



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 20, 2011

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

OR2011-08744

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# 421068.

The Ennis Police Department and Ellis County Jail (collectively, the "county") received a request for basic information, including the front page from a specified offense report regarding the requestor's client, and any related search warrant, search warrant affidavit, arrest warrant, arrest warrant affidavit, arrest report, or booking report. You claim some of 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 basic information, including the front page from a specified offense report regarding the requestor's client, and any related search warrant, search warrant affidavit, arrest warrant, arrest warrant affidavit, arrest report, or booking report as specified in the request. This information is not responsive to the request. This ruling does not address the public availability of non-responsive information, and the county 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 county may not withhold the responsive information under article 39.14.

Section 552.108(a)(1) of the Government Code excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]” Gov’t Code § 552.108(a)(1). A governmental body claiming section 552.108 must reasonably explain how and why this exception is applicable to the information at issue. *See id.* §§ 552.108(a)(1), . 301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state the responsive information you have marked pertains to a pending criminal investigation and prosecution and that release of the information at issue would interfere with the pending prosecution. *See Houston Chronicle Publ’g Co. v. City of Houston*, 531 S.W.2d 177 (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). However, the responsive information you seek to withhold under section 552.108 consists of basic information. Section 552.108 does not except from disclosure “basic information about an arrested person, an arrest, or a crime.” Gov’t Code § 552.108(c). Section 552.108(c) refers to the basic information held to be public in *Houston Chronicle*, 531 S.W.3d 177. Basic information includes, among other things, a detailed description of the offense. Open Records Decision No. 127 at 4-5 (1976). Consequently, the county may not withhold any of the responsive information you have marked under section 552.108(a)(1) of the Government Code.

Next, you assert the responsive information you have marked is excepted from disclosure under section 552.103 of the Government Code. Section 552.103 provides, in pertinent part:

(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 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).

Although you assert the basic information in the submitted offense report relates to pending criminal litigation by the Ellis County and District Attorney's Office (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 submitted arrest warrant, and arrest warrant affidavit relate to pending criminal litigation. We note the county 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 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 information at issue relates to the pending criminal litigation. Thus, section 552.103 is generally applicable to the 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 or anticipated litigation has already seen or had access to the arrest warrant and 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 and arrest warrant affidavit, such information is not excepted under section 552.103; however, to the extent the opposing party to the pending criminal

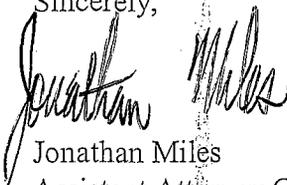
litigation has not already seen or had access to the arrest warrant and arrest warrant affidavit, the county may withhold this information under section 552.103 of the Government Code.

In summary, to the extent the opposing party to the pending criminal litigation has not seen the arrest warrant or arrest warrant affidavit, the sheriff may withhold this information under section 552.103 of the Government Code. To the extent the opposing party has seen or had access to the arrest warrant and arrest warrant affidavit, such information must be released along with the remaining responsive 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, 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,



Jonathan Miles
Assistant Attorney General
Open Records Division

JM/em

Ref: ID# 421068

Enc. Submitted documents

c: Requestor
(w/o enclosures)