



ATTORNEY GENERAL OF TEXAS
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Ms. Julia M. Vasquez
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City of Wichita Falls
P. O. Box 1431
Wichita Falls, Texas 76307

OR2004-4981

Dear Ms. Vasquez:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 203774.

The Wichita Falls Police Department (the "department") received a request for five categories of information related to a specified incident, including the department's vehicle pursuit policy. You state that the department has provided the requestor with the requested videotape footage. However, you claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.103, 552.108, 552.130, and 552.136 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that person may submit comments stating why information should or should not be released).

Initially, we address the requestor's assertion that some of the requested information has previously been released. You state that the requested videotape footage had previously been released to the news media, and thus, it has been provided to the requestor. However, you make no representation as to whether or not any of the remaining information has been previously released. Whether this information has previously been voluntarily released is a fact question that cannot be determined in the ruling process. *See* Attorney General Opinions

¹Although the department did not assert section 552.136 of the Government Code within ten business days after its receipt of the request for information, this section constitutes a compelling reason for non-disclosure that overcomes the legal presumption that the information at issue is public. Thus, we will address section 552.136. *See* Gov't Code §§ 552.301, .302; Open Records Decision No. 150 (1977).

GA-0087 at 1 (2003), GA-0003 at 1 n. 2 (2003), JC-0534 at 1 (2002) (this office does not make factual determinations in opinion process). Accordingly, if in fact any portion of the requested information has been voluntarily released to a third party, it may not be withheld on the basis of section 552.103 or 552.108. *See* Gov't Code § 552.007 (if governmental body voluntarily releases information to member of public, such information may not later be withheld unless confidential under law). However, we will address your arguments in case this information was not voluntarily disclosed.

First, we note that the submitted information includes a search warrant affidavit. An affidavit to support a search warrant is made public by statute if the search warrant has been executed. *See* Code Crim. Proc. art. 18.01(b); *see also* Open Records Decision No. 525 (1989). Thus, because the corresponding search warrant has been executed, the department must release the submitted search warrant affidavit.

The submitted information also contains an accident report form that appears to have been completed pursuant to chapter 550 of the Transportation Code. *See* Transp. Code § 550.064 (officer's accident report). Section 550.065(b) of the Transportation Code states that, except as provided by subsection (c), accident reports are privileged and confidential. Section 550.065(c)(4) provides for release of accident reports to a person who provides two of the following three pieces of information: (1) date of the accident; (2) name of any person involved in the accident; and (3) specific location of the accident. Transp. Code § 550.065(c)(4). Under this provision, a governmental entity is required to release a copy of an accident report to a person who provides the law enforcement agency with two or more pieces of information specified by the statute. *Id.* In reviewing the information you have submitted to us, we find that the requestor has provided the department with two of the three pieces of information required by the statute. Thus, the department must release the submitted accident report under section 550.065(c)(4) of the Transportation Code.

Additionally, the submitted information contains a custodial death report. In Open Records Decision No. 521 at 5 (1989), this office concluded that under article 49.18(b) of the Code of Criminal Procedure, in conjunction with a directive issued by the attorney general, section one of a custodial death report filed with this office is public information, but sections two through five of the report are confidential. *See* Code Crim. Proc. art. 49.18(b) (attorney general shall make report, with exception of any portion of report that attorney general determines is privileged, available to any interested person). Accordingly, the department must release section one of the custodial death report to the requestor. However, because sections two through five of the report are deemed confidential under article 49.18(b), the department must not release the remaining portions of this report to the requestor.

Next, we note that a portion of the remaining submitted information is made expressly public under section 552.022 of the Government Code. This section provides, in relevant part:

- (a) the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). In this instance, the submitted information consists of completed investigations made of, for, or by the department. Case nos. 03-102227, 03-102226, and 03-101493 must be released under section 552.022(a)(1), unless they are excepted from public disclosure under section 552.108 or expressly confidential under other law. Section 552.103 is a discretionary exception to disclosure that protects the governmental body's interests and is therefore not other law that makes information expressly confidential for purposes of section 552.022(a). See *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (government body may waive section 552.103); Open Records Decision Nos. 665 at 2 n.5 (2000) (governmental body may waive litigation exception, section 552.103); 522 at 4 (1989) (discretionary exceptions in general). Thus, the department may not withhold case nos. 03-102227, 03-102226, and 03-101493 under section 552.103 of the Government Code. However, because information subject to section 552.022(a)(1) may be withheld as provided by sections 552.101, 552.108, 552.130, and 552.136, we will address your arguments regarding these sections.

First, however, we will address your arguments regarding Exhibit 53, the only submitted information that is not subject to section 552.022. You assert section 552.103 of the Government Code, which 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).

Section 552.103 requires concrete evidence that litigation may ensue. To demonstrate that litigation is reasonably anticipated, the department must furnish evidence that litigation is realistically contemplated and is more than mere conjecture. Open Records Decision No. 518 at 5 (1989). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986). Among other examples, this office has concluded that litigation was reasonably anticipated where the opposing party took the following objective steps toward litigation: (1) filed a complaint with the Equal Employment Opportunity Commission ("EEOC"), *see* Open Records Decision No. 336 (1982); (2) hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and (3) threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981). A governmental body may also establish that litigation is reasonably anticipated by the receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. Open Records Decision No. 555 (1990).

Although you state that the requestor has threatened litigation, you have failed to provide any concrete evidence that litigation may ensue. Therefore, we find that you have failed to demonstrate that litigation involving the department was reasonably anticipated at the time it received the instant request for information. Consequently, Exhibit 53 may not be withheld under section 552.103 of the Government Code.

Next, we will address your arguments for the remaining submitted information. You assert that case nos. 03-102227 and 03-101493, as well as the department's vehicle pursuit policy in Exhibit 53, are subject to section 552.108(a)(2) of the Government Code, which excepts from disclosure information concerning an investigation that concluded in a result other than conviction or deferred adjudication. A governmental body claiming section 552.108(a)(2) must demonstrate that the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. Based on the information you provided, we agree that case nos. 03-102227 and 03-101493 pertain to investigations that concluded in results other than conviction or deferred adjudication. Therefore, section 552.108(a)(2) is applicable to this information. We find, however, that you have failed to demonstrate how Exhibit 53 relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. Consequently, Exhibit 53 may not be withheld on this basis.

Section 552.108 is inapplicable to basic information about an arrested person, an arrest, or a crime. Gov't Code § 552.108(c). We believe such basic information refers to the information held to be public in *Houston Chronicle Publishing Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). *See* Open Records Decision No. 127 (1976) (listing basic information that must be released from offense report in accordance with *Houston*

Chronicle). Thus, with the exception of the basic offense and arrest information, the department may withhold case nos. 03-102227 and 03-101493 based on section 552.108(a)(2).² We note that you have the discretion to release all or part of the information at issue that is not otherwise confidential by law. Gov't Code § 552.007.

You also assert that Exhibit 53 is subject to section 552.108(b)(1) of the Government Code, which protects from disclosure an internal record of a law-enforcement agency 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 section is intended to protect “information which, if released, would permit private citizens to anticipate weaknesses in a police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate the laws of this State.” *City of Ft. Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet.). To prevail on its claim that section 552.108(b)(1) excepts information from disclosure, a law-enforcement agency must do more than merely make a conclusory assertion that releasing the information would interfere with law enforcement. Instead, the governmental body must meet its burden of explaining how and why release of the requested information would interfere with law enforcement and crime prevention. *See* Open Records Decision No. 562 at 10 (1990) (construing statutory predecessor). In addition, generally known policies and techniques may not be withheld under section 552.108. *See, e.g.*, Open Records Decision Nos. 531 at 2-3 (1989) (Penal Code provisions, common law rules, and constitutional limitations on use of force are not protected under law enforcement exception), 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 determination of whether the release of particular records would interfere with law enforcement is made on a case-by-case basis. *See* Open Records Decision No. 409 at 2 (1984) (construing statutory predecessor).

You state that the department’s vehicle pursuit policy “provides what tactics an officer may and may not use during a pursuit, and releasing this policy would provide an advantage to criminal suspects attempting to evade arrest.” We have reviewed Exhibit 53 and marked those portions that relate to detailed procedures and may be withheld pursuant to section 552.108(b)(1) of the Government Code. As for the remaining information, it is general in nature and you have failed to explain how its release “would interfere with law enforcement or prosecution.” Thus, none of the remaining submitted information in Exhibit 53 may be withheld pursuant to section 552.108(b)(1), and it must be released to the requestor.

In regard to the submitted information from case no. 03-102226, section 552.130 of the Government Code requires the department to withhold “information [that] relates to . . . a motor vehicle operator’s or driver’s license or permit issued by an agency of this state; [or] a motor vehicle title or registration issued by an agency of this state.” We note, however,

²As our ruling is dispositive, we need not address your arguments under section 552.101 of the Government Code.

that section 552.130 is designed to protect individuals' privacy and that the right to privacy expires at death. *See Moore v. Charles B. Pierce Film Enters. Inc.*, 589 S.W.2d 489 (Tex. Civ. App.—Texarkana 1979, writ ref'd n.r.e.); *see also Justice v. Belo Broadcasting Corp.*, 472 F. Supp. 145, 146-47 (N.D. Tex. 1979); Attorney General Opinions JM-229 (1984); H-917 (1976); Open Records Decision No. 272 at 1 (1981). Accordingly, motor vehicle record information that pertains to persons who are living and vehicles in which living individuals have an interest must be withheld under section 552.130. Information from motor vehicle records that was issued to persons who are now deceased may not be withheld under section 552.130.

Also, we note that the submitted account number is confidential under section 552.136 of the Government Code, which states that “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136. Thus, pursuant to this section, the department must withhold the account number we have marked.

In summary, we conclude that: 1) sections two through five of the custodial death report must be withheld under article 49.18(b) of the Code of Criminal Procedure; 2) with the exception of the basic offense and arrest information, the department may withhold case nos. 03-102227 and 03-101493 based on section 552.108(a)(2) of the Government Code; 3) the department may withhold the information we have marked in Exhibit 53 under section 552.108(b)(1) of the Government Code; 4) Texas-issued motor vehicle record information pertaining to living individuals or automobiles in which living individuals have an interest must be withheld under section 552.130 of the Government Code; and 5) the account number must be withheld under section 552.136 of the Government Code. All remaining information must be released, including the search warrant affidavit under article 18.01(b) of the Code of Criminal Procedure, the accident report under section 550.065(c)(4) of the Transportation Code, and section one of the custodial death report.

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,



W. Montgomery Meitler
Assistant Attorney General
Open Records Division

WMM/krl

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Enc: Submitted documents

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