



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 27, 2010

Ms. Lynn Switzer
31st District Attorney
P.O. Box 1592
Pampa, Texas 79066

OR2010-14666

Dear Ms. Switzer:

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# 394874.

The 31st District Attorney's Office (the "district attorney") received a request for all information provided by the district attorney to the Texas Board of Pardons and Paroles or to the Office of the Texas Governor about a named individual. You claim that the requested 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. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, it appears some of the submitted information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2010-10965 (2010). In that ruling, we determined the district attorney failed to meet the procedural requirements of section 552.301 and must release the information responsive to that request. You now seek to withhold the submitted information, including the information that appears to have been previously addressed by this office. Section 552.007 of the Government Code provides that if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law or the information is confidential by law. *See* Gov't Code § 552.007; Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive

exceptions to disclosure under the Act, but it may not disclose information made confidential by law). Accordingly, pursuant to section 552.007, the district attorney may not now withhold the previously released information unless its release is expressly prohibited by law or the information is confidential by law. You seek to withhold the submitted information, including the information that appears to have been previously released under Open Records Letter No. 2010-10965, under section 552.103. Section 552.103 does not prohibit the release of information or make information confidential. *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 Gov't Code § 552.103); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, to the extent any portion of the submitted information was ruled on in Open Records Letter No. 2010-10965, the district attorney may not now withhold such information under section 552.103. Thus, with regard to any portion of the submitted information that was previously requested and ruled on by this office, we conclude that the district attorney must release that information in accordance with Open Records Letter No. 2010-10965. To the extent the submitted information was not encompassed by the prior ruling, we will consider your arguments against disclosure.

Next, we note some of the submitted information is subject to section 552.022 of the Government Code, which states in relevant part:

(a) Without limiting the amount or kind of information that is public information under this chapter, 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:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). The remaining information contains completed reports. Pursuant to section 552.022(a)(1) of the Government Code, a completed report is expressly public, unless it is excepted under section 552.108 of the Government Code or is expressly confidential under other law. Section 552.103 of the Government Code is a discretionary exception to public 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 section 552.103); Open Records Decision No. 665 at 2 n.5 (discretionary exceptions generally). As such, section 552.103 is not "other law" that makes information confidential for the purposes of section 552.022. Accordingly, you may not withhold the completed reports under section 552.103 of the Government Code. However, we note a portion of information contained in the completed reports is subject to section 552.130 of

the Government Code.¹ Because section 552.130 is “other law” for the purposes of 552.022(a)(1), we will consider whether this exception is applicable to the information at issue.

Section 552.130 of the Government Code provides information relating to a motor vehicle title or registration issued by a Texas agency is excepted from public release. Gov’t Code § 552.130(a)(2). Therefore, the Texas license plate number we have marked is generally subject to section 552.130 of the Government Code. We note, however, the license plate number at issue may belong to the requestor’s client. Accordingly, this requestor may have a right of access to the marked Texas license plate number. *See id.* § 552.023(a); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when an individual or authorized representative asks governmental body to provide information concerning that individual). In this instance, it is not clear whether the license plate number at issue belongs to the requestor’s client. Therefore, we must rule conditionally. To the extent the license plate number at issue belongs to the requestor’s client, the requestor has a right of access to the marked Texas license plate under section 552.023, and the district attorney may not withhold the marked license plate under section 552.130 of the Government Code. To the extent the license plate number does not belong to the requestor’s client, the requestor has no such right of access, and the district attorney must withhold the marked license plate number under section 552.130 of the Government Code. As you raise no further exceptions for the information subject to section 552.022(a)(1) of the Government Code, it must be released.

To the extent the remaining submitted records were not the subject of Open Records Letter No. 2010-10965, we address your remaining argument. You assert the remaining information is excepted under section 552.103 of the Government Code, which provides in relevant 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

¹The 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).

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 district attorney has the burden of providing relevant facts and documents to show 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, 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 district attorney must meet both prongs of this test for information to be excepted under section 552.103(a).

You inform us that the submitted information pertains to a capital murder case where the defendant is currently sentenced to death. You state, and provide documentation showing, prior to the district attorney's receipt of the instant request for information, a lawsuit styled United States Supreme Court Docket Number, 09-9000, *Henry W. Skinner, Petitioner v. Lynn Switzer, District Attorney for the 31st Judicial District of Texas* was pending before the United States Supreme Court. You explain that the submitted information relates to the substance of the claims in the litigation. Based on your representations and our review, we find that litigation was pending on the date the district attorney received the request for information and that the submitted information relates to the pending litigation. Thus, the district attorney may withhold the remaining information under section 552.103 of the Government Code.

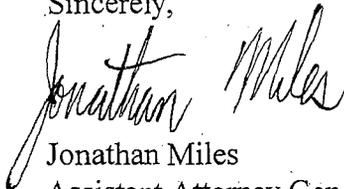
We note, however, that once information has been obtained by all parties to the pending litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. *See* Open Records Decision No. 349 at 2 (1982). Thus, any information that has either been obtained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

In summary, with regard to any portion of the submitted information that was previously requested and ruled upon by this office, we conclude that the district attorney must release that information in accordance with Open Records Letter No. 2010-10965. The district attorney must withhold the Texas license plate number we have marked in the information subject to section 552.022(a)(1) under section 552.130, if such information does not belong to the requestor's client. The remaining information not subject to section 552.022(a)(1) may be withheld under section 552.103 of the Government Code. The remaining 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 cursive script that reads "Jonathan Miles". The signature is written in dark ink and is positioned above the typed name.

Jonathan Miles
Assistant Attorney General
Open Records Division

JM/eeg

Ref: ID# 394874

Enc. Submitted documents

c: Requestor
(w/o enclosures)