



OFFICE of the ATTORNEY GENERAL  
GREG ABBOTT

December 12, 2002

Ms. Angela M. DeLuca  
Assistant City Attorney  
City of College Station  
P.O. Box 9960  
College Station, Texas 77842

OR2002-7086

Dear Ms. DeLuca:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 173522.

The College Station Police Department (the "department") received a request for electronic communications sent or received from computer-equipped patrol units during a four-hour time interval on August 17, 2002. You inform us that you have redacted Texas driver's license and license plate numbers contained in the requested information in accordance with Open Records Letter Nos. 2001-5574 (2001) and 2002-2022 (2002). *See* Gov't Code § 552.301(a); Open Records Decision No. 673 at 7-8 (2001) (listing criteria for second type of previous determination under Gov't Code § 552.301). You claim that the rest of the requested information is excepted from disclosure under sections 552.101, 552.103, and 552.108 of the Government Code. We have considered the exceptions you claim and have reviewed the information you submitted.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception encompasses information that other statutes make confidential. The department raises section 552.101 in conjunction with article 39.14 of the Code of Criminal Procedure. The department asserts that the requested information relates to a criminal case in which the requestor represents the defendant. The department argues that this information would not be available to the requestor under article 39.14. The department does not demonstrate, however, that article 39.14 makes the requested information confidential. Therefore, the requested information is not excepted from disclosure under section 552.101 of the

Government Code in conjunction with article 39.14 of the Code of Criminal Procedure. *See* Open Records Decision Nos. 658 at 4 (1998) (statutory confidentiality must be express, and confidentiality requirement will not be implied from statutory structure), 478 at 2 (1987) (statutory confidentiality requires express language making certain information confidential or stating that information shall not be released to public).

The department also appears to contend that the requested information is confidential under rules 612 and 615 of the Texas Rules of Evidence. In raising rules 612 and 615, the department cites *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). In *City of Georgetown*, the Texas Supreme Court concluded that the Texas Rules of Civil Procedure and the Texas Rules of Evidence are “other law” that makes information expressly confidential for the purposes of section 552.022 of the Government Code. *See* 53 S.W.3d at 336. We note, however, that section 552.022 is not applicable to the requested information. Furthermore, rules 612 and 615 of the Texas Rules of Evidence are not confidentiality provisions. *See City of Georgetown*, 53 S.W.2d at 337 (“We hold that if documents are privileged or confidential under the Texas Rules of Civil Procedure or Texas Rules of Evidence, they are within a ‘category of information that is expressly made confidential under other law’ within the meaning of section 552.022[.]”); Open Records Decision Nos. 658 at 4 (1998), 478 at 2 (1987). Therefore, the department may not withhold the requested information under Texas Rules of Evidence 612 or 615.

The department also raises section 552.103 of the Government Code. This exception provides in part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature 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.

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov’t Code § 552.103(a), (c). The governmental body has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate: (1) that litigation was pending or reasonably anticipated on the date of its receipt of the request for information *and* (2) that the information at issue is related to that

litigation. *See 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 (Tex. App. – Houston [1<sup>st</sup> Dist.] 1984, writ ref'd n.r.e.); *see also* Open Records Decision No. 551 at 4 (1990). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *Id.*

The department informs us that the requested information relates to an arrest that has resulted in a criminal prosecution in the City of College Station Municipal Court. The department also indicates that the prosecution was pending when it received this request for information. The department does not inform us, however, that it is a party to the criminal case. *See* Gov't Code § 552.103(a); Open Records Decision No. 575 at 2 (1990). Under these circumstances, we require an affirmative representation from the prosecuting attorney representing the governmental body that is a party to the litigation that he or she wants the requested information withheld from disclosure under section 552.103. You state that your office also serves as municipal prosecutor for the City of College Station. In that capacity, you ask that all of the requested information be withheld from disclosure. Having considered your representations, we find that you have established that criminal litigation was pending when the department received this request for information. We also find, however, that only a portion of the requested information relates to the underlying arrest and thus to the pending criminal case. *See* Open Records Decision Nos. 551 at 5 (1990) (attorney general will determine whether governmental body has reasonably established that information at issue is related to litigation), 511 at 2 (1988) (information "relates" to litigation under section 552.103 if its release would impair governmental body's litigation interests). Therefore, based on your representations and our review of the information at issue, we conclude that the requested information that relates to the arrest of the defendant in the pending prosecution is excepted from disclosure at this time under section 552.103. We have marked that information.

In reaching this conclusion under section 552.103, we assume that the opposing party in the criminal case has not seen or had access to the marked information. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing a party seeking information relating to the litigation to obtain such information through discovery procedures. *See* Open Records Decision No. 551 at 4-5 (1990). If the opposing party has seen or had access to information that relates to the pending litigation, through discovery or otherwise, then there is no interest in withholding that information from public disclosure at this time under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Furthermore, the applicability of section 552.103 ends once the related litigation concludes. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Next, we address the department's claims under section 552.108 with regard to the remaining requested information. Section 552.108(a)(1) excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or

prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]” A governmental body that raises section 552.108 must reasonably explain, if the requested information does not supply an explanation on its face, how and why section 552.108 is applicable to the information. *See* Gov’t Code § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986).

The department asserts that the remaining communications are “directly related to the pending prosecution because anything [the arresting officer] did that evening as a College Station Police Officer will be under scrutiny in trial, especially since he is the State’s main witness.” The department also argues that the remaining information relates to the arresting officer’s credibility as a witness, competency to testify, and qualification as an expert witness. The department also claims that the remaining information could be used to create a defense in the criminal case. You contend, in your capacity as a prosecutor, that the release of the remaining information would interfere with the prosecution of the case. We conclude, however, that you have not established that any of the remaining information relates to the arrest that resulted in the pending prosecution. Moreover, you have not otherwise established that the release of any of this information would interfere with the detection, investigation, or prosecution of crime. *See* Gov’t Code § 552.108(a)(1); *Houston Chronicle Publ’g Co. v. City of Houston*, 531 S.W.2d 177, 186-87 (Tex. Civ. App.--Houston [14th Dist.] 1975), *writ ref’d n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases); Open Records Decision No. 434 at 3 (unless records show on their face that disclosure would interfere with law enforcement or prosecution, law enforcement agency must explain how release of particular records or parts thereof will do so). We therefore conclude that none of the remaining information is excepted from disclosure under section 552.108(a)(1).

The department also raises section 552.108(b)(1), which excepts from disclosure “[a]n 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 . . . release of the internal record or notation would interfere with law enforcement or prosecution.” You have not shown that the release of any of the remaining information would interfere with law enforcement or crime prevention. *See* Gov’t Code § 552.108(b)(1); Open Records Decision No. 508 at 4 (1988) (governmental body must demonstrate how release of particular information at issue would interfere with law enforcement efforts, unless information does so on its face). Therefore, the department may not withhold any of the remaining information under section 552.108(b)(1).

In summary, the department may withhold the marked information at this time under section 552.103 of the Government Code. The rest of the requested information is not excepted from disclosure and must be released.

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).

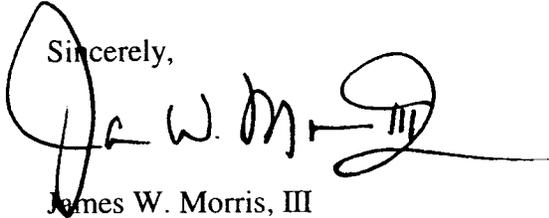
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

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,

A handwritten signature in black ink, appearing to read "J.W. Morris III". The signature is written in a cursive style with a large initial "J" and a distinct "III" at the end.

James W. Morris, III  
Assistant Attorney General  
Open Records Division

JWM/sdk

Ref: ID# 173522

Enc: Submitted documents

c: Mr. Jim W. James  
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(w/o enclosures)