



March 31, 1999

Mr. J. David Dodd, III
Nichols, Jackson, Dillard,
Hagar & Smith, L.L.P.
1800 Lincoln Plaza
500 North Akard
Dallas, Texas 75201

OR99-0883

Dear Mr. Dodd:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act (the "act"), chapter 552 of the Government Code. Your request was assigned ID# 123096.

The City of DeSoto Police Department (the "department"), which you represent, received a request for "[a]ny and all files, records, and any other documents in the possession of [the department] pertaining to the arrests, investigations, and prosecutions," of seven specified "defendants or suspects concerning the January 7, 1991 murder of Taco Bell Manager, Jennifer Soto." In response to the request, you submit to this office a "sample" of the records at issue.¹ You state that the submitted information is excepted from disclosure pursuant to sections 552.028, 552.101, 552.103, and 552.108 of the Government Code. We have considered your arguments and claimed exceptions and reviewed the information submitted.

We first consider your assertion that the department need not release the information pursuant to section 552.028 of the Government Code. Section 552.028 provides:

(a) A governmental body is not required to accept or comply with a request for information from an individual who is imprisoned or confined in a correctional facility.

¹We 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 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 that those records contain substantially different types of information than that submitted to this office.

(b) Subsection (a) does not prohibit a governmental body from disclosing to an individual described by that subsection information held by a governmental body pertaining to that individual.

(c) In this section, “correctional facility” has the meaning assigned by Section 1.07(a), Penal Code.

Gov’t Code § 552.028 (as added by Acts 1995, 74th Leg., ch. 302, § 1).

By enacting section 552.028, the legislature intended to prevent inmates from using information obtained through the Open Records Act “to file bogus income tax returns on correctional officers, harass nurses at their home addresses, and send mail to the homes of Texas Department of Criminal Justice employees.” Tex. Sen. Criminal Justice Comm., Bill Analysis, Tex. H.B. 949, 74th Leg., R.S. (1995) (quoting from “Background”) (available through Senate Research Center). After careful consideration and given the stated purpose of section 552.028, we do not believe that the legislature intended to prevent an attorney, who is subject to rules of professional responsibility, from requesting information on behalf of an inmate whom he is representing. Accordingly, we conclude that section 552.028 does not relieve a governmental body of its obligation to accept and comply with an open records request from an *attorney* who is making such a request on behalf of an inmate whom he is representing. Consequently, we now address the exceptions you raise.

You contend that section 552.103 protects all of the information submitted to this office for review. Section 552.103(a) applies to 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.

Additionally, section 552.103(b) provides that the state or a political subdivision is considered to be a party to litigation of a criminal nature until the defendant has exhausted all post-conviction remedies in state and federal court.

The governmental body has the burden of providing relevant facts and documents to show that 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, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas 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). To demonstrate that litigation is reasonably anticipated, the governmental body must furnish evidence that litigation is realistically contemplated and is more than mere conjecture. Open Records Decision No. 518 at 5 (1989). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986).

In this instance, you explain that one of the individuals, identified as a suspect in the submitted records, "has been appointed an attorney to handle a writ of habeas corpus in the United States District Court for the Northern District of Texas. . . . Cause No. 3:98-CV-1778-G." We conclude that you have made the requisite showing that the requested information relates to a pending post-conviction writ of habeas corpus for purposes of section 552.103.

We note, however, that basic information in an offense report generally may not be withheld under section 552.103 or 552.108. *See generally Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.--Houston [14th Dist.] 1975), writ ref'd n.r.e. per curiam, 536 S.W.2d 559 (Tex. 1976); Open Records Decision Nos. 127 (1976) (summarizing types of information considered to be basic information), 597 (1991). Basic information is the type of information that is considered to be front page offense report information even if this information is not actually located on the front page of the offense report. *Id.*

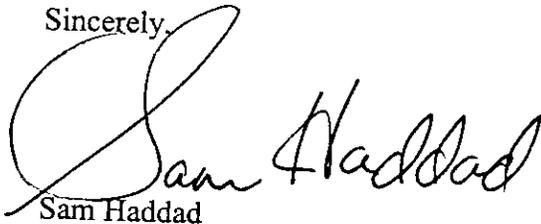
We further note that some documents at issue may be public and should be disclosed. Records that have been filed with a court, including affidavits, are generally public and may not be withheld. *Star-Telegram, Inc. v. Walker*, 834 S.W.2d 54 (Tex. 1992). Section 11 of article 49.25 of the Texas Code of Criminal Procedure provides that an autopsy report, including the full report and detailed findings of an autopsy, is a public record. *See* Open Records Decision No. 529 at 4 (1989). We also note that a probable cause affidavit to support a search warrant is public by statute once the warrant has been executed. *See* Code Crim. Proc. art. 18.01(b).

Finally, we note that, generally, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the criminal defendant or any of his prior

attorneys, in this or related criminal litigation, is not excepted from disclosure under section 552.103(a), and must be disclosed unless otherwise excepted from public disclosure. *See Gov't Code § 552.101, Open Records Decision No. 597 (1991).* Moreover, the applicability of section 552.103(a) ends once the litigation has been concluded.² Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

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,

A handwritten signature in black ink that reads "Sam Haddad". The signature is written in a cursive style with a large, looping initial "S".

Sam Haddad

Assistant Attorney General
Open Records Division

SH/nc

Ref.: ID# 123096

cc: Ms. Tena S. Francis
T.S. Francis & Associates
P. O. Box 443
Wylie, Texas 75098
(w/o enclosures)

²As we resolve this matter under section 552.103, we need not address your claimed exceptions at this time. We note that some of the information in the submitted records may also be confidential by law. Therefore, once litigation has concluded should there be a subsequent request for this information, we advise the department to exercise caution and seek a ruling from this office concerning the records. *See Gov't Code § 552.352 (distribution of confidential information may constitute criminal offense); Fam. Code § 51.14.*