



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

May 12, 2011

Mr. Tom Rugg  
First Assistant Attorney  
Jefferson County  
1001 Pearl Street, 3rd Floor  
Beaumont, Texas 77701-3545

OR2011-06579

Dear Mr. Rugg:

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# 419171.

The Jefferson County Crime Laboratory (the "crime laboratory") received a request for "a copy of all intoxilyzer test slips from May 1, 2009 through June 1, 2010[,]" as well as twelve other categorized items of related information. You state the crime laboratory has determined to release information responsive to items three, four, five, seven, eleven, twelve, and thirteen. You also state the crime laboratory does not have information responsive to items two, six, eight, nine, and ten.<sup>1</sup> You claim the information responsive to item one, which consists of the requested intoxilyzer slips, 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 representative sample of information.<sup>2</sup>

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<sup>1</sup>The Act does not require a governmental body to disclose information that did not exist when the request for information was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

<sup>2</sup>We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

Section 552.103 of the Government Code provides in 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). The governmental body 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 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 from disclosure under section 552.103(a).

You state the requested information is excepted from disclosure under section 552.103 because it "relates to pending criminal prosecutions[.]" The crime laboratory is not a party to pending criminal prosecutions and, therefore, does not have a litigation interest in the matter for purposes of section 552.103. See Open Records Decision Nos. 575 at 2 (1990) (statutory predecessor to section 552.103 applies only where governmental body claiming exception is party or expects to be party to litigation), 392 at 3 (1983) (same). In this situation, we require an affirmative representation from the prosecuting attorney in the litigation that the prosecuting attorney wants the requested information withheld from disclosure under section 552.103. In addition, based on the language and purpose of section 552.103, it is incumbent upon the prosecuting attorney to specify the particular pending case and the particular information related to that case that the prosecuting attorney seeks to withhold under section 552.103.

We understand you to object to the release of the submitted information on behalf of the Criminal District Attorney of Jefferson County (the "district attorney"). You assert the information is excepted from disclosure under section 552.103 because, "[w]hile the requestor has not specified any particular DWI case prosecution[,] it appears from the request that the information relates to a pending criminal case and is sought for the purpose

of avoiding the criminal discovery process.” However, upon review, we find neither the crime laboratory nor the district attorney has identified the particular pending prosecution to which the requested information relates. Accordingly, we determine neither the crime laboratory nor the district attorney has established the submitted information is excepted from disclosure under section 552.103, and the crime laboratory may not withhold it from release on that ground.

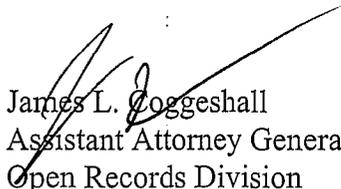
You also assert the submitted information is excepted from disclosure pursuant to section 552.108 of the Government Code. Section 552.108(a) excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime[.]” Gov’t Code § 552.108(a)(1). Generally, a governmental body claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), (b)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). Section 552.108 may be invoked by the proper custodian of information relating to an investigation or prosecution of criminal conduct. *See Open Records Decision Nos. 474 at 4-5 (1987)*. Where a governmental body possesses information relating to a pending case of a law enforcement agency, the governmental body may withhold the information under section 552.108 if (1) it demonstrates that the information relates to the pending case and (2) this office is provided with a representation from the law enforcement entity that the law enforcement entity wishes to withhold the information.

As noted above, we understand you to object to the release of the submitted information on behalf of the district attorney. You state “[p]roduction of the intoxilizer test slips amounts to the production of evidence used in the prosecution of criminal conduct in hundreds of criminal cases many, if not most of which, are still pending in this county.” However, upon review, we find you have neither demonstrated the information at issue pertains to any particular pending case nor otherwise established release of the information would be detrimental to any specific criminal matter. Thus, having considered your arguments, we find you have not demonstrated release of the submitted information would interfere with the detection, investigation, or prosecution of crime. *See Gov’t Code § 552.108(a)(1); Houston Chronicle Publ’g Co. v. City of Houston*, 531 S.W.2d 177, 186-188 (Tex. Civ. App.—Houston [14th Dist.] 1975) (court delineates law enforcement interests that are present in active cases), *writ ref’d n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). We conclude, therefore, the crime laboratory may not withhold any of the submitted information under section 552.108(a)(1) of the Government Code. Accordingly, the crime laboratory must release the submitted information to the requestor.

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,



James L. Coggeshall  
Assistant Attorney General  
Open Records Division

JLC/eb

Ref: ID# 419171

Enc. Submitted documents

c: Requestor  
(w/o enclosures)