



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

February 22, 2010

Mr. Randall Miller  
Assistant Criminal District Attorney  
Navarro County Criminal District Attorney's Office  
300 West 3rd Avenue, Suite 203  
Corsicana, Texas 75110

OR2010-02588

Dear Mr. Miller:

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# 370999.

The Navarro County Sheriff's Department (the "sheriff") received a request for documentation evidencing specified complaints regarding the requestor's client. 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 contains court-filed documents. These documents are subject to section 552.022(a)(17) of the Government Code, which provides that "information that is also contained in a public court record" is "public information and not excepted from required disclosure under this chapter unless [it is] expressly confidential under other law[.]" Gov't Code § 552.022(a)(17). Although you seek to withhold this information under section 552.103 of the Government Code, that section is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. See *id.* § 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). As such, section 552.103 is not "other law" that makes information expressly confidential for purposes of section 552.022(a)(17). Therefore, the court-filed documents, which we have marked, may not be withheld under section 552.103. As you raise no further exceptions to disclosure, the court-filed documents subject to section 552.022(a)(17) must be released to the requestor.

The sheriff claims the information not subject to section 552.022 is excepted from disclosure under section 552.103 of the Government Code, which provides in relevant 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). The governmental body claiming this exception bears the burden of providing relevant facts and documents to demonstrate the applicability of the exception. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the governmental body 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 governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

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." Open Records Decision No. 452 at 4 (1986). When the governmental body is the prospective plaintiff or prosecutor in the anticipated litigation, 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).

We note the sheriff is not a party to the anticipated litigation and, therefore, does not have a litigation interest in the matter for purposes of section 552.103. 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. In this instance, the Navarro County Criminal District Attorney (the "district attorney") informs us that the request concerns illegal dumping activities on the

requestor's client's property. The district attorney explains that the perpetrator has not yet cleaned up the property, and if the problem is not remedied shortly, the district attorney anticipates filing litigation regarding the illegal dumping. Thus, the district attorney requests the information at issue be withheld. Therefore, based on the district attorney's representations, we conclude that litigation was reasonably anticipated when the sheriff received the present request for information. In addition, as the submitted information relates to the illegal dumping activities, we find the submitted information concerns the subject of the anticipated litigation.

We note, however, once the information at issue has been obtained by all parties to the anticipated litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to the information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). In this instance, it appears some of the information at issue was seen by the potential opposing party in the anticipated lawsuit. Thus, any information at issue that was seen by the potential opposing party may not be withheld from the requestor under section 552.103. However, the sheriff may withhold under section 552.103 any information that has not been seen by the opposing party.

In summary, the sheriff must release the court-filed documents subject to section 552.022(a)(17). The sheriff may withhold the remaining information under section 552.103, to the extent this information has not been seen by the potential opposing party.

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](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, toll free, at (888) 672-6787.

Sincerely,



Sarah Casterline  
Assistant Attorney General  
Open Records Division

SEC/eeg

Ref: ID# 370999

Enc. Submitted documents

c: Requestor  
(w/o enclosures)