



March 16, 2000

Mr. Greg Buckley
County Attorney
Childress County Courthouse
Box 3
Childress, Texas 79201

OR2000-1045

Dear Mr. Buckley:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 133027.

The Childress County Attorney (the "County Attorney") received a request for various types of information pertaining to the county's arrest, incarceration, transporting, and commitment of a certain individual who died while in the county's custody. In addition, the requestor seeks medical information and the autopsy report regarding this individual. We understand you to claim that the responsive information in the possession of the County Attorney is excepted from required public disclosure under sections 552.103, 552.107, and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

As a preliminary matter, we address your concern that the request for information was not directed to the custodian of the law enforcement records which the requestor seeks, but rather to the County Attorney. The County Attorney, as the officer for public information that received the request, is responsible for releasing or making available public information that is responsive to the request and that exists in the County Attorney's possession. *See* Gov't Code §§ 552.201, 552.203, 552.204; *see* Open Records Decision No. 87 (1975). The Public Information Act does not require a governmental body to make available information which does not exist at the time of the request. Open Records Nos. 605 at 2 (1992), 572 at 1 (1990), 558 at 1 (1990), 362 at 2 (1983). Thus, the County Attorney is under no obligation to obtain or prepare new information in response to the request. *See* Gov't Code §§ 552.002, 552.021, 552.227, 552.351; Open Records Decision

request. See Gov't Code §§ 552.002, 552.021, 552.227, 552.351; Open Records Decision No. 572 (1990). One of the submitted documents appears to be notes prepared by the County Attorney in response to the request for information. If this document was not in existence at the time of the request, then the County Attorney is under no obligation to release it to the requestor. Furthermore, this letter ruling does not address your arguments for withholding information that your office does not possess and which consequently you have not submitted.

You have also expressed concern because in addition to requesting specific information, the requestor also seeks answers to various questions. The Public Information Act does not require a governmental body to answer factual questions. Open Records Nos. 379 (1983), 347 (1982), 555 (1990). Nor does the Public Information Act require a governmental body to perform legal research. Open Records No. 563 (1990). Therefore, you are under no obligation under the Public Information Act to provide answers to the requestor's questions.

Turning to the submitted information, we note that it includes a court order that has been filed with a court. Documents filed with a court are generally considered public. Gov't Code § 552.022(a)(17); see *Star-Telegram, Inc. v. Walker*, 834 S.W.2d 54, 57 (Tex. 1992). Thus, the submitted court order must be released to the requestor.

We turn now to your argument regarding section 552.108. Section 552.108 excepts from required public disclosure:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if:

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

(2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication; or

(3) 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 [and]

(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 . . . if:

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

(2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication; or

(3) the internal record or notation:

(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.

(c) This section does not except from [public disclosure] information that is basic information about an arrested person, an arrest, or a crime.

Gov't Code § 552.108. Generally, a governmental body claiming section 552.108 must reasonably explain, if the information does not supply the explanation on its face, how and why release of the requested information would interfere with law enforcement. *See* Gov't Code §§ 552.108(a)(1), (b)(1), .301(b)(1); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). Although you refer to section 552.108, you do not specify which subsection you believe is implicated, nor do you provide any facts, reasons, or arguments that would explain why any portion of the submitted information falls under section 552.108. Therefore, you may not withhold any of the submitted information under section 552.108.¹

¹We note that you appear to raise section 552.108 partially in regard to an autopsy report which apparently is not yet in the possession of the County Attorney, or at least was not in the County Attorney's possession at the time of the request. As explained above, you have no obligation under the Public Information Act to create or obtain information not in your possession at the time of the request. Open Records Nos. 605 at 2 (1992), 572 at 1 (1990), 558 at 1 (1990), 362 at 2 (1983). However, we caution you that should the

You also argue that the submitted information is excepted under section 552.103 of the Government Code. Section 552.103(a) excepts from disclosure information relating to litigation to which a governmental body is or may be a party. The governmental body has the burden of providing relevant facts and documents to show that section 552.103(a) is applicable in a particular situation. In order to meet this burden, the governmental body must show that at the time that the governmental body receives the request: (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. Gov't Code § 552.103. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (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 County Attorney must meet both prongs of this test for information to be excepted under section 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office with "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.² Open Records Decision No. 555 (1990); see Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. See Open Records Decision No. 331 (1982). Nor does the mere fact that an individual hires an attorney and alleges damages establish that litigation is reasonably anticipated. Open Records Decision No. 361 at 2 (1983). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986).

County Attorney receive the autopsy report and subsequently receive a request for the report, section 11 of article 49.25 of the Code of Criminal Procedure requires that autopsy reports be made available to the public. CODE CRIM. PROC. art. 49.25, §11; Open Records No. 525 (1989).

²In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, see Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, see Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, see Open Records Decision No. 288 (1981).

You concede that while the letter containing the request for information questions the county's conduct, it does not contain a threat of litigation. You imply that the requestor may have made verbal threats, but you do not elaborate as to what was said. Therefore, we find that you have not met your burden of showing that litigation has been either pending or reasonably anticipated since you received the request. Accordingly, the County Attorney may not withhold any of the submitted information under section 552.103. Consequently, you must release all of the submitted information to the requestor.

Finally, you ask various questions regarding the Public Information Act. We appreciate your concern for understanding the Public Information Act. However, due to the number and variety of your questions, we do not address them in this ruling. Enclosed please find this office's Public Information Handbook which we hope may provide answers to some of your questions. In addition, we encourage you to call our office's toll-free hotline at (877) 673-6839 and visit our web site at www.oag.state.tx.us for additional guidance.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll

free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.–Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



E. Joanna Fitzgerald
Assistant Attorney General
Open Records Division

EJF\nc

Ref: ID# 133027

Encl: Submitted documents

cc: Ms. Helen Thompson
112 Helen Drive
Arlington, Texas 76011
(w/o enclosures)