



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

March 16, 2004

Mr. Francisco J. Martinez  
Assistant County Attorney  
Cameron County  
974 East Harrison Street  
Brownsville, Texas 78520

OR2004-1993

Dear Mr. Martinez:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 197676.

The Cameron County District Attorney's Office (the "district attorney") received a request for an audiotape or CD of a telephone conversation between the Cameron County sheriff and a named individual and a written transcript of the conversation. You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, and 552.108 of the Government Code.<sup>1</sup> We have considered your arguments and have reviewed the information you submitted.

Initially, we address your statement that "[a] copy of the CD has been obtained by [a television station] and certain excerpts of the conversation have been televised in news reports." We note that if information held by a governmental body has been voluntarily released to any member of the public, then the governmental body may not withhold that same information from further disclosure unless public disclosure of the information is expressly prohibited by law or the information is confidential under law. *See Gov't Code* § 552.007; *Open Records Decision No. 518 at 3 (1989)*. You do not inform this office of any

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<sup>1</sup>You also seek to withhold the submitted information under section 552.022 of the Government Code. We note, however, that this section does not except information from disclosure. Rather, section 552.022 specifies eighteen categories of information that must be released to the public unless the information is expressly confidential by law or, in the case of information encompassed by section 552.022(a)(1), excepted from disclosure under section 552.108. *See Gov't Code* § 552.022(a)(1)-(18).

law, nor are we aware of any law except as noted below, that expressly prohibits public disclosure of the submitted information. On the other hand, a governmental body is not precluded from invoking an exception to the further public disclosure of information that has been released on a limited basis through no official action of the governmental body and against its wishes and policy. *See* Open Records Decision No. 376 at 2 (1983); *see also* Open Records Decision No. 387 at 3 (1983) (information not voluntarily released by governmental body that nevertheless comes into another party's possession not henceforth automatically available to everyone). Because you do not indicate that the district attorney has voluntarily released any of the submitted information to a member of the public, we will address your arguments with regard to this information. To the extent, however, that the district attorney has voluntarily disclosed any of the submitted information to a member of the public, the district attorney may not now withhold any such information under sections 552.103 or 552.108 of the Government Code. *See* Gov't Code § 552.007(b); *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive Gov't Code § 552.103); Open Records Decision Nos. 542 at 4 (1990) (governmental body may waive statutory predecessor to Gov't Code § 552.103), 177 (1977) (governmental body may waive statutory predecessor to Gov't Code § 552.108).

Next, we address your claim under section 552.103 of the Government Code. This section provides 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.
- (b) For purposes of this section, the state or a political subdivision is considered to be a party to litigation of a criminal nature until the applicable statute of limitations has expired or until the defendant has exhausted all appellate and postconviction remedies in state and federal court.
- (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. The governmental body that raises section 552.103 has the burden of providing relevant facts and documents sufficient to establish the applicability of this section to the information that the governmental body 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.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See* Open Records Decision No. 551 at 4 (1990).

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To establish that litigation is reasonably anticipated for purposes of section 552.103, a governmental body must provide this office with “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” *See* Open Records Decision No. 452 at 4 (1986). In the context of anticipated litigation in which the governmental body is the prospective plaintiff, the concrete evidence must at least reflect that litigation is “realistically contemplated.” *See* Open Records Decision No. 518 at 5 (1989); *see also* Attorney General Opinion MW-575 (1982) (finding that investigatory file may be withheld if governmental body attorney determines that it should be withheld pursuant to statutory predecessor to Gov’t Code § 552.103 and that litigation is “reasonably likely to result”). This office also has concluded that litigation was reasonably anticipated where the governmental body was the prospective defendant and the opposing party took the following objective steps toward litigation: (1) filed a complaint with the Equal Employment Opportunity Commission (“EEOC”), *see* Open Records Decision No. 336 (1982); (2) 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 (3) threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

You assert that section 552.103 is applicable in this instance “since [the submitted information] may be the subject of litigation of a criminal nature involving the State of Texas[.]” You state that the applicable statute of limitations has not expired. You also indicate, however, that the district attorney has declined prosecution of the case to which the submitted information is related. Therefore, having considered all of your arguments, we conclude that you have not demonstrated that the submitted information relates to any litigation that was reasonably anticipated on the date of the district attorney’s receipt of this request for information. *See* Gov’t Code § 552.103(c); Open Records Decision No. 331 at 1-2 (1982) (mere chance of litigation not sufficient to trigger statutory predecessor). Likewise, you do not indicate that the submitted information relates to any pending litigation to which your office was a party when the district attorney received this request. We therefore conclude that the district attorney may not withhold any of the submitted information under section 552.103.

You also seek to withhold the submitted information under section 552.108 of the Government Code. Section 552.108(a)(1) excepts from required public 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[.]” Generally, section

552.108(a)(1) is applicable to information that relates to a pending criminal investigation or prosecution. *See* Open Records Decision Nos. 636 at 2 (1995), 252 at 2 (1980). Section 552.108(b)(1) excepts from public disclosure an internal record of a law enforcement agency 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.” Section 552.108(b)(1) is applicable to information, the release of which would interfere with law enforcement or crime prevention. *See* Open Records Decision Nos. 562 at 10 (1990), 531 at 2 (1989).

A governmental body that claims an exception to disclosure under section 552.108 must reasonably explain how and why this exception is applicable to the information that the governmental body seeks to withhold. *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). In this instance, you state that the submitted information relates to a case that was declined by the district attorney’s office. You do not indicate that the submitted information relates to any criminal investigation or prosecution that was pending when the district attorney received the request for this information. We therefore conclude that you have not demonstrated that section 552.108(a)(1) is applicable to the submitted information. *See* Gov’t Code § 552.108(a)(1); *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). Likewise, you have not demonstrated how or why the release of any of this information would interfere with law enforcement or crime prevention. *See* Gov’t Code § 552.108(b)(1); *City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet. h.) (Gov’t Code § 552.108(b)(1) protects information that, if released, would permit private citizens to anticipate weaknesses in police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate state laws); Open Records Decision Nos. 531 at 2-3 (1989) (Penal Code provisions, common law rules, and constitutional limitations on use of force not protected by statutory predecessor), 252 at 3 (1980) (governmental body failed to indicate why investigative procedures and techniques requested were any different from those commonly known). We therefore conclude that the district attorney may not withhold any of the submitted information under section 552.108.

You also raise section 552.101 of the Government Code. This section excepts from required public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Section 552.101 protects information that is deemed to be confidential under other constitutional, statutory, or case law. *See, e.g.*, Open Records Decision Nos. 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality), 611 at 1 (1992) (common-law privacy). You have not identified, and this office is not otherwise aware of, any law under which any of the submitted information is considered to be confidential for the purposes of section 552.101. Therefore, the district attorney may not withhold any of the submitted information under section 552.101 of the Government Code.

We note, however, that the district attorney must withhold a small amount of the submitted information under section 552.117 of the Government Code. Section 552.117(a)(2) excepts from public disclosure the home address, home telephone number, and social security number of a peace officer, as well as information that reveals whether the peace officer has family members, regardless of whether the peace officer complies with sections 552.024 or 552.1175. Section 552.117(a)(2) adopts the definition of peace officer found at article 2.12 of the Code of Criminal Procedure. We have marked the portion of the submitted transcript that the district attorney must withhold under section 552.117(a)(2). The district attorney must also redact this same information from the submitted CD. If the district attorney has no means of redacting this information from the CD, then the entire CD must be withheld from disclosure.

In summary, the district attorney must withhold the information that is excepted from disclosure under section 552.117(a)(2). The rest of the submitted information 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).

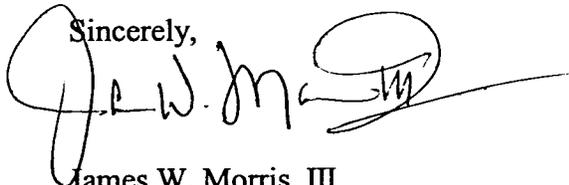
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following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

A handwritten signature in black ink, appearing to read 'J.W. Morris, III', with a long horizontal flourish extending to the right.

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

JWM/sdk

Ref: ID# 197676

Enc: Submitted documents

c: Ms. Patricia Guillermo  
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(w/o enclosures)