



May 2, 2002

Ms. Mary E. Reveles
Assistant County Attorney
Fort Bend County
301 Jackson, Suite 621
Richmond, Texas 77469-3108

OR2002-2288

Dear Ms. Reveles:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 162261.

The Fort Bend Sheriff's Office (the "sheriff") received a written request for an audiotape of conversations between several sheriff employees regarding a citation issued to a minor for possession of alcohol. You contend that the requested tape recording is excepted from required public disclosure pursuant to section 552.103 of the Government Code.

Section 552.103 is commonly referred to as the "litigation exception." This exception was intended to prevent the use of the Public Information Act as a method of avoiding the rules of discovery in litigation. *See* Attorney General Opinion JM-1048 at 4 (1989). The purpose of section 552.103 is to protect a governmental body's position in litigation by forcing parties to obtain information relating to the litigation through the discovery process. *See* Open Records Decision No. 551 (1990). Further, section 552.103 only applies where the litigation involves or is expected to involve the governmental body which is claiming the exception. *See* Open Records Decision No. 392 (1983) (finding predecessor to section 552.103 only applicable to governmental body who has the litigation interest).

Under section 552.103(a) and (c), the governmental body raising this exception must demonstrate that (1) litigation in which the governmental body is a party was either pending or reasonably anticipated on the date that the governmental body received the records request, and (2) the information at issue is related to that litigation. *See also 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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103.

You contend that the requested tape recording relates to three separate legal actions. You first inform us that civil litigation is currently pending against the sheriff and Fort Bend County in a law suit brought by a former deputy. You further state that the sheriff's Chief Deputy has commenced pre-suit discovery in accordance with Rule 202 of the Texas Rules of Civil Procedure in connection with the Chief Deputy's allegations of defamation. Finally, you inform us that the criminal litigation pertaining to the issued citation is currently pending in the Justice Court, Precinct 3, of Fort Bend County.

With regard to the pending civil litigation against the sheriff and Fort Bend County, you have not informed us of the legal or factual issues raised in that litigation; consequently, we have no basis on which to conclude that the content of the requested tape recording relates to that litigation for purposes of section 552.103. With regard to the anticipated defamation lawsuit, you have not established that the sheriff or the county would be a party to that lawsuit, nor could this office determine from our review of the submitted information how the tape recording would relate to that lawsuit. Finally, you have not explained how the sheriff would be a party to the pending criminal litigation currently before the justice of the peace. We therefore conclude that you have not met your burden of establishing the applicability of section 552.103 in this instance. The sheriff therefore must release the requested tape recording in its entirety.

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).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



David R. Saldivar
Assistant Attorney General
Open Records Division

DRS/RWP/sdk

Ref: ID# 162261

Enc: Submitted audiotape

c: Ms. B.K. Cater
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(w/o enclosures)