



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 21, 2005

Ms. Catherine C. Kemp
Records Supervisor
City of Rowlett Police Department
P.O. Box 370
Rowlett, Texas 75030-0370

OR2005-10546

Dear Ms. Kemp:

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# 236600.

The City of Rowlett Police Department (the "department") received a request for information pertaining to a particular traffic accident and arrest. You state that the accident report has been released. However, you claim that the remaining submitted information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, we note that the submitted records include an arrest warrant and affidavit for arrest warrant or *capias*. Article 15.26 of the Code of Criminal Procedure states that an "arrest warrant, and any affidavit presented to the magistrate in support of the issuance of the warrant, is public information." Crim. Proc. Code art. 15.26. A court may order the issuance of a *capias pro fine* to arrest a defendant who is not in custody. *Id.* art. 45.045. Therefore, the submitted arrest warrant and affidavit for arrest warrant or *capias*, which we have marked, is public under article 15.26 of the Code of Criminal Procedure and must be released.

Next, we address your section 552.103 claim. Section 552.103 of the Government Code provides in pertinent 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.

...

(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 that raises section 552.103 has the burden of providing relevant facts and documents to show that the 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 that the governmental body received the request for information and (2) the information at issue is related to that litigation. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *see also 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); Gov't Code § 552.103(c). The department must meet both prongs of this test for information to be excepted under section 552.103(a).

You represent to this office 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. However, the department is not a party to the pending criminal litigation. *See Gov't Code § 552.103(a)*; Open Records Decision No. 575 at 2 (1990). In such a situation, we require an affirmative representation from the governmental body with the litigation interest that the governmental body wants the information at issue withheld from disclosure under section 552.103. You have not provided this office with an affirmative representation from the prosecuting entity that it wants the information at issue withheld from public disclosure. Accordingly, you may not withhold the submitted information under section 552.103 of the Government Code.

We note, however, that a portion of the submitted information is subject to section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses the doctrine of common law privacy, which protects information if it is highly intimate or embarrassing such that its release would be highly objectionable to a reasonable person and the public has no legitimate interest in it. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). The types of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* include 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. After reviewing the submitted information, we marked the information that is confidential under common law privacy, and the department must withhold it under section 552.101. The department must also redact the same information from the submitted videotape.

We further note that the remaining submitted information contains social security numbers. Section 552.147 of the Government Code provides that “[t]he social security number of a living person is excepted from” required public disclosure under the Act.¹ Accordingly, the department must withhold the social security number we have marked on the submitted documents.² The requestor, however, has a special right of access to his client’s social security number pursuant to section 552.023 of the Government Code and it must be released to the requestor. *See* Gov’t Code § 552.023(b).

In summary, the department must release the submitted arrest warrant and affidavit for arrest warrant under article 15.26 of the Code of Criminal Procedure. The department must withhold (1) the information we have marked on the submitted documents, in addition to the information on the submitted videotape under section 552.101 in conjunction with common law privacy and (2) the marked social security number under section 552.147. The remaining information must be released to this requestor.³

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

¹Added by Act of May 23, 2005, 79th Leg., R.S., S.B. 1485, ch. 397, 2005 Tex. Sess. Law Serv. 1091 (Vernon) (to be codified at Tex. Gov’t Code § 552.147).

²We note that section 552.147(b) of the Government Code authorizes a governmental body to redact a living person’s social security number from public release without the necessity of requesting a decision from this office under the Act.

³We note that the information being released contains information relating to the requestor’s client that would be excepted from disclosure to the general public under laws and exceptions designed to protect privacy, including the client’s Texas motor vehicle record information. However, as the authorized representative of the individual at issue, the requestor has a special right of access to this information. *See* Gov’t Code § 552.023(b) (governmental body may not deny access to person to whom information relates, or that person’s representative, solely on grounds that information is considered confidential by privacy principles). If the department receives another request for this information from a person who would not have a special right of access to the victim’s private information, the department should resubmit this same information and request another decision. *See* Gov’t Code §§ 552.301(a), 302; Open Records Decision No. 673 (2001).

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Office of the Attorney General 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. 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,



Michael A. Lehmann
Assistant Attorney General
Open Records Division

MAL/sdk

Ref: ID# 236600

Enc. Submitted documents

c: Mr. Aaron Herbert
Rad Law Firm
North Dallas Bank Tower
12900 Preston Road, Suite 900
Dallas, Texas 75230-1325
(w/o enclosures)