



February 25, 1999

Mr. James M. Kuboviak
County Attorney
Brazos County
300 E. 26th, Suite 325
Bryan, Texas 77803

OR99-0553

Dear Mr. Kuboviak:

You have asked whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 122293.

Brazos County (the "county") received a request for a number of different records, including information about radar units used by the police department, traffic cases, and telephone bills.¹ You assert initially that the county does not have all of the information requested, and also that the requestor seeks itemized budget and expense records that are not maintained in an itemized format. We note that the county has an obligation to make a good faith effort to locate requested records. Open Records Decision No. 561 at 8 (1990). If the request is unclear or too broad, the county may ask the requestor to clarify the request or discuss how the request may be narrowed. Gov't Code § 552. 222(a). However, the county is not obligated to provide information which is not in its possession or that does not exist at the time of the request. Open Records Decision Nos. 561 at 9 (1990) (governmental body does not have to obtain new information); 483 at 2 (1987); 452 at 3 (1986) (open records request applies to information in existence when request is received); 362 at 2 (1983) (governmental body does not have to supply information which does not exist).²

You indicate in correspondence to this office that the county has records which are responsive to part of the request for information and which are in the format requested. It is our understanding that some of this information has already been made available to the requestor. You contend that the remaining responsive records are protected from disclosure under sections 552.103 and 552.108 of the Government Code. Samples of the records you

¹The request was directed to various county offices, specifically to: Custodian of Records, County Judge, County Commissioners, County Sheriff, Treasure/Auditor, County Attorney and Assistant County Attorney. It is our understanding that you seek a decision on behalf of all the county offices to which the request was directed. We note that the Open Records Act does not apply to information held by the judiciary. Gov't Code § 552.003(1)(B).

²You state that some of the information had been maintained by the county but the county has disposed of the information pursuant to its records retention guidelines.

contend are protected from disclosure were submitted to this office for review.³ We will address your arguments as to the categories of requested information that the county indicates it maintains.

Radar Unit Information - The requestor asked for documents concerning the certification or re-certification of employees who operate radar units, radar operation manuals, and other information concerning every radar unit owned or operated by the county since 1985. You contend that release of this information would interfere with the detection, investigation, and prosecution of crime. You supplied information to this office to demonstrate that the county has pending criminal cases that involve the use of county radar units. We have reviewed the information submitted as responsive and your arguments against release. However, it is not apparent that release of the categories of information requested will interfere with the detection, investigation, and prosecution of crime.

You also assert that this information is protected from disclosure under section 552.103(a) of the Government Code. We note initially that section 552.103 was designed to protect "a governmental body's position in litigation, in part, by imposing the necessity that the adverse party develop information through the normal process of discovery." However, the particular motives of an individual requesting records is generally not part of a section 552.103(a) inquiry, as the Open Records Act does not look to the motives of any particular requestor. Gov't Code § 552.222 (governmental body may not make general inquiries of requestor). This helps to protect the purpose of the Open Records Act in providing broad access to public information, Gov't Code § 552.001, because when information is withheld from one individual, that information is likewise protected from all other members of the public. Gov't Code § 552.007 (prohibiting selective disclosure of information).

Thus, a governmental body must meet a multi-pronged test to show that particular records are subject to the section 552.103(a) exception. First, the governmental body must show that litigation is reasonably anticipated or that it is pending. *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. Second, the governmental body must establish how and why the exception is applicable to particular records, by showing the relationship of the subject of the underlying litigation to the records at issue. Open Records Decision No. 638 (1996). You have established that criminal litigation is pending and that the records at issue are related to that pending litigation.

You thus have shown the applicability of the section 552.103(a) exception to these records. We note, however, that once information has been obtained by all parties to the litigation,

³We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision No. 499 (1988), 497 (1988). Here, we do not address any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

no section 552.103(a) interest generally exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). You may withhold the records that the opposing party to the anticipated litigation has not seen or had access to. The applicability of section 552.103(a) also ends once the litigation has concluded. Attorney General Opinion MW-575 (1982), Open Records Decision No. 350 (1982).

Telephone Bills - The requestor asked for information about long distance telephone bills paid for telephones used by law enforcement employees who use or are authorized to use radar units. You express concern that the bills disclose numbers called by law enforcement employees who are involved in the detection, investigation, and prosecution of crime. You assert that the telephone bills are protected from disclosure under section 552.108 because "release would unduly interfere with the county law enforcement's detection, investigation, and prosecution of crime."

In Open Records Decision No. 506 (1988), this office construed a predecessor statute to section 552.108 to protect the mobile telephone numbers of county officials with specific law enforcement duties. We agree that section 552.108(a)(1) protects from disclosure the telephone numbers of employees with specific law enforcement duties, as well as the numbers called in cases which are under active investigation. However, the amount the county pays on long distance telephone bills is clearly public information and not protected from disclosure under section 552.108. See Gov't Code § 552.022(3).

As this information may be withheld from disclosure under section 552.108, we need not further address your section 552.103 argument. We note that, except for the information that may be withheld from disclosure under as addressed above, information that is responsive to the request and that is actually maintained by the county in a format requested must be released to the requestor.

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 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.

Sincerely,



Ruth H. Soucy
Assistant Attorney General
Open Records Division

RHS/ch

RHS/ch

Ref: ID# 122293

Enclosures: Submitted documents

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(w/o enclosures)