



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

September 21, 2004

Mr. Charles H. Weir  
Assistant City Attorney  
City of San Antonio  
P.O. Box 839966  
San Antonio, Texas 78283-3966

OR2004-8064

Dear Mr. Weir:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 209696.

The San Antonio Police Department (the "department") received a request for "[b]oth copies" of a citation issued to the requestor and information relating to a named officer of the department, including (1) the officer's arrest record for a specified date and the previous three months; (2) his log for the same date; (3) his arrests or citations for violations of day labor laws on the same date and during the previous three months and "total violations for soliciting employment"; and (4) his length of employment with the department and length of assignment on the downtown bicycle patrol. You claim that the requested information is excepted from disclosure under sections 552.103 and 552.108 of the Government Code. We have considered the exceptions you claim and have reviewed the information you submitted. We note that the submitted information does not appear to include the officer's tenure with the department and the downtown bicycle patrol. We therefore assume that the department has released any other information that is responsive to this request, to the extent that such information existed when the department received this request. If not, then the department must do so at this time.<sup>1</sup> We note that the Act does not require a governmental body to

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<sup>1</sup>See Gov't Code §§ 552.221, .301, .302; Open Records Decision No. 664 (2000).

release information that did not exist when it received a request or to create responsive information.<sup>2</sup>

We also note that the submitted citation is subject to section 552.022 of the Government Code. This section provides that

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:

...

(17) information that is also contained in a public court record[.]

Gov't Code § 552.022(a)(17). As the citation appears to have been filed with the municipal court, it must be released under section 552.022(a)(17), unless it contains information that is expressly confidential under other law. Sections 552.103 and 552.108 are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived.<sup>3</sup> As such, these exceptions are not other law that makes information confidential for the purposes of section 552.022. Therefore, the department may not withhold any information contained in the submitted citation under sections 552.103 or 552.108. As you claim no other exception to the disclosure of the citation, it must be released under section 552.022(a)(17).

Next, we address your claim under section 552.103. This section 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.

(b) For purposes of this section, the state or a political subdivision is considered to be a party to litigation of a criminal nature until the applicable

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<sup>2</sup>See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

<sup>3</sup>See Gov't Code § 552.007; *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no petition) (Gov't Code § 552.103 may be waived); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 542 at 4 (1990) (statutory predecessor to Gov't Code § 552.103 subject to waiver), 177 at 3 (1977) (statutory predecessor to Gov't Code § 552.108 subject to waiver).

statute of limitations has expired or until the defendant has exhausted all appellate and postconviction remedies in state and federal court.

(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. The governmental body that raises section 552.103 has the burden of providing relevant facts and documents sufficient to establish the applicability of this exception to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate that: (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information *and* (2) the information at issue is related to the pending or anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. 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.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See Open Records Decision No. 551 at 4 (1990) Id.*

You state that the submitted information relates to a pending criminal prosecution. You indicate that the prosecution was pending when the department received this request for information. You do not inform us, however, that the department either is or expects to be a party to the pending prosecution. Under these circumstances, we require an affirmative representation from the governmental body whose litigation interests are at stake that it wants the information at issue withheld from disclosure under section 552.103. You state that the city is a party to the pending prosecution. You indicate that the city seeks to have the submitted information withheld from disclosure in order to protect its litigation interests. Based on your arguments, we conclude that the rest of the submitted information is excepted from disclosure at this time under section 552.103.<sup>4</sup>

In reaching this conclusion, we assume that the opposing party to the pending prosecution has not seen or had access to the information that the city seeks to have withheld under section 552.103. The purpose of this exception is to enable a governmental body to protect its position in litigation by forcing parties to obtain information that relates to the litigation 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 pending litigation, through discovery or otherwise, then there is no interest in withholding such 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 when the related

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<sup>4</sup>As we are able to make this determination, we need not address your claim under section 552.108.

litigation concludes. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary: (1) the department must release the citation under section 552.022(a)(17) of the Government Code; and (2) the rest of the submitted information is excepted from disclosure at this time under section 552.103.<sup>5</sup>

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).

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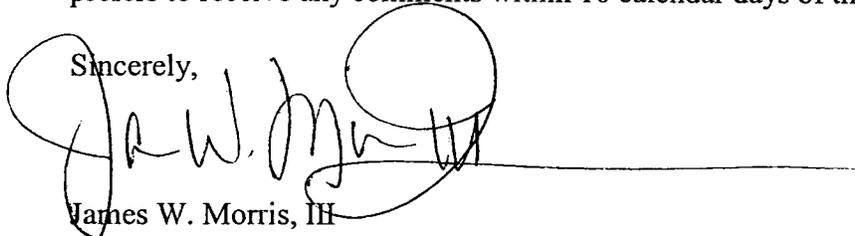
<sup>5</sup>We note that the citation contains the requestor's Texas driver's license number, which would be excepted from public disclosure under section 552.130, and his social security number, which might be excepted from public disclosure under section 552.101 in conjunction with section 405(c)(2)(C)(viii)(I) of title 42 of the United States Code. However, the requestor has a right of access to his own Texas driver's license and social security numbers. Therefore, they may not be withheld from the requestor under section 552.130 or under section 552.101 in conjunction with the federal law. *See* Gov't Code § 552.023(a); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning himself). Should the department receive another request for this same information from a person who would not have a right of access to it, the department should resubmit this information and request another decision. *See* Gov't Code §§ 552.301(a), .302.

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,

A handwritten signature in black ink, appearing to read "James W. Morris, III", is written over a horizontal line. The signature is stylized and includes a large circular flourish on the left side.

James W. Morris, III  
Assistant Attorney General  
Open Records Division

JWM/sdk

Ref: ID# 209696

Enc: Submitted documents

c: Mr. Scott Benedix  
230 East Travis  
San Antonio, Texas 78205  
(w/o enclosures)