in Texas, this information must be redacted pursuant to section 552.130. The remaining information on the requested audiotape 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

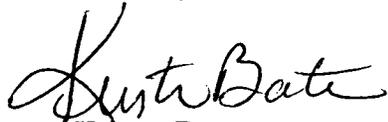
provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to 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,



Kristen Bates
Assistant Attorney General
Open Records Division

KAB/lmt

Ref: ID# 191768

Enc. Submitted documents

c: Mr. Colin McAndrew
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Houston, TX 77077
(w/o enclosures)