



October 24, 2002

Mr. Scott Kelly
Deputy General Counsel
Texas A & M University System
301 Tarrow, 6th Floor
College Station, Texas 77840-7896

OR2002-6043

Dear Mr. Kelly:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 170494.

The Texas Forest Service (the "TFS") received a written request for all files pertaining to timber theft that have been investigated or are currently being investigated by the TFS. The requestor specifically requests the complete investigative file pertaining to the requestor's criminal complaint. You contend that the information coming within the scope of the request is excepted from required public disclosure pursuant to sections 552.103 and 552.108 of the Government Code. This office has also received comments from the requestor. *See Gov't Code § 552.304.*

You characterize the documents you submitted to this office as Exhibit C as being a representative sample of some of the requested documents. You describe the requested documents in Exhibit C as consisting of representative records of criminal investigations that either 1) were closed without a resulting conviction or deferred adjudication or 2) resulted in a criminal conviction or deferred adjudication. However, the documents contained in Exhibit C concern only criminal investigations that did not result in a conviction or deferred adjudication. Consequently, these documents cannot serve as representative samples of criminal investigations that resulted in a criminal conviction or a deferred adjudication. We therefore conclude that in requesting this decision, you did not submit to this office any records pertaining to criminal investigations that resulted in a criminal conviction or a deferred adjudication.

Additionally, although you state that the documents contained in the investigative file pertaining to the requestor's criminal complaint, which you submitted to this office as Exhibit B, pertain to a pending criminal investigation, you have not submitted to this office any other records pertaining to pending criminal investigations, nor have you made the representation that you intend Exhibit B to serve as a representative sample of records

pertaining to other pending criminal investigations. We therefore conclude that you have not submitted to this office a representative sample of any other records pertaining to pending criminal investigations.

Section 552.301 of the Government Code prescribes procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Under section 552.301(e)(1)(D), “[a] governmental body that requests an attorney general decision . . . must . . . not later than the 15th business day after the date of receiving the written request [for information] submit to the attorney general . . . a copy of the specific information requested, or submit representative samples of the information if a voluminous amount of information was requested[.]” Section 552.302 provides that “[i]f a governmental body does not request an attorney general decision as provided by section 552.301 . . . the information requested in writing is presumed to be subject to required public disclosure and must be released unless there is a compelling reason to withhold the information.”

You state that the TFS received this request for information on July 25, 2002. The TFS then had fifteen business days, or until and including August 15, 2002, in which to comply with section 552.301(e)(1)(D). As of the date of this decision, you have not submitted to this office any records pertaining to investigations that resulted in a conviction or deferred adjudication or a representative sample of records pertaining to pending criminal investigations. Thus, with respect to these types of information, you have failed to comply with section 552.301. Therefore, these types of information are presumed to be public and must be released, unless there is a compelling reason to withhold any of the information in question from the public. Gov’t Code § 552.302; *see also Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.--Austin 1990, no writ).

The presumption that information is public under section 552.302 can generally be overcome by demonstrating that the information is confidential by law or that third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982). Section 552.103 is a discretionary exception to disclosure that protects only the governmental body’s interests and may be waived; this exception does not make information confidential or protect third-party interests.¹ The TFS waived this exception in failing to comply with section 552.301. *See generally* Open Records Decision No. 630 at 2-3 (1994). You also raise section 552.108 with respect to this information. This exception can provide a compelling reason for non-disclosure under section 552.302.² However, you have not demonstrated a compelling reason to withhold this information under section 552.108. Therefore, we have no choice but to order all records pertaining to pending criminal investigations, other than Exhibit B, and

¹ *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App. - Dallas 1999, no pet.); Open Records Decision No. 542 at 4 (1990) (governmental body may waive section 552.103).

² *See* Open Records Decision No. 586 at 3 (1991) (need of governmental body, other than governmental body that failed to timely seek open records decision, to withhold information under section 552.108 may, in appropriate circumstances, be compelling reason for non-disclosure).

investigations that have resulted in a criminal conviction or deferred adjudication released pursuant to section 552.302. If you believe that any of this information is confidential and may not lawfully be released, then you must challenge this ruling in court as outlined below.

We now address the applicability of the exceptions you raise to Exhibit B and the representative sample of documents you submitted as Exhibit C.³ As noted above, you contend that the records you submitted to this office are excepted from public disclosure pursuant to sections 552.103 and 552.108 of the Government Code. To secure the protection of section 552.103(a), a governmental body must demonstrate that the requested information relates to pending or reasonably anticipated litigation to which the governmental body is or may be a party. Open Records Decision No. 588 (1991) at 1. The mere chance of litigation will not trigger section 552.103(a). Open Records Decision No. 452 (1986) at 4 and authorities cited therein. To demonstrate that litigation is reasonably anticipated, the governmental body must furnish *concrete* evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* 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.⁴ 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).

In support of your contention that the TFS anticipates litigation, you state that on two occasions the requestor has threatened to sue the TFS in connection with her dissatisfaction with the manner in which the TFS has handled her criminal complaint and that she has stated that she seeks the requested information "to obtain pertinent information about additional potential plaintiffs for her planned suit." Even assuming that these allegations are true, they do not by themselves establish that the requestor has taken objective steps towards pursuing litigation against the TFS. We therefore conclude that you have not established that litigation against the TFS was reasonably anticipated at the time it received this request. Accordingly,

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 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.

⁴In 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).

none of the information submitted to this office may be withheld pursuant to section 552.103 of the Government Code.

You also contend that the submitted information is excepted from required public disclosure pursuant to sections 552.108(a)(1) and 552.108(a)(2) of the Government Code. Section 552.108(a)(1) generally applies to information held by law-enforcement agencies that pertains to pending criminal investigations or prosecutions. Based on your representation that records you submitted to this office as Exhibit B relate to a pending criminal investigation, we conclude that you have met your burden of demonstrating the applicability of section 552.108(a)(1) to Exhibit B. The TFS therefore may withhold most of the information contained in Exhibit B pursuant to section 552.108(a)(1) of the Government Code.

Section 552.108(a)(2) protects law-enforcement records that pertain to criminal investigations and prosecutions that have concluded in a result other than a criminal conviction or deferred adjudication. You contend that the records you submitted to this office as Exhibit C represent cases that are excepted from public disclosure pursuant to section 552.108(a)(2) because those investigations did not result in a conviction or deferred adjudication. Based on your representations and our review of the documents, we conclude that you have met your burden of demonstrating the applicability of section 552.108(a)(2) to most of the information contained in those reports of which Exhibit C is a sample.

Section 552.108 does not, however, except from required public disclosure "basic information about an arrested person, an arrest, or a crime." Gov't Code § 552.108(c). This provision requires the release of "basic information" in accordance with *Houston Chronicle Publishing Company 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). Consequently, the TFS must release to the requestor all basic information from Exhibit B as well as all basic information contained in the investigation reports represented by Exhibit C.

In summary, the TFS must release in their entirety all responsive records pertaining to pending criminal investigations, other than Exhibit B, and investigations that resulted in a conviction or deferred adjudication. Exhibit B may be withheld pursuant to section 552.108(a)(1), and records such as those submitted as Exhibit C may be withheld under section 552.108(a)(2), but basic information must be released from all of these reports.

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).

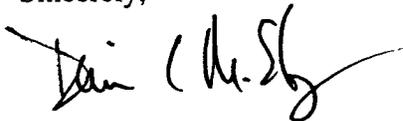
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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,



Denis C. McElroy
Assistant Attorney General
Open Records Division

DCM/RWP/sdk

Ref: ID# 170494

Enc: Submitted documents

c: Ms. Betty Dougia
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(w/o enclosures)