ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 8, 2010

Ms. Laura Garza Jimenez
Nueces County Attorney
901 Leopard, Suite 207
Corpus Christi Texas 78401-3680

OR2010-08333

Dear Ms. Garza Jimenez:

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# 382178.

The Nueces County Sheriff's Department (the "sheriff") received a request for six categories of information related to a specified case and writ of execution. You claim some of the submitted information is subject to section 552.027 of the Government Code. You claim that the remaining information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, you state that a portion of the submitted information is commercially available information. Section 552.027 of the Government Code provides as follows:

> (a) A governmental body is not required under this chapter to allow the inspection of or to provide a copy of information in a commercial book or publication purchased or acquired by the governmental body for research purposes if the book or publication is commercially available to the public.
>
> (b) Although information in a book or publication may be made available to the public as a resource material, such as a library book, a governmental body

> is not required to make a copy of the information in response to a request for public information.
>
> (c) A governmental body shall allow the inspection of information in a book or publication that is made part of, incorporated into, or referred to in a rule or policy of a governmental body.

Gov't Code § 552.027. Section 552.027 is designed to alleviate the burden of providing copies of commercially available books, publications, and resource materials maintained by governmental bodies, such as telephone directories, dictionaries, encyclopedias, statutes, and periodicals. You state that the information you have marked consists of pages from O'Connor's Texas Rules—Texas Rules of Civil Procedure on Executions, which you state is a textbook and is commercially available. In this instance, however, the requestor has not requested commercially available publications in particular, but rather the requestor seeks any manual that was relied upon in the sheriff's response to the writ of execution. We note this information cannot be obtained by a member of the public if the member of the public is not aware of which documents were relied upon by the sheriff. The fact that commercially available research materials happen to be responsive to the request does not, in our view, bring such materials within the ambit of section 552.027. Accordingly, due to the nature of the request, we determine that the information you have marked is not subject to section 552.027. As you raise no further exceptions to disclosure of this information, it must be released.

We note, however, that the information from the textbook appears to be protected by copyright. A governmental body must allow inspection of copyrighted information unless an exception to disclosure applies to the information. *See* Attorney General Opinion JM-672 (1987). An officer for public information also must comply with copyright law, however, and is not required to furnish copies of copyrighted information. *Id.* A member of the public who wishes to make copies of copyrighted information must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 at 8-9 (1990). Therefore, in releasing the information from the textbook, the sheriff must comply with copyright laws.

Next, we note that some of the remaining information is subject to section 552.022 of the Government Code. Section 552.022(a) provides in relevant part that:

> (a) the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:
>
> . . .

> (17) information that is also in a public court record[.]

Gov't Code. § 552.022 (17). In this instance, the submitted information includes a court-filed document, which we have marked. Thus, the sheriff must release the information we have marked pursuant to section 552.022(a)(17) unless it is expressly confidential under other law. You assert that the court-filed document is excepted under section 552.103 of the Government Code. However, section 552.103 is a discretionary exception to disclosure that protects the governmental body's interests and may be waived. *See 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 section 552.103); Open Records Decision No.542 at 4 (1990) (statutory predecessor to section 552.103 may be waived); *see also* Open Records Decision No. 522 (1989) (discretionary exceptions in general). Therefore, the sheriff may not withhold the court-filed document subject to section 552.022 under section 552.103. As you raise no further exception to disclosure of this information, it must be released. We will, however, consider your claims under sections 552.103 and 552.107 for the remaining information not subject to section 552.022.

Section 552.103 of the Government Code provides:

> (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). When a governmental body receives a request for information that relates to pending or anticipated litigation, it may raise section 552.103 as an exception to disclosure in order to protect its litigation interests. *See* Gov't Code 552.103; Open Records Decision No. 551 at 4 (1990) (noting that predecessor to section 552.103 protects discovery process and avoids interference in matters properly resolved in court by excepting from disclosure information when access to such material is more appropriately sought through discovery). 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.); ORD 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You state, and provide documentation showing, that prior to the sheriff's receipt of the present request for information, the requestor filed a judgment creditor's notice of hearing on motion for damages against the sheriff and its surety. You state the requestor alleges the sheriff failed to perform its duty to levy a writ of execution on the property involved in the case specified in the instant request. We therefore agree that litigation to which the sheriff is a party was pending on the date the sheriff received the request. We further find that the submitted information relates to the pending litigation. Therefore, we find section 552.103 of the Government Code is generally applicable to the remaining information.

As noted above, the purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. *See* ORD 551 at 4-5. If the opposing party has seen or had access to information relating to pending or anticipated 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). Further, the applicability of section 552.103(a) ends once the litigation has concluded. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982). We note that the remaining information contains letters sent to the sheriff from the requestor. Thus, because these letters were provided to the sheriff by the plaintiff in the pending litigation, the opposing party in the litigation has already seen that information. Therefore, the sheriff may not withhold these letters under section 552.103 of the Government Code. However, the remaining information that has not been seen by the opposing party in the pending litigation may be withheld under section 552.103 of the Government Code.[1]

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

[1]As our ruling is dispositive, we need not address your remaining argument against disclosure.

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,

Kate Hartfield
Assistant Attorney General
Open Records Division

KH/dls

Ref: ID# 382178

Enc. Submitted documents

c: Requestor
(w/o enclosures)