



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 12, 2010

Ms. Thao La
Assistant District Attorney
Dallas County District Attorney's Office
411 Elm Street Fifth Floor
Dallas, Texas 75202

OR2010-05116

Dear Ms. La:

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# 375862.

The Southwestern Institute of Forensic Sciences ("SWIFS") received a request for records of all DWI blood tests for 2009 conducted by SWIFS for the Dallas Police Department (the "DPD"). You contend that SWIFS should not be required to comply with the instant request for information. You also claim that the requested information is excepted from disclosure under sections 552.103 and 552.108 of the Government Code. We have considered your arguments and reviewed the information you submitted.¹

We begin with your claim that SWIFS should not be required to comply with the instant request because SWIFS is not the entity to which the request should be directed. We note that the Act is applicable to "public information," which includes information that is "collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business . . . by a governmental body." Gov't Code § 552.002(a)(1). Virtually all of the information in a governmental body's physical possession constitutes

¹This letter ruling assumes that the submitted representative sample of information is truly representative of the requested information as a whole. This ruling neither reaches nor authorizes SWIFS to withhold any information that is substantially different from the submitted information. See Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

public information that is subject to the Act.² *See* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). Public information must be released in response to a request under the Act, unless the information is demonstrated to be within the scope of an exception to disclosure. *See* Gov't Code §§ 552.006; .021, .301, .302; Open Records Decision No. 470 at 2 (1987).

You concede that SWIFS is in possession of information that is responsive to the instant request. You explain that SWIFS analyzes blood specimens and provides written reports of its analysis to the DPD, pursuant to a written agreement between Dallas County and the City of Dallas.³ You have submitted, as a representative sample of the requested information, three such reports produced by SWIFS for the DPD. Thus, the submitted reports constitute information maintained by SWIFS in connection with the transaction of official business and are therefore subject to disclosure under the Act. *See* Gov't Code § 552.002(a)(1). Nevertheless, you argue that "DPD, rather than SWIFS, is the true custodian of the records and would have the ability to make claims . . . against disclosure of these records[.]" You assert that "[t]he requestor should direct her request to the originating agency [i.e., the DPD] that ordered and purchased the responsive lab analyses." You contend that "SWIFS has no custodia[l] authority to make decisions regarding the disclosure of the test results for samples sent to it by *any* of its clients" (emphasis in original). We disagree. The fact that a request for information might more appropriately be directed to a different governmental body does not mean that the request may be dismissed by the governmental body to which it is properly directed. *See* Attorney General Opinion JM-266 at 3 (1984). Thus, SWIFS may not decline to comply with the instant request for the submitted information on the ground that the request could or should be directed to the DPD. *See id.* (rejecting argument that public records held by Harris County District Attorney "should be obtained from the agency that is the legal custodian of [the] records").

You also contend that the instant request is "overly broad" and "would require unreasonable time . . . and excessive resources" to determine which of the responsive information would be subject to exception under section 552.103 or section 552.108 of the Government Code. You argue that requiring SWIFS to respond to this request "will force SWIFS to take on a role that [it] does not have the resources or the ability to do[.]" We note that a governmental

²You state that SWIFS is a laboratory jointly established by the Dallas County Commissioners Court, the University of Texas Southwestern Medical School, and the Dallas County Hospital District. Thus, we do not understand you to contend that SWIFS is not a governmental body for the purposes of the Act. *See* Gov't Code § 552.003(1)(A).

³You have provided a copy of the agreement, which states, among other things, that Dallas County is an independent contractor. We note that whether a party to a contract with a governmental body is an independent contractor and/or an agent is not dispositive of whether information held by the party is subject to the Act. *See* Open Records Decision No. 462 at 4-5 (1987). We also note that a governmental body cannot compromise its obligations under the Act simply by deciding to enter into a contract. *See* Open Records Decision Nos. 541 at 4 (1990), 514 at 1 (1988).

body may not decline to comply with the requirements of the Act on the ground of administrative inconvenience. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 687 (Tex. 1976); *see also* Open Records Decision No. 497 at 4 (1988) (fact that submitting copies for review may be burdensome does not relieve governmental body of its responsibility to do so). Thus, SWIFS must release the submitted information unless it falls within the scope of an exception to disclosure.

SWIFS claims exceptions under sections 552.103 and 552.108 of the Government Code. You contend that “[t]he likelihood that all, if not most of [the information at issue] would still be under law enforcement’s pending litigation or investigation is strong given that these files are very recent 2009 cases.” You also state that the requestor indicated she is seeking information relating to instances of the “DPD’s failure to take appropriate immediate actions.” You assert that such information would require additional investigation, and potentially also litigation, by the Dallas County District Attorney (the “district attorney”), so as to fall within the scope of sections 552.103 and 552.108. Accordingly, we will determine whether SWIFS may withhold the submitted information under either of those exceptions.

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.

...

(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 claims an exception to disclosure under section 552.103 has the burden of providing relevant facts and documentation 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).

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 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 contend that the submitted information may be related to pending or anticipated litigation, you do not inform us that SWIFS would be a party to any such litigation. *See* Gov't Code § 552.103(a); Open Records Decision No. 575 at 2 (1990). Under such circumstances, we require an affirmative representation from a prosecuting attorney that the information at issue should be withheld because it is related to pending or anticipated litigation to which a governmental body is or would be a party. *See* Open Records Decision No. 469 (1987). Neither the district attorney nor any other prosecutor has informed our office that SWIFS should withhold any of the information at issue because it pertains to a pending or anticipated criminal case. We therefore conclude that SWIFS may not withhold any of the submitted information under section 552.103 of the Government Code.

Section 552.108 of the Government Code excepts from 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[.]" Gov't Code § 552.108(a)(1). A governmental body must reasonably explain how and why section 552.108 is applicable to the information at issue. *See id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). Although SWIFS is not a law enforcement agency for the purposes of section 552.108, this exception may be invoked by a proper custodian of information relating to a pending investigation or prosecution of criminal conduct. *See* Open Records Decision No. 474 at 4-5 (1987). Where a non-law enforcement agency has custody of information that would otherwise qualify for exception under section 552.108 as information relating to the pending case of a law enforcement agency, the custodian of the records may withhold the information if it provides this office with a demonstration that the information relates to the pending case and a representation from the law enforcement agency that it wishes to have the information withheld.

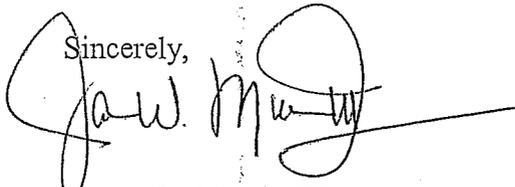
Neither the DPD nor any other law enforcement agency has informed us that SWIFS should withhold any of the information at issue because its release would interfere with a pending criminal case. We therefore conclude that SWIFS may not withhold any of the submitted information under section 552.108 of the Government Code.

In summary, SWIFS may not withhold any of the information at issue under section 552.103 or section 552.108 of the Government Code. The submitted information must be released.

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

Sincerely,

A handwritten signature in black ink, appearing to read "J.W. Morris, III", with a long horizontal line extending to the right.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/cc

Ref: ID# 375862

Enc: Submitted documents

c: Requestor
(w/o enclosures)