



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 28, 2011

Mr. Gerard A. Calderon
Assistant Criminal District Attorney
Bexar County Criminal District Attorney's Office
300 Dolorosa, Fifth Floor
San Antonio, Texas 78205-3030

OR2011-19052

Dear Mr. Calderon:

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# 440320.

The Bexar County District Attorney's Office (the "district attorney") received a request for the evidence logs of the four Bexar County Constables, "all cases the constables have designated as 'closed[,]'" "all policies and procedures regarding the disposal, release, or auction of evidence within the constables' offices[,] and "all documents that have recorded the release/disposal/auction of evidence in closed cases."¹ You claim the requested information is excepted from disclosure under sections 552.101, 552.103, and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

¹The district attorney sought and received clarification of the information requested. *See* Gov't Code § 552.222 (if request for information is unclear, governmental body may ask requestor to clarify request); *see also City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (if governmental entity, acting in good faith, requests clarification of unclear or over-broad request, ten-day period to request attorney general ruling is measured from date request is clarified).

²We 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.

Initially, we note you have submitted a representative sample of evidence logs, but not any information responsive to the other requested categories information. We assume that, to the extent any information responsive to the other requested categories of information existed in the possession of the district attorney when it received the request for information, the district attorney has released it to the requestor. If not, then the district attorney must do so immediately. *See* Gov't Code §§ 552.006, 552.301, 552.302; Open Records Decision No. 664 (2000).

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov't Code § 552.101. You assert the submitted information is confidential pursuant to the common-law physical safety exception that the Texas Supreme Court recognized in *Texas Department of Public Safety v. Cox Texas Newspapers, L.P. & Hearst Newspapers, L.L.C.*, 343 S.W.3d 112, 117 (Tex. 2011) (“freedom from physical harm is an independent interest protected under law, untethered to the right of privacy”). In the *Cox* decision, the Supreme Court recognized, for the first time, a common-law physical safety exception to required disclosure. *Cox*, 343 S.W.3d at 118. Pursuant to this common-law physical safety exception, the court determined “information may be withheld [from public release] if disclosure would create a substantial threat of physical harm.” *Id.* In applying this new standard, the court noted “deference must be afforded” law enforcement experts regarding the probability of harm, but further cautioned “vague assertions of risk will not carry the day.” *Id.* at 119.

You indicate the requested evidence logs contain information about constable offices. You assert this information is confidential under the common-law physical safety exception because “[t]hese constable offices contain evidence rooms with items that, if made public, would make these offices, the constables and their staff, targets from criminal activity.” You also assert “the [c]onstables’ offices would become criminal targets once the public became aware of the number of weapons and drugs [that] were kept in the [c]onstable’s evidence rooms.” Upon review, we find you have made only vague assertions of risk of harm if the submitted information is released. Accordingly, we find you have not established disclosure of the submitted information would create a substantial threat of physical harm to any individual, and the district attorney may not withhold the submitted information under section 552.101 of the Government Code in conjunction with the common-law physical safety exception.

Section 552.101 also encompasses the informer’s privilege, which has long been recognized by Texas courts. *E.g.*, *Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928). The informer’s privilege protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided the subject of the information does not already know the informer’s identity. *See* Open Records Decision No. 208 at 1-2 (1978). The informer’s privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement

agencies, as well as those who report violations of statutes with civil or criminal penalties to “administrative officials having a duty of inspection or of law enforcement within their particular spheres.” Open Records Decision No. 279 at 1-2 (1981) (citing 8 John H. Wigmore, *Evidence in Trials at Common Law*, § 2374, at 767 (J. McNaughton rev. ed. 1961)). The report must be of a violation of a criminal or civil statute. See Open Records Decision Nos. 582 at 2 (1990), 515 at 4 (1988). The privilege excepts the informer’s statement only to the extent necessary to protect that informer’s identity. Open Records Decision No. 549 at 5 (1990).

You assert “by looking at the evidence logs, an informant(s)’ identity may be discerned” and that “one may also discern a pattern of law enforcement techniques, as these logs can be used as a sort of chronology of the officers’ law enforcement activities.” However, you have not identified what information in the submitted documents you seek to withhold under the common-law informer’s privilege. See Gov’t Code § 552.301(e)(2) (governmental body must label copy of information at issue to indicate which exceptions apply to which parts of the information). We also find you have not otherwise established the applicability of the informer’s privilege to any of the submitted information. Thus, we conclude you have failed to establish the submitted information is confidential under the common-law informer’s privilege, and the district attorney may not withhold it under section 552.101 on that ground.

You also assert the submitted information is excepted from disclosure under section 552.103 of the Government Code, which 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.

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).

To establish litigation is reasonably anticipated for purposes of section 552.103, a governmental body must provide this office with “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” *See* Open Records Decision No. 452 at 4 (1986). In the context of anticipated litigation in which the governmental body is the prospective prosecutor or plaintiff, the concrete evidence must at least reflect litigation is “realistically contemplated.” *See* Open Records Decision No. 518 at 5 (1989); *see also* Attorney General Opinion MW-575 (1982) (investigatory file may be withheld if governmental body attorney determines it should be withheld pursuant to section 552.103 and litigation is “reasonably likely to result”). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* ORD 452 at 4.

You assert the submitted information is excepted under section 552.103 because “[t]hese evidence logs are a vital part of a criminal investigation and are used to prosecute criminals.” However, you inform us some of the information in the evidence logs pertains to criminal cases that are closed. We also note you have not identified which of the submitted information, if any, pertains to pending or anticipated criminal investigations or prosecutions. *See* Gov’t Code § 552.301(e)(2). Thus, upon review, we find you have not established the submitted evidence logs are part of pending litigation, or that the district attorney anticipated litigation related to the evidence logs when it received the request for information. Accordingly, we conclude you have failed to establish the submitted information is excepted from disclosure under section 552.103.

Section 552.108 of the Government Code provides in relevant part the following:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of Section 552.021 if:

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

...

(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 the requirements of Section 552.021 if:

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

Id. § 552.108(a)(1), (b)(1). You assert the requested information relates to the detection, investigation and prosecution of criminal activity. However, as noted in part above, you

identified which of the submitted information, if any, pertains to pending criminal investigations. *See id.* § 552.301(e)(2). Upon review, we find you have failed to establish release of the requested evidence logs would interfere with the detection, investigation, or prosecution of crime. Thus, we conclude you have not established the submitted information is excepted from disclosure under section 552.108(a)(1) or (b)(1) of the Government Code. Accordingly, the district attorney must release the requested evidence logs 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, 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/ag

Ref: ID# 440320

Enc. Submitted documents

c: Requestor
(w/o enclosures)