



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 30, 2004

Ms. Bertha A. Ontiveros
Assistant County Attorney
El Paso County
500 East San Antonio, Room 503
El Paso, Texas 79901

OR2004-10066

Dear Ms. Ontiveros:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 213029.

The El Paso Sheriff's Department (the "sheriff") received a request for notices of suspensions for the last fifteen years of individuals who have been disciplined under a specific provision of the sheriff's Policy and Procedure Manual. You claim that the requested information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.¹

Section 552.103 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.

...

¹We 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.

(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 sheriff 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 on the date the request for information was received, 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 sheriff must meet both prongs of this test for information to be excepted under 552.103(a).

You state that the information at issue relates to a pending arbitration proceeding between the sheriff and a member of the El Paso County Sheriff's Officers Association, Inc. (the "association"), and you contend that this arbitration constitutes "pending litigation" for purposes of section 552.103. This office has long held that "litigation" within the meaning of section 552.103 of the Government Code includes "contested cases" conducted in a quasi-judicial forum. See Open Records Decision Nos. 474 (1987), 368 (1983), 336, 301 (1982). For example, a "contested case" conducted under the Texas Administrative Procedure Act, chapter 2001 of the Government Code, constitutes "litigation" for purposes of section 552.103. See Open Records Decision Nos. 588 (1991) (former State Board of Insurance proceeding), 301 (1982) (hearing before Public Utilities Commission). When determining whether an proceeding is conducted in a quasi-judicial forum, this office has focused on the following factors: (1) whether the dispute is, for all practical purposes, litigated in an administrative proceeding where discovery takes place, evidence is heard, factual questions are resolved, and a record is made and (2) whether the proceeding is an adjudicative forum of first jurisdiction, *i.e.*, whether judicial review of the proceeding in district court is an appellate review and not the forum for resolving a controversy on the basis of evidence. See ORD No. 588 at 2.

You inform us that the sheriff has established a Sheriff's Department Civil Service System pursuant to Chapter 158 of the Local Government Code and that, in accordance with section 5 of the civil service rules, the sheriff entered into a collective bargaining agreement with the association. The collective bargaining agreement allows for arbitration of appeals of grievances in lieu of an appeal to the civil service commission. Pursuant to section 552.303(c) of the Government Code, on November 2, 2004, this office sent a notice to the sheriff via facsimile requesting that it provide further information regarding the rules and regulations that establish the powers of the arbitrator and that govern such arbitrations. In its response, the sheriff provided us with a copy of these rules and regulations.

The terms of the arbitration agreement provide that (1) the arbitrator may enforce discovery requests, subject to the rules of discovery in Texas civil cases, (2) evidence is heard, (3) factual questions are resolved, (4) the grievance hearing must be public, unless agreed otherwise in writing, and (5) the arbitrator's award is final and binding. The agreement further provides that an arbitration is governed by the rules of the American Arbitration Association, Federal Mediation Conciliation Service, or the National Academy for Arbitrators, as determined by which arbitrator is used, or by the Texas Rules of Civil Procedure for all other cases. Having reviewed your arguments and representations, we find that the arbitration proceeding is conducted in a quasi-judicial forum, and agree that it constitutes "litigation" for purposes of section 552.103. We also agree that the litigation was pending on the date the sheriff received the request for information. Furthermore, we find that the submitted information is related to the pending litigation for purposes of section 552.103. Therefore, the sheriff may generally withhold the information at issue pursuant to section 552.103.

However, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

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

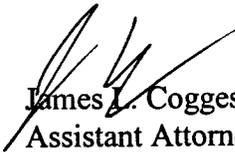
governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The 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,


James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/seg

Ref: ID# 213029

Enc. Submitted documents

c: Mr. Gerald Cichon
Staff Attorney
CLEAT Legal Services
747 East San Antonio #103
El Paso, Texas 79901
(w/o enclosures)