ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 9, 2004

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

OR2004-0955

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# 195953.

The College Station Police Department (the "department") received a request for electronic communications (e-mails) sent or received from mobile computer-equipped police patrol units during a specified time interval. You inform us that the department has withheld some of the requested information in accordance with Open Records Decision No. 670 (2001).[1] You claim that the remaining 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 have reviewed the information you submitted.

Section 552.101 of the Government Code excepts from required public 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. You argue that under article 39.14, "the requested information is not available to criminal defense counsel except in cases where good cause

[1] *See* Open Records Decision No. 670 at 6 (2001) (authorizing all governmental bodies that are subject to chapter 552 of Government Code to withhold home addresses and telephone numbers, personal cellular telephone numbers, personal pager numbers, social security numbers, and family member information of peace officers without necessity of requesting attorney general decision under Gov't Code § 552.117(a)(2)); *see also* Gov't Code § 552.301(a); Open Records Decision No. 673 (2001) (delineating circumstances under which attorney general decision constitutes previous determination under Gov't Code § 552.301).

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). Therefore, none of 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 also rely on *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 submitted 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 any of the requested information under Texas Rules of Evidence 612 or 615.

You also raise section 552.103 of the Government Code. This exception 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). 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 submitted information relates to two arrests that have resulted in pending criminal prosecutions. You indicate that these prosecutions were pending in Brazos County Court when the department received this request for information. You do not inform us, however, that the department is a party to either of the pending criminal cases. *See* Gov't Code § 552.103(a); Open Records Decision No. 575 at 2 (1990). Under these 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. You have submitted letters from an Assistant County Attorney for Brazos County, stating that his office is prosecuting the pending cases. The prosecutor states that "[t]he information being requested relates to our pending criminal litigation because it includes records related to the arrest of [the defendants] for the alleged offense[s]." The letters ask that the submitted information be withheld from disclosure to protect the prosecutor's position in the pending criminal prosecutions. Based on your representations and the prosecutor's letters, we find that you have established that criminal litigation was pending when the department received this request for information. *See* Gov't Code § 552.103(c). We also find, however, that only the submitted information that we have marked relates to either of the pending criminal cases. *See id.* § 552.103(a); 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 Gov't Code § 552.103 if its release would impair governmental body's litigation interests). We therefore conclude that the department may withhold the information that we have marked under section 552.103 of the Government Code.

In reaching this conclusion, we assume that the opposing party in the related 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 a party seeking information relating to the litigation to obtain such information 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 at this time 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 of the Government Code with regard to the remaining requested information. Section 552.108(a)(1) 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[.]" A governmental body that claims an exception to disclosure under section 552.108 must reasonably explain how and why section 552.108 is applicable to the information that the governmental body seeks to withhold. *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 contend that the remaining information is "directly related to the pending prosecution because anything the officer did that evening as a College Station Police Officer will be under scrutiny in trial, especially since [the officer] is the State's main witness." You argue that the remaining information relates to the arresting officer's credibility as a witness, competency to testify, and qualification as an expert witness. You also claim that the remaining information, which relates to the time interval during which the arrests occurred, could be used to create a defense. Both you and the prosecutor generally contend that the release of the remaining information would interfere with the prosecution of the pending cases. We conclude, however, that neither you nor the prosecutor have sufficiently demonstrated how or why any of the remaining information relates to the arrests that resulted in the pending prosecutions. Likewise, neither you nor the prosecutor have sufficiently explained how or why the release of any of the remaining information would interfere with the detection, investigation, or prosecution of crime. *See* Gov't Code §§ 552.108(a)(1), 552.301(e)(1)(A); *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). We therefore conclude that none of the remaining information is excepted from disclosure under section 552.108(a)(1).

You also raise section 552.108(b)(1) of the Government Code. Section 552.108(b)(1) 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." You have not demonstrated, however, that the release of any of the remaining information would interfere with law enforcement or crime prevention. *See* Gov't Code § 552.108(b)(1); *City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet. h.) (Gov't Code § 552.108(b)(1) protects information that, if released, would permit private citizens to anticipate weaknesses in police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate state laws); Open Records Decision Nos. 508 at 4 (1988) (governmental body must demonstrate how release of particular information at issue would interfere with law enforcement efforts), 531 at 2-3 (1989) (statutory predecessor to Gov't Code § 552.108(b)(1) not applicable to Penal Code provisions, common law rules, and constitutional limitations on use of force),

252 at 3 (1980) (governmental body failed to indicate why investigative procedures and techniques requested were any different from those commonly known). Therefore, the department may not withhold any of the remaining information under section 552.108(b)(1).

In summary, the department may withhold the marked information at this time under section 552.103 of the Government Code. The rest of the 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).

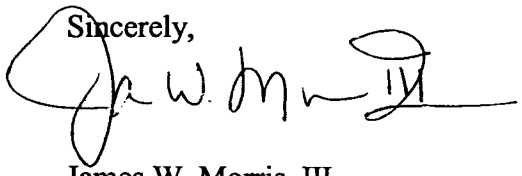
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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,



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Open Records Division

JWM/sdk

Ref: ID# 195953

Enc: Submitted documents

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