



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

March 18, 2011

Mr. David A. Mendoza  
Assistant District Attorney  
Hays County District Attorney's Office  
110 East Martin Luther King  
San Marcos, Texas 78666

OR2011-03784

Dear Mr. Mendoza:

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# 411835.

The Hays County District Attorney (the "district attorney") received a request for nine categories of information relating to a specified incident, all policies regarding use of force by officers of the Hays County Sheriff's Office (the "sheriff"), and any insurance agreement or interlocal/intergovernmental agreement with any county risk pool that may cover allegations of negligence, constitutional violations, or other complaints or allegations against sheriff's officers. You claim that the submitted information is excepted from disclosure under sections 552.103 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered comments from the requestor. *See Gov't Code § 552.304* (interested party may submit comments stating why information should or should not be released).

Initially, we note you have not submitted the requested use of force policies. To the extent information responsive to this portion of the request existed and was maintained by the district attorney on the date the instant request was received, we assume you have released it. If not, the district attorney must do so at this time. *See id.* §§ 552.301, .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to the requested information, it must release the information as soon as possible).

Next, we address the requestor's contention that the district attorney failed to comply with the procedural requirements of the Act. Section 552.301 of the Government Code prescribes the procedures a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(b),

a governmental body must ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request. *See* Gov't Code § 552.301(b). The district attorney states, and the requestor acknowledges, the district attorney received the request for information on December 22, 2010. This office does not count any holidays observed by a governmental body that receives a request for information as business days for the purpose of calculating that governmental body's deadlines under the Act. The district attorney informs this office it observed holidays on December 23, 24, and 27, 2010 and January 3, 2011. Thus, the district attorney's ten-business-day deadline was January 11, 2011. The district attorney's request for a ruling from this office was postmarked January 11, 2011. *See id.* § 552.308 (describing rules for calculating submission dates of documents sent via first class United States mail). Consequently, we conclude the district attorney complied with the Act in requesting a ruling from this office. Thus, we will address the district attorney's arguments against disclosure.

Next, we note a portion of the submitted information is subject to section 552.022 of the Government Code, which provides 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). In this instance, the submitted incident report and related videos constitute a completed investigation subject to section 552.022(a)(1). Although you seek to withhold the information subject to section 552.022 under section 552.103 of the Government Code, this section is a discretionary exception to disclosure that protects the 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); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 (1999) (governmental body may waive section 552.103). As such, section 552.103 is not "other law" that makes information confidential for the purposes of section 552.022. Accordingly, the district attorney may not withhold the completed investigation under section 552.103 of the Government Code. However, because information subject to section 552.022(a)(1) may be withheld under section 552.108, we will consider the applicability of section 552.108 to all of the submitted information. In addition, we will address your argument under section 552.103 for the information not subject to section 552.022.

You raise section 552.108 of the Government Code for the submitted information. Section 552.108 provides in relevant part:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of Section 552.021 if:

...

(2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication[.]

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from the requirements of Section 552.021 if:

...

(2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication[.]

Gov't Code § 552.108(a)(2), (b)(2). A governmental body claiming subsection 552.108(a)(2) or subsection 552.108(b)(2) must demonstrate that the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. Subsection 552.108(a)(2) applies to information that deals with the detection, investigation, or prosecution of crime. Subsection 552.108(b)(2) applies to internal records or notations that relate to law enforcement.

The submitted information consists of an incident report and related recordings, three criminal case summaries, and a liability insurance agreement to which Hays County is a party. You state the submitted information relates to a criminal investigation that is closed and did not result in conviction or deferred adjudication. Accordingly, we understand you to raise section 552.108(a)(2) for this information. Upon review, we conclude section 552.108(a)(2) of the Government Code is applicable to the incident report and the related video recordings and the criminal case summaries. However, you have not explained how the insurance agreement either relates to the detection, investigation, or prosecution of crime or consists of internal records or notations that relate to law enforcement. Accordingly, the district attorney may not withhold the insurance agreement under section 552.108.

We note section 552.108 does not except from disclosure basic information about an arrested person, an arrest, or a crime. *Id.* § 552.108(c). Basic information refers to the information held to be public in *Houston Chronicle Publishing Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). *See* Open Records Decision No. 127 (1976) (summarizing types of information made public by *Houston Chronicle*). Thus, with the exception of basic information, the

district attorney may withhold the incident report and the related video recordings and the criminal case summaries under section 552.108(a)(2).

Finally, we will address your argument under section 552.103 for the remaining information that is not subject to section 552.022 of the Government Code. Section 552.103 of the Government Code 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 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 has the burden of providing relevant facts and documents to show that the section 552.103 exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date that 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 district attorney must meet both prongs of this test for information to be excepted under section 552.103.

To establish litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. Open Records Decision No. 331 (1982). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. ORD 452 at 4.

You contend the district attorney reasonably anticipates litigation from the requestor regarding the incident specified in the request. In support of your assertion, you state the requestor's firm specializes in personal injury law. You also state, and have submitted newspaper articles reporting, that the individuals arrested during the incident have filed formal complaints with the sheriff. However, you also state "there is no direct or overt threat of litigation." Upon review of your arguments, we conclude you have not demonstrated that the requestor, or any other potential opposing party, has taken any objective steps toward filing suit. Accordingly, we conclude the district attorney has failed to demonstrate it reasonably anticipated litigation on the date of the request. *See* ORD 361. Thus, the district attorney may not withhold any of the information at issue under section 552.103 of the Government Code.

In summary, with the exception of basic information, the district attorney may withhold the incident report and related video recordings and the case summaries under section 552.108(a)(2) of the Government Code. The district attorney must release the remaining information.

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,



Kate Hartfield  
Assistant Attorney General  
Open Records Division

KH/em

Ref: ID# 411835

Enc. Submitted documents

c: Requestor  
(w/o enclosures)