



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 3, 2004

Ms. Julie Joe
Assistant County Attorney
County of Travis
P. O. Box 1748
Austin, Texas 78767

OR2004-1596

Dear Ms. Joe:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 197103.

The Travis County Attorney's Office (the "county attorney") received a request for any and all records related to a specified incident involving the requestor's client. You state that you are releasing some information to the requestor. You claim that the remaining requested information is excepted from disclosure under sections 552.103, 552.108, and 552.119 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.103 provides in part as follows:

- (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 county attorney 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. *Univ. of Tex. Law Sch. v. Tex. 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 county attorney must meet both prongs of this test for information to be excepted under section 552.103(a).

You contend that criminal litigation is currently pending concerning the incident in question. In support of this contention, you state that the defendant in this case received a probated sentence. You state that “[a]lthough the defendant agreed to waive his rights to appeal as part of the plea bargain agreement, the defendant could still attempt to invoke postconviction remedies.” You further state that “should the defendant violate any of his conditions of probation, the [county attorney] can file a motion to revoke the probation.” It appears to this office that the defendant in the criminal case was convicted and placed on probation. We do not believe that criminal litigation is pending in this instance where the defendant has been convicted and placed on probation and he has waived his right to appeal. *Cf.* Gov't Code § 552.001 (Act liberally construed in favor of granting request for information). Because you have provided us with no concrete evidence that litigation in the criminal case is pending, we find that the submitted information is not excepted from disclosure under section 552.103.

Section 552.108(a) of the Government Code excepts from disclosure “[i]nformation 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.” Generally, a governmental body claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See* Gov't Code §§ 552.108(a)(1), (b)(1), .301(e)(1)(a); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). In support of your contention that the information is excepted from disclosure by section 552.108, you state:

In this instance, the responsive information pertains to a criminal case (Cause No. 615248 in County Court at Law No. 6) in which the defendant entered received a probated sentence as part of a plea bargain agreement in a DWI case. [sic] The plea bargain agreement was entered into on November 19,

2003. As of the date the request was received, the defendant was still on probation. Should the defendant violate any of his conditions of probation, the [county attorney] can file a motion to revoke his probation.

We find, however, that as the defendant has entered a plea with the court and received a sentence, neither the investigation nor the prosecution of the matter is pending. *See 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) (court delineates law enforcement interests that are present in active cases). Furthermore, you have not explained how release of the requested information would otherwise interfere with the detection, investigation or prosecution of crime. Accordingly, we conclude that you may not withhold the information under subsection 552.108(a)(1).

Finally, you claim that portions of the requested videotape are excepted under section 552.119 of the Government Code. Section 552.119 of the Government Code provides:

(a) A photograph that depicts a peace officer as defined by Article 2.12, Code of Criminal Procedure, or a security officer commissioned under Section 51.212, Education Code, the release of which would endanger the life or physical safety of the officer, is excepted from [required public disclosure] unless:

- (1) the officer is under indictment or charged with an offense by information;
- (2) the officer is a party in a fire or police civil service hearing or a case in arbitration; or
- (3) the photograph is introduced as evidence in a judicial proceeding.

(b) A photograph exempt from disclosure under Subsection (a) may be made public only if the peace officer or security officer gives written consent to the disclosure.

Gov't Code § 552.119. As you note, the submitted videotape contains depictions of peace officers during the performance of their duties. In this instance, however, you have not demonstrated, nor is it apparent from our review of the submitted information, that release of the videotape would endanger the life or physical safety of any of the officers depicted. We therefore determine that the county attorney may not withhold any portion of the submitted videotape pursuant to section 552.119 of the Government Code.

We note, however, that the submitted documents contain information that is excepted from disclosure under section 552.130 of the Government Code, which excepts from disclosure information that relates to a motor vehicle operator's or driver's license or permit issued by an agency of this state, or a motor vehicle title or registration issued by an agency of this state. *See* Gov't Code § 552.130. Consequently, pursuant to section 552.130, the county attorney must withhold the information we have marked under section 552.130. We note, however, that section 552.130 is based on privacy concerns. Therefore, the requestor has a special right of access to his own driver's license and registration information.¹ *See* Gov't Code § 552.023(b) (governmental body may not deny access to information to person to whom information relates on grounds that information is considered confidential by privacy principles).

In summary, we conclude that the county attorney must withhold the information we have marked under section 552.130 of the Government Code. The remaining information must be released to the requestor.

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

¹Because some of the responsive information is confidential with respect to the general public, if the county attorney receives a future request for this information from an individual other than the requestor or his authorized representative, the county attorney should again seek our decision.

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 Dep't of Pub. 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,



Sarah I. Swanson
Assistant Attorney General
Open Records Division

SIS/lmt

Ref: ID# 197103

Enc. Submitted documents

c: Mr. Eric E. Ostrom
Don W. Kothmann & Associates
700 Lavaca, Suite 1100
Austin, Texas 78701
(w/o enclosures)