



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 26, 2011

Ms. M. Ann Montgomery-Moran
Assistant County and District Attorney
Ellis County
109 South Jackson
Waxahachie, Texas 75165

OR2011-13908

Dear Ms. Montgomery-Moran:

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# 430898.

The Ellis County and District Attorney's Office (the "district attorney") received a request for specified communications pertaining to a named individual. You claim 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.¹

We understand you have marked portions of the submitted information as not responsive to the request. This ruling does not address the public availability of any information that is not responsive to the request and the district attorney is not required to release that information in response to the request.

Section 552.103 of the Government Code provides in part as follows:

¹We 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.

(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 under section 552.103(a).

You provide documentation showing the district attorney received the request for information after a lawsuit styled, *State of Texas v. Brian Jones*, Cause No. 1110294CR, was pending in county court. Based on your representations and our review, we conclude litigation involving the district attorney was pending when the district attorney received the request. However, in order to demonstrate the applicability of section 552.103, a governmental body must explain how the requested information is related to the litigation. ORD 551; *see generally* Gov't Code § 301(e)(1)(A) (governmental body must provide comments explaining why exceptions raised should apply to requested information). You did not submit any arguments explaining how the responsive information, pertaining to a charge for possession of a controlled substance, relates to the pending litigation, which pertains to an assault family violence case. Therefore, we find you have failed to demonstrate the applicability of section 552.103 of the Government Code to this information and none may be withheld on this basis.

Next, we turn to your arguments under section 552.108 of the Government Code. Section 552.108 provides in part:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:

(1) release of the information would interfere with the detection, investigation, or prosecution of crime;

[or]

(4) it is information that:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

(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 [required public disclosure] if:

(1) release of the internal record or notation would interfere with law enforcement or prosecution.

Id. § 552.108(a)(1), (a)(4), (b)(1). 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 the release of the requested information would interfere with law enforcement. *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 relates to a pending investigation and prosecution for family violence and its release would hinder that prosecution. However, as noted above, the information at issue relates to a possession of a controlled substance case. You have not explained, and the submitted documents do not reveal, how the information at issue pertains to the pending prosecution for family violence, nor have you explained how release of this information would interfere with the detection, investigation, or prosecution of that case. Accordingly, we conclude that you have failed to demonstrate the applicability of section 552.108(a)(1) to the information at issue, and the district attorney may not withhold any of the responsive information on that basis.

Sections 552.108(a)(4) is applicable to information that was prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation or that reflects the mental impressions or legal reasoning of an attorney representing the state. Gov't Code § 552.108(a)(4). The information at issue consists of handwritten notes and a prisoner release form pertaining to the drug case. However, you do not provide any arguments explaining how any of the submitted information either was prepared by an attorney representing the state or reflects any attorney's mental processes or legal reasoning. Furthermore, contrary to your statement that the communications relate to the pending family violence case, we find they relate to a charge for possession of a controlled substance. Thus, we conclude you have failed to explain how these documents are subject to section 552.108(a)(4) and they may not be withheld on that basis. *See id.* § 552.301(e)(1)(A), (e)(2) (governmental body must label copy of requested information to indicate which exceptions apply to which parts of the copy).

You also raise section 552.108(b)(1) of the Government Code. Section 552.108(b)(1) encompasses internal law enforcement and prosecution records, the release of which would interfere with ongoing law enforcement and prosecution efforts in general. *See City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet.). This office has concluded that this provision protects certain kinds of information, the disclosure of which might compromise the security or operations of a law enforcement agency. *See, e.g.*, Open Records Decision Nos. 531 (1989) (detailed guidelines regarding police department's use of force policy), 508 (1988) (information relating to future transfers of prisoners), 413 (1984) (sketch showing security measures for forthcoming execution). To claim section 552.108(b)(1), a governmental body must meet its burden of explaining how and why release of the requested information would interfere with law enforcement and crime prevention. Open Records Decision No. 562 at 10 (1990). Further, commonly known policies and techniques may not be withheld under section 552.108. *See, e.g.*, Open Records Decision Nos. 531 at 2-3 (Penal Code provisions, common-law rules, and constitutional limitations on use of force are not protected under section 552.108), 252 at 3 (1980) (governmental body did not meet burden because it did not indicate why investigative procedures and techniques requested were any different from those commonly known with law enforcement and crime prevention). To prevail on its claim that section 552.108(b)(1) excepts information from disclosure, a law enforcement agency must do more than merely make a conclusory assertion that releasing the information would interfere with law enforcement. The determination of whether the release of particular records would interfere with law enforcement is made on a case-by-case basis. Open Records Decision No. 409 at 2 (1984). Upon review, we find the district attorney has failed to demonstrate that release of the responsive information would interfere with law enforcement and crime prevention. We therefore conclude the district attorney may not withhold the information at issue under section 552.108(b)(1). As no other exceptions to disclosure have been raised, the district attorney must release the 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,



Paige Lay
Assistant Attorney General
Open Records Division

PL/bs

Ref: ID# 430898

Enc. Submitted documents

c: Requestor
(w/o enclosures)