



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

June 20, 2011

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

OR2011-08742

Dear Mr. Auvenshine:

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# 421069.

The Ennis Police Department (the "department") received a request for basic information from a specified offense report regarding 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 therefore not responsive to the request. This ruling does not address the public availability of non-responsive information, and the department is not required to release non-responsive information in response to this request.

Next, you seek to withhold the responsive information pursuant to article 39.14 of the Code of Criminal Procedure. We note, 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 information shall not be released to public); *see also* Open Records Decision No. 575 at 2 (1990) (explicitly stating discovery privileges are not covered by statutory predecessor to section 552.101). We therefore conclude the department may not withhold any of the responsive information under article 39.14 of the Code of Criminal Procedure.

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). 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* Open Records Decision No. 551 at 4-5 (1990). A 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 was 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. *Thomas v. Cornyn*, 71 S.W.3d 473, 487 (Tex. App.—Austin 2002, no pet.); *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. A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

Although you assert the basic information in the submitted offense report relates to pending criminal litigation by the Ellis County District Attorney (the "district attorney"), in Open Records Decision No. 597 (1991), this office determined that basic information may not be withheld under the statutory predecessor to section 552.103. ORD 597 at 3. Accordingly, the basic information in the submitted offense report may not be withheld under section 552.103 of the Government Code.

You also assert the responsive arrest report, arrest warrant, and arrest warrant affidavit relate to pending criminal litigation. We note that the department is not a party to the criminal prosecution by the district attorney, and therefore does not have a litigation interest in the matter for purposes of section 552.103. In such a situation, we require an affirmative representation from the governmental body with the litigation interest that the governmental body wants the information at issue withheld from disclosure under section 552.103. You, as a representative of the district attorney, state that the release of the submitted arrest report, arrest warrant, and arrest warrant affidavit could interfere with the district attorney's prosecution of the pending criminal litigation. Based on your representations and our review, we agree litigation was pending as of the date the request was received and that the submitted arrest report, arrest warrant, and arrest warrant affidavit relate to the pending criminal litigation. Thus, section 552.103 is generally applicable to the submitted arrest report, arrest warrant, and arrest warrant affidavit.

However, it appears that the opposing party to the pending criminal litigation may have seen or had access to the arrest warrant and arrest warrant affidavit. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information that relates to the litigation through discovery procedures. *See* ORD 551 at 4-5. Thus, if the opposing party to pending litigation has already seen or had access to the arrest warrant or arrest warrant affidavit through discovery or otherwise, there is no interest in now withholding such information under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Therefore, to the extent the opposing party to the pending criminal litigation has already seen or had access to the arrest warrant or arrest warrant affidavit, such information is not excepted under section 552.103; however, to the extent the opposing party to the pending criminal litigation has not already seen or had access to the arrest warrant or arrest warrant affidavit, the department may withhold this information, along with the responsive arrest report, under section 552.103 of the Government Code.¹

In summary, to the extent the opposing party to the pending criminal litigation has not seen the arrest warrant or arrest warrant affidavit, the department may withhold this information, along with the responsive arrest report, under section 552.103 of the Government Code. To

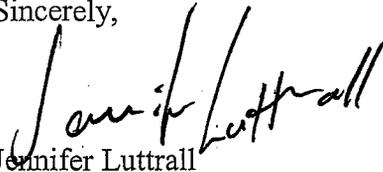
¹As our ruling is dispositive, we need not address your remaining argument against disclosure of the information at issue, except to note section 552.103 does not generally except from disclosure the same basic information that must be released under section 552.108(c). *See* Open Records Decision No. 597 (1991).

the extent the opposing party has seen or had access to this information, it must be released.²
The basic 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,



Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/dls

Ref: ID# 421069

Enc. Submitted documents

c: Requestor
(w/o enclosures)

²We note the arrest warrant contains the driver's license number of the requestor's client, to which the requestor has a right of access under section 552.023 of the Government Code. *See* Gov't Code § 552.023(a); *see also id.* § 552.023(b) (governmental body may not deny access to person to whom information relates, or that person's representative, solely on the grounds that information is considered confidential by privacy principles); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual or individual's authorized representative requests information concerning the individual). This office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including a Texas driver's license number under section 552.130 of the Government Code, without the necessity of requesting an attorney general decision. Accordingly, if the department receives another request from an individual other than this requestor, the department is authorized to withhold this requestor's client's driver's license number under section 552.130 of the Government Code without the necessity of requesting an attorney general decision.