



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

March 27, 2009

Ms. Jacqueline Cullom Murphy
Assistant Criminal District Attorney
Bexar County Criminal District Attorney's Office
Cadena-Reeves Justice Center
300 Dolorosa, Fifth Floor
San Antonio, Texas 78205-3030

OR2009-04030

Dear Ms. Murphy:

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# 338389.

The Bexar County Fire Marshal's Office (the "fire marshal") received two requests for a copy of the presentation made by the fire marshal on December 9, 2008, and information related to a specific video. You state you have no responsive information regarding a portion of the request.¹ You claim that the 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 information may have been presented in an open meeting before the Bexar County Commissioners Court on December 9, 2008. *See* Gov't Code § 551.002 (requiring that every meeting of a governmental body shall be open to the public except as provided in the Open Meetings Act, Chapter 551 of the Government Code). We note that section 552.007 of the Government Code prohibits selective disclosure of

¹ 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 dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

information that a governmental body has voluntarily made available to any member of the public. *See id.* § 552.007(b). As a general rule, if a governmental body releases information to one member of the public, the Act's exceptions to disclosure are waived unless the information is deemed confidential under the Act. Open Records Decision Nos. 490 (1988), 400 (1983). Section 552.103 of the Government Code is a discretionary exception to disclosure under the Act and does not constitute law that makes information confidential or expressly prohibits its release for purposes of section 552.007. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); *see also* Open Records Decision Nos. 663 at 5 (1999) (governmental body may waive section 552.103, 665 at 2 n.5 (2000) (discretionary exceptions in general). Accordingly, the fire marshal may not withhold the submitted information if it has already been released to the public. In this instance, we are unable to determine whether the submitted information has in fact been presented to the public; thus, we rule conditionally. To the extent the submitted information was presented to the public during an open meeting of the commissioner's court, or otherwise, the information must generally be released pursuant to section 552.007. We note, however, the submitted information contains Texas motor vehicle information. Because section 552.007 does not apply to information made confidential by law, we will address whether any portion of the submitted information is excepted from disclosure under section 552.130.

Section 552.130 provides that information relating to a motor vehicle operator's license, driver's license, motor vehicle title, or registration issued by a Texas agency is excepted from public release.² Gov't Code § 552.130(a)(1), (2). Thus, if the submitted information was presented in an open meeting, the fire marshal must withhold the Texas license plate numbers found within the submitted video pursuant to section 552.130 and release the remaining information.

However, to the extent the submitted information has not been presented to the public, we address the fire marshal's arguments for the submitted information. Section 552.103 of the Government Code provides in 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.

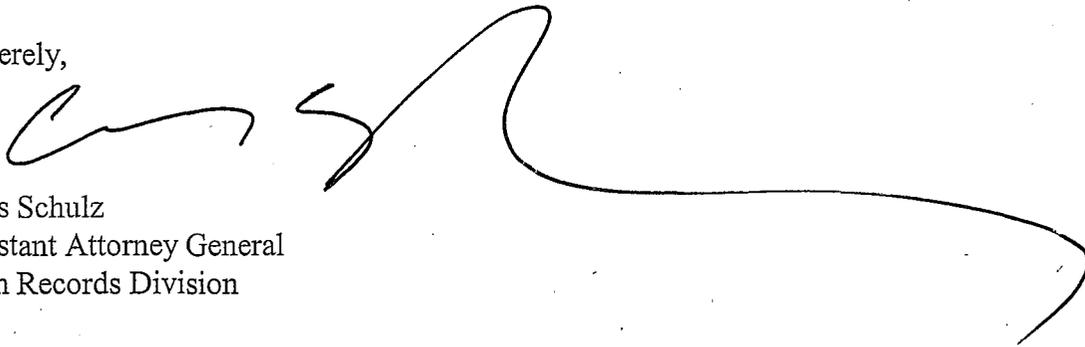
...

² The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,

A large, stylized handwritten signature in black ink, appearing to read 'Chris Schulz', is written over the typed name and title.

Chris Schulz
Assistant Attorney General
Open Records Division

CS/cc

Ref: ID# 338389

Enc. Submitted documents

cc: Requestor
(w/o enclosures)

(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). 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 receives the request for information, and (2) the information at issue is related to that litigation. *See Thomas v. Cornyn*, 71 S.W.3d 473, 487 (Tex.App.—Austin 2002, no pet.); *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 governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). ORD 551 at 4.

You state, and provide documentation showing, that one of the requestors filed a lawsuit styled *Alamo Fireworks, Inc. v. Bexar County, Texas* before the fire marshal received the request for information. You state this lawsuit was pending when the fire marshal received the requests. Thus, based on your representations and our review of the requested information, we find that litigation was pending on the date the fire marshal received the requests for information. You state that the submitted information involves the issuance of a ban on fireworks and the pending litigation “directly attacks the County’s ability to issue a ban on fireworks.” We therefore conclude that the submitted information relates to the pending litigation. Therefore, if the submitted information was not previously released to the public, the fire marshal may generally withhold the submitted information under section 552.103 of the Government Code.

We note, however, that once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends when the litigation has concluded. Attorney General Opinion MW-575 at 2 (1982); Open Records Decision Nos. 350 at 3 (1982), 349 at 2.

In summary, to the extent the submitted information was presented to the commissioner’s court in an open meeting, the fire marshal must withhold the Texas motor vehicle information in the submitted video under section 552.130 of the Government Code. The remaining information must be released. To the extent the submitted information was not presented to the commissioner’s court in an open meeting, the fire marshal may withhold the submitted information under section 552.103 of the Government Code.