



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 15, 2011

Mr. W. Lee Auvenshine
Assistant Ellis County & District Attorney
Ellis County
109 South Jackson
Waxahachie, Texas 75165

OR2011-08432A

Dear Mr. Auvenshine:

This office issued Open Records Letter No. 2011-08432 (2011) on June 14, 2011. We have examined this ruling and determined that an error was made in its issuance. Where this office determines that an error was made in the decision process under sections 552.301 and 552.306 of the Government Code, and that error resulted in an incorrect decision, we will correct the previously issued ruling. Consequently, this decision serves as the corrected ruling and is a substitute for the decision issued on June 14, 2011. *See generally* Gov't Code § 552.011 (providing that Office of Attorney General may issue decision to maintain uniformity in application, operation, and interpretation of Public Information Act ("Act")). This ruling was assigned ID# 420478A.

The Ellis County and District Attorney's Office (the "district attorney") received a request for basic information from a specified offense report pertaining to a specified incident involving the arrest of the requestor's client and any related arrest warrant, arrest warrant affidavit, arrest report, or book-in report. You claim the submitted information is excepted from disclosure under sections 552.103 and 552.108 of the Government Code and privileged under article 39.14 of the Code of Criminal Procedure. We have considered your arguments and reviewed the submitted information.

Initially, we note you have submitted information other than the basic information and any related arrest warrant, arrest warrant affidavit, arrest report, or book-in report. This information is not responsive to the request. This ruling does not address the public availability of non-responsive information, and the district attorney is not required to release non-responsive information in response to this request.

You seek to withhold the responsive information pursuant to article 39.14 of the Code of Criminal Procedure. However, article 39.14 governs the discovery of information and the testimony of witnesses in criminal proceedings. Article 39.14 does not expressly make information confidential for purposes of the Act. *See* Open Records Decision Nos. 658 at 4 (1998) (statutory confidentiality under section 552.101 must be express, and confidentiality requirement will not be implied from statutory structure), 478 at 2 (1987) (statutory confidentiality requires express language making certain information confidential or stating that information shall not be released to public); *see also* Open Records Decision No. 575 at 2 (1990) (explicitly stating that discovery privileges are not covered by statutory predecessor to section 552.101). We therefore conclude the district attorney may not withhold any of the responsive information under article 39.14.

You seek to withhold the responsive information 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 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(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, 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). A governmental body must meet both prongs of this test for information to be excepted under 552.103(a).

The purpose of section 552.103 is to protect the litigation interests of governmental bodies that are parties to the litigation at issue. Gov't Code § 552.103(a); Open Records Decision No. 638 at 2 (1996) (section 552.103 only protects the litigation interests of the governmental body claiming the exception). You inform this office the responsive

information pertains to cause numbers 1011538CR and 1011961CR, which are pending prosecution at Ellis County's County Court at Law Number 2. Upon review, we agree the responsive information pertains to those pending criminal cases. Accordingly, based on your representations and our review, we find litigation was pending on the date the district attorney received the request for information and that the responsive information relates to that pending litigation.

However, the information at issue involves alleged criminal activity. Information normally found on the front page of an offense or incident report is generally considered public. *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex Civ. App.—Houston [14th Dist.] 1975, writ ref'd n.r.e.); see Open Records Decision No. 127 (1976). This office has stated basic information about a crime may not be withheld under section 552.103 of the Government Code even if it is related to the litigation. Open Records Decision No. 362 (1983). Thus, we find the basic offense information from the incident and arrest reports may not be withheld on the basis of section 552.103 of the Government Code. We note basic information does not include Texas motor vehicle record information subject to section 552.130 of the Government Code. Therefore, with the exception of basic information, the district attorney generally may withhold the responsive 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), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the pending litigation is not excepted from disclosure under section 552.103(a), and it 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 at 3 (1982).

In summary, except for basic information, the district attorney may withhold the responsive information under section 552.103 of the Government Code, to the extent the district attorney's opposing party has not seen or had access to this information. To the extent the district attorney's opposing party has seen or had access to this information, it 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 'Bob Davis', with a stylized flourish at the end.

Bob Davis
Assistant Attorney General
Open Records Division

RSD/eb

Ref: ID# 420478

Enc. Submitted documents

c: Requestor
(w/o enclosures)