ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 8, 2003

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

OR2003-8781

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# 192501.

The College Station Police Department (the "department") received a request for all electronic communications (e-mails) sent or received from mobile computer-equipped patrol units during a certain time period. You claim that 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 552.103 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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> . . .
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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). A 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.—Austin1997, 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.*

The department represents to this office that the requested information relates to the arrests of three individuals who are the subjects of pending criminal prosecutions. We understand you to assert that these criminal cases were pending when the department received this request for information. The department does not inform us, however, that it 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 submitted information withheld from disclosure under section 552.103. The department has submitted three letters from an Assistant County Attorney for Brazos County in which the Assistant County Attorney states that his office is prosecuting the pending cases. In each letter, 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 letters ask that the requested information be withheld from disclosure to protect the prosecutor's position in the pending criminal prosecutions. We find that the department has established that criminal litigations were pending when it received this request for information.

Upon review, we find that a small portion of submitted information relates to the pending criminal prosecutions. *See* Open Records Decision Nos. 551 at 5 (1990) (attorney general will determine whether governmental body has reasonably established that the information at issue is related to litigation), 511 at 2 (1988) (information "relates" to litigation under section 552.103 if its release would impair the governmental body's litigation interests). We have marked the information that may be withheld under section 552.103. However, we find that the remaining submitted information does not relate to the pending criminal prosecutions and, therefore, may not be withheld under section 552.103.

We next address your arguments under section 552.108 of the Government Code with regard to the remaining information. Section 552.108(a)(1) excepts from 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[.]" 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).

The department contends that the remaining e-mail messages are "directly related to the pending prosecution[s] because anything the officer[s] did that evening . . . will be under scrutiny in trial[.]" The department further asserts that the remaining information relates to the arresting officers' credibility as witnesses, competency to testify, and qualifications as expert witnesses. The prosecutor contends that the release of this information would interfere with his positions in the pending prosecutions. However, upon review, we determine that you have not adequately demonstrated that the remaining submitted information relates to the pending prosecutions at issue. 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). Therefore, the department may not withhold the remaining submitted information 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 concluded that section 552.108(b)(1) excepts from public disclosure information relating to the security or operation of a law enforcement agency. *See, e.g.*, Open Records Decision Nos. 531 (1989) (holding that section 552.108 excepts detailed guidelines regarding a police department's use of force policy), 508 (1988) (holding that release of dates of prison transfer could impair security), 413 (1984) (holding that section 552.108 excepts sketch showing security measures for execution). However, generally known policies and techniques may not be withheld under section 552.108(b)(1). *See, e.g.,* Open Records Decision Nos. 531 at 2-3 (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). The department asserts that release of the remaining information would reveal investigative techniques. We find, however, that the department has failed to show that release of the remaining submitted information would interfere with law enforcement or crime prevention. *See* Gov't Code § 552.108(b)(1); Open Records Decision No. 508 at 4 (1988) (governmental body must demonstrate how release of particular information at issue would interfere with law enforcement efforts unless information does so on its face). Therefore, the department may not withhold the remaining submitted information under section 552.108(b)(1).

You also claim that the remaining 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." This section encompasses information protected 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 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). Consequently, we conclude that the department may not withhold the remaining submitted information pursuant to section 552.101 of the Government Code in conjunction with article 39.14 of the Code of Criminal Procedure.

We further note that you argue that article 39.14 and rules 612 and 615 of the Texas Rules of Evidence are "other law" that makes the remaining submitted information confidential. You cite *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001), concluding that the Texas Rules of Civil Procedure and Texas Rules of Evidence are "other law" that makes information expressly confidential for purposes of Government Code section 552.022. We note, however, that section 552.022 of the Government Code is not applicable to the requested information. Furthermore, article 39.14 is not one of the Texas Rules of Civil Procedure or Texas Rules of Evidence and is therefore not "other law" for purposes of section 552.022. *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). Consequently, we conclude that the department may not withhold the remaining submitted information under article 39.14 of the Code of Criminal Procedure or under rule 612 or rule 615 of the Texas Rules of Evidence.

We note, however, that the submitted information contains a Texas driver's license number that is excepted from disclosure under section 552.130 of the Government Code. Section 552.130 excepts information relating to a Texas motor vehicle driver's license and information relating to a Texas motor vehicle title or registration. Gov't Code § 552.130. The department must withhold the Texas driver's license number we have marked under section 552.130.

In summary, the department must withhold the marked Texas driver's license number under section 552.130. The department may withhold the information we have marked under

section 552.103. The remaining submitted information must be released in its entirety 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,

Amy D. Peterson
Assistant Attorney General
Open Records Division

ADP/sdk

Ref: ID# 192501

Enc. Submitted documents

c: Mr. Jim W. James
P.O. Box 1146
Bryan, Texas 77806
(w/o enclosures)