



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

May 21, 2008

Mr. David K. Walker  
Montgomery County Attorney  
207 West Phillips 1st Floor  
Conroe, Texas 77301

OR2008-06980

Dear Mr. Walker:

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# 310965.

The Montgomery County Sheriff's Office and the Montgomery County Attorney's Office (collectively the "county") received a request for approximately forty six categories of information pertaining to a specified case.<sup>1</sup> You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.108, 552.117, 552.1175, 552.119, 552.130, and 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.<sup>2</sup>

Initially, you assert that a portion of the request requires the county to perform legal research. We note that the Act does not require a governmental body to conduct legal research or create new information in responding to a request. *See* Open Records Decision Nos. 563 at 8

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<sup>1</sup>The submitted information indicates that the county attorney's office does not maintain any responsive information. We note that the Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. *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>2</sup>To the extent additional responsive information existed on the date that the county received the instant request, we assume that information has been released to the requestor. If the county has not released any such information, the county must release it to the requestor at this time. *See* Gov't Code §§ 552.301(a), .302; Open Records Decision No. 664 (2000) (noting that if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible under circumstances).

(1990), 555 at 1-2 (1990). However, the Act does require that a governmental body make a good faith effort to relate a request to information that it has or to which it has access. *See* Open Records Decision Nos. 563 at 8 , 561 at 8-9 (1990), 555 at 1-2 , 534 at 2-3 (1989). Accordingly, we will address your arguments under the Act for the submitted information.

Next, we note that the county has previously released some of the information that it now seeks to withhold. A portion of the documents submitted as Exhibit E, "Rules and Regulations for Non-Consent Towing and Storage Services," has been made publicly available on the Montgomery County Sheriff's Office website. Because this information has already been made generally available to the public, it may not now be withheld, and the county must release this information. *See* Gov't Code § 552.007.

We also note that section 552.022 of the Government Code is applicable to some of the submitted information. Section 552.022 (a)(1) provides for required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body[,]" unless the information is expressly confidential under other law or excepted from disclosure under section 552.108 of the Government Code. *Id.* § 552.022 (a)(1). Section 552.022(a)(3) provides for required public disclosure of "information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body," unless the information is expressly confidential under other law. *Id.* § 552.022 (a)(3). Section 552.022(a)(17) provides that information filed with a court is generally a matter of public record that cannot be withheld from disclosure. *Id.* §552.022(a)(17); *Star-Telegram, Inc. v. Walker*, 834 S.W.2d 54 (Tex. 1992). In this instance, the submitted information includes completed reports and performance evaluations that are subject to section 552.022(a)(1), information related to the expenditure of public funds that is subject to section 552.022(a)(3), and a search warrant that is subject to section 552.022(a)(17). Section 552.103 is not other law that makes information expressly confidential for the purposes of section 552.022(a)(1), section 552.022(a)(3), and section 552.022(a)(17). *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 pet.) (governmental body may waive Gov't Code § 552.103); Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Likewise, section 552.108 is not other law that makes information confidential for the purposes of section 552.022 (a)(3) or section 552.022(a)(17). *See* Open Records Decision No. 177 at 3 (1977) (statutory predecessor to Gov't Code § 552.108 subject to waiver). Therefore, the information that we have marked under sections 552.022(a)(3) and 552.022(a)(17) may not be withheld under section 552.103 or section 552.108. However, because information subject to section 552.022 may be withheld under sections 552.101, 552.117, 552.1175; 552.119, 552.130, and 552.147, we will consider the applicability of these exceptions to the documents that are subject to section 552.022, as well as the remaining information. We will also consider the county's claim under section 552.108 with respect to the remaining information, including the information that is subject to section 552.022(a)(1), and section 552.103 with respect to the remaining information that is not subject to section 552.022.

In addition, we note that a portion of the information subject to section 552.022(a)(3) is excepted from disclosure under section 552.136 of the Government Code, which is considered other law for purposes of section 552.022.<sup>3</sup> Section 552.136 states that “[n]otwithstanding any other provision of [the Act], 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 (b). An access device number is one that may be used to “(1) obtain money, goods, services, or another thing of value; or (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.” *Id.* § 552.136 (a). The county must withhold the account and routing numbers we have marked in the information that is subject to 552.022 under section 552.136 of the Government Code.

We now address your section 552.108(a)(1) claim with regard to the information contained in Exhibits F and G, to include the documents that are subject to section 552.022(a)(1) of the Government Code. Section 552.108 of the Government Code excepts from 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[.]” *Id.* § 552.108(a)(1). 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 at issue. *See id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You indicate, and have provided an affidavit stating, that the information contained in Exhibits F and G is related to a pending prosecution by the Montgomery County District Attorney’s Office. Based on your representation and the affidavit, we conclude that the release of Exhibits F and G would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ’g 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) (court delineates law enforcement interests that are present in active cases). Accordingly, we agree that section 552.108(a)(1) is applicable to the information at issue.

However, section 552.108 does not except from disclosure basic information about an arrested person, an arrest, or a crime. Gov’t Code § 552.108(c). Basic information refers to the information held to be public in *Houston Chronicle*. *See* 531 S.W.2d at 186-87. Thus, with the exception of the basic front page offense and arrest information, you may withhold the remaining information in Exhibits F and G from disclosure based on section 552.108(a)(1).<sup>4</sup> 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.

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<sup>3</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

<sup>4</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

We now turn to the submitted information contained in Exhibit E. Section 552.103 of the Government Code provides in part 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.

*Id.* § 552.103(a), (c). The county 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 that the department received the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. 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). The county must meet both prongs of this test for information to be excepted under section 552.103(a).

You indicate that Exhibit E relates to a pending criminal prosecution. You state that a lawsuit styled *State of Texas v. Douglas Reece*, Cause No. 08-01-01050, was pending in the District Court of the 284<sup>th</sup> Judicial District of Montgomery County, Texas on the date the county received the request for information. We note, however, that the county is not a party to this 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 submitted an affidavit from the Montgomery County District Attorney's Office which states that "release of . . . any policy and/or procedures . . . in connection with arrests, searches, and seizures would greatly jeopardize the State's case." Based on your representations, the affidavit, and our review of the information at issue, we agree that litigation was pending as of the date the request was received. We further find that the information at issue relates to

the pending litigation. Accordingly, the county may withhold Exhibit E pursuant to section 552.103 of the Government Code.<sup>5</sup>

In reaching this conclusion under section 552.103, we assume that the opposing party to the criminal case has not seen or had access to the submitted information. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to that litigation to obtain it 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 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).

In summary, the county must release the submitted "Rules and Regulations for Non-Consent Towing and Storage Services" which has been made publicly available on the Montgomery County Sheriff's Office website. With the exception of the marked information that must be withheld under section 552.136 of the Government Code, you must release the information that we have marked as subject to section 552.022(a)(3) and section 552.022(a)(17). The county may withhold Exhibit E under section 552.103 of the Government Code. With the exception of basic information, the county may withhold Exhibits F and G under section 552.108(a)(1) of the Government Code.

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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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

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<sup>5</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

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 challenge 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,



Paige Savoie  
Assistant Attorney General  
Open Records Division

PS/ma

Ref: ID# 310965

Enc. Submitted documents

c: Mr. Stephen D. Jackson  
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(w/o enclosures)