



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 19, 2006

Mr. Richard L. Bilbie
Assistant District and County Attorney
Cameron County Courthouse
974 East Harrison
Brownsville, Texas 78520

OR2006-03937

Dear Mr. Bilbie:

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# 245710.

The Cameron - Willacy Counties Community Supervision and Corrections Department (the "department") received a request for six categories of information relating to the department pre-trial diversion program. You state that the department does not have any documents responsive to items one and two of the request. The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dism'd); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983). You claim that some of the requested information constitutes records of the judiciary and is, therefore, not subject to the Act. Alternatively, you claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.108, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹ We have also considered comments submitted by the

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

The Act generally requires the disclosure of information maintained by a “governmental body.” *See* Gov't Code § 552.021. While the Act's definition of a “governmental body” is broad, it specifically excludes “the judiciary.” *See* Gov't Code § 552.003(1) (A), (B). In Open Records Decision No. 646 (1996), this office determined that a community supervision and corrections department is a governmental body for purposes of the Act, and that its administrative records, such as personnel records and other records reflecting day-to-day management decisions, are subject to the Act. *Id.* at 5. On the other hand, we also ruled that specific records regarding individuals on probation and subject to the direct supervision of a court that are held by a community supervision and corrections department are not subject to the Act because such records are held on behalf of the judiciary *Id.*; *see* Gov't Code § 552.003.

You argue that “[s]pecific records regarding individuals who are on probation and subject to the direct direct supervision of a court that are held by a community supervision and corrections department are not subject to the Open Records Act because such records are held on behalf of the judiciary.” We also understand you to assert that the submitted information concerning the pre-trial diversion program itself is not subject to the Act. In this instance, we agree that the information in Exhibits C and D relating to actual probationers is held by the department on behalf of the judiciary and, therefore, is not subject to disclosure under the Act. *See id.* at 2-3; *Benavides v. Lee*, 665 S.W.2d 151 (Tex. App.—San Antonio 1983, no writ) (in determining whether governmental entity falls within judiciary exception, this office looks to whether governmental entity maintains relevant records as agent of judiciary with regard to judicial, as opposed to administrative, functions).² However, after review of your arguments and the information at issue, we find that the information in Exhibit B does not pertain to individuals on probation and subject to the direct supervision of a court, but instead relates solely to the administration of the department. We therefore conclude that this information is subject to the Act and must be released unless it comes within an exception to disclosure.

We turn now to your arguments regarding the exception of Exhibit B. Section 552.108(a) excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime.” We note that a governmental body that claims an exception to disclosure under section 552.108 must reasonably explain how and why this exception is applicable to the information that the governmental body seeks to withhold. *See* Gov't Code § 552.301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986).

²As we reach this conclusion, we need not address your arguments under sections 552.101 and 552.111 of the Government Code for Exhibits C and D.

Although you claim that Exhibit B is excepted from disclosure under 552.108, you have failed to reasonably explain how the release of information regarding the pre-trial program itself would interfere in some way with the detection, investigation, or prosecution of a crime. Accordingly, we conclude that the department has failed to demonstrate the applicability of section 552.108(a)(1). Consequently, the department may not withhold any of this information under section 552.108 of the Government Code.

Next, we address your claim under section 552.103 of the Government Code. This exception 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 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 claims an exception to disclosure under 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 [1st 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.*

To establish that litigation is reasonably anticipated for purposes of section 552.103, a governmental body must provide this office with "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." *See Open Records Decision No. 452 at 4 (1986)*. In the context of anticipated litigation in which the governmental body is the prospective plaintiff or prosecutor, the concrete evidence must at least reflect that

litigation is "realistically contemplated." *See* Open Records Decision No. 518 at 5 (1989); *see also* Attorney General Opinion MW-575 (1982) (finding that investigatory file may be withheld if governmental body attorney determines that it should be withheld pursuant to section 552.103 and that litigation is "reasonably likely to result"). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986).

Although you assert that section 552.103 is applicable to Exhibit B, you have not demonstrated that the pre-trial program policy manual relates to any litigation that was pending on the date of the department's receipt of this request for information. Likewise, you have not shown that the information relates to any litigation that the department reasonably anticipated when it received this request for information. Thus, you have not demonstrated that section 552.103 of the Government Code is applicable in this instance, and therefore the department may not withhold Exhibit B under section 552.103. As you have raised no other exceptions to disclosure for this information, it must be released to the requestor.

In summary, the information in Exhibits C and D consists of records of the judiciary that are not subject to release under the Act, and the department need not release this information in response to the present request. The remaining information must be released 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, 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,



Brian J. Rogers
Assistant Attorney General
Open Records Division

BJR/krl

Ref: ID# 245710

Enc. Submitted documents

c: Mr. Hoss Lozano
c/o Richard L. Bilbie
Assistant District and County Attorney
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974 East Harrison
Brownsville, Texas 78520
(w/o enclosures)