



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

September 22, 1998

Mr. Frank M. Crull
Assistant General Counsel
Texas Department of Public Safety
5805 N. Lamar Boulevard
P.O. Box 4087
Austin, Texas 78773-0001

OR98-2266

Dear Mr. Crull:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID # 118691

The Texas Department of Public Safety (the "DPS") received a request for the following:

any and all records regarding or relating to the death of William Euell Poyner . . . specifically . . . autopsy reports, preliminary autopsy reports, officer's reports, investigative reports, 911 tapes, and tapes of any calls to the Eastland County Sheriff's Department or other law enforcement office by Maxine Poyner requesting assistance.

You state that the DPS will make the portions of the autopsy report currently in its possession available to the requestor.¹ The final version of the full autopsy report with detailed findings is a public record.² We assume that you have released it to the requestor.

You state that the DPS believes that, with the exception of the autopsy report, all of

¹We note that section 552.002 of the Government Code defines public information to include information maintained for a governmental body to which the governmental body has right of access. Therefore, if the DPS has a right of access to the final autopsy report, the DPS cannot withhold the final autopsy report from the requestor merely because it is in the possession of another entity.

²Because you seek to withhold information other than the autopsy report, we assume that you have released to the requestor the final version of the full autopsy report with detailed findings. *See* Crim. Proc. Code art. 49.25, § 11; Open Records Decision Nos. 529 (1989), 21 (1974).

the other information requested is exempt from disclosure pursuant to Government Code § 552.103. You maintain that the other information requested concerns the investigation of a fatality shooting and that as a result of this incident a suit has been filed styled, *Elnor Maxine Poyner, Individually and as Independent Executor of the Estate of William Euell Poyner and as sole heir of William Euell Poyner, Plaintiff vs. County of Eastland, et al.*, Cause No. 37385 in the 91st Judicial District Court, Eastland County, Texas.

When asserting section 552.103(a), a governmental body must establish that the requested information relates to pending or reasonably anticipated litigation.³ Thus, under section 552.103(a) a governmental body's burden is two-pronged. The governmental body must establish that (1) litigation to which the governmental body is a party is either pending or reasonably anticipated, and that (2) the requested information relates to that litigation. *See 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). In this instance, you have failed to meet the requirement that the litigation involve or be expected to involve the governmental body claiming the exemption for purposes of section 552.103(a).

Section 552.103(a) was intended to prevent the use of the Open Records Act as a method of avoiding the rules of discovery in litigation.⁴ Attorney General Opinion JM-1048 at 4 (1989). The litigation exception enables a governmental body to protect its position in litigation by requiring information related to the litigation to be obtained through discovery. Open Records Decision No. 551 at 3 (1990). Although section 552.103(a) gives the attorney for a governmental body discretion to determine whether section 552.103(a) should be claimed, that determination is subject to review by the attorney general. Open Records Decision Nos. 551 at 5 (1990), 511 at 3 (1988).

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue

³Section 552.103(a) exempts from required public disclosure information:

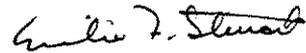
(1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

⁴The Open Records Act is not a substitute for the discovery process under the Texas Rules of Civil Procedure. *See* Attorney General Opinion JM-1048 at 3 (1989) ("the fundamental purposes of the Open Records Act and of civil discovery provisions differ"); Open Records Decision No. 551 at 3-4 (1990) (discussion of relation of Open Records Act to discovery process).

under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Emilie F. Stewart
Assistant Attorney General
Open Records Division

EFS\nc

Ref: ID# 118691

Enclosures: Submitted documents

cc: Richard D. Coan
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(w/o enclosures)