



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 10, 2006

Ms. Holly C. Lytle
Assistant County Attorney
El Paso County
500 East San Antonio, Room 503
El Paso, Texas 79901

OR2006-09040

Dear Ms. Lytle:

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# 256262.

The 34th Judicial District Attorney's Office (the "district attorney") received a request for seven categories of information regarding two named individuals. You state that the district attorney does not maintain information responsive to portions of the request for information.¹ You state that portions of the remaining requested information will be released to the requestor, but you seek to withhold the submitted information under sections 552.101, 552.102, 552.103, 552.107, 552.108, and 552.111 of the Government Code, Texas Rule of Civil Procedure 192.5, article 39.14 of the Code of Criminal Procedure, and Texas Rule of Evidence 503. We have considered your arguments and reviewed the submitted information.

Initially, we note that the submitted information contains a document filed with a court. Section 552.022 of the Government Code provides in relevant part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

¹We note that the Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed).

...

(17) information that is also contained in the public court record[.]

Gov't Code § 552.022(a)(17). Section 552.022(a)(17) makes information filed with a court expressly public. You claim the court-filed document may be withheld under sections 552.103, 552.108, and 552.111 of the Government Code, Texas Rule of Civil Procedure 192.5, and article 39.14 of the Code of Criminal Procedure. However, sections 552.103, 552.108, and 552.111 are discretionary exceptions that protect a governmental body's interests and are therefore not "other law" for purposes of section 552.022(a)(17). See *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 section 552.103); Open Records Decision Nos. 677 at 10 (2002) (attorney work product privilege under section 552.111 may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 (1999) (governmental body may waive section 552.103), 586 (1991) (governmental body may waive section 552.108). You also raise the attorney work product privilege found at rule 192.5 of the Texas Rules of Civil Procedure.² The Texas Supreme Court has held that the Texas Rules of Civil Procedure are "other law" for purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). However, the Texas Rules of Civil Procedure apply only to "actions of a civil nature." See TEX. R. CIV. P. 2. The document at issue pertains to a criminal action. Thus, the department may not withhold the document that is subject to section 552.022 under rule 192.5. Furthermore, article 39.14 governs the discovery of information and the testimony of witnesses in criminal proceedings. Article 39.14 does not expressly make information confidential. 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). Thus, the court-filed document may not be withheld pursuant to article 39.14. As you raise no further exceptions for the court-filed document, it must be released to the requestor.

We next address your arguments for the submitted information that is not subject to section 552.022. Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state or a political subdivision is or may be a party. A governmental body 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

²We note that the district attorney claims the information at issue is privileged attorney work product under rule 503 of the Texas Rules of Evidence. We note, however, that rule 503 protects privileged attorney-client communications. See Texas R. Evid. 503.

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 district attorney must meet both prongs of this test for information to be excepted under section 552.103(a).

You indicate that a pending lawsuit has been filed in United States District Court for the Western District of Texas against the district attorney. We thus find that you have shown that litigation was pending for purposes of section 552.103 at the time the district attorney received the request. You state that Attachments B, C, and D relate to the litigation. Based on your representations and our review of the submitted information, we agree that the remaining information at Attachments B, C, and D is related to the pending litigation. Therefore, other than the court-filed document, which we have marked, you may withhold this portion of the submitted information pursuant to section 552.103.

We note, however, that once the information has been obtained by all parties to the pending litigation, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). We also note that the applicability of section 552.103(a) ends when the litigation has concluded. Attorney General Opinion MW-575 (1982) at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2 (1982).

Section 552.101 of the Government Code excepts from public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This exception encompasses information that is made confidential by another statute. You ask whether information in Attachment F is excepted from disclosure under section 143.089 of the Local Government Code. The provisions of chapter 143 of the Local Government Code only apply to civil service cities. In this instance, the information at issue is held by the county and not by a civil service city. Therefore, the submitted information may not be withheld on this basis.

You also ask whether any part of the information in Attachment E is subject to common-law privacy under sections 552.101 and 552.102 of the Government Code. Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Section 552.102 of the Government Code excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” Gov’t Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the Act. See 540 S.W.2d 668, 683-85. Accordingly, we will consider your section 552.101 and section 552.102 claims together. The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental

disorders, attempted suicide, and injuries to sexual organs. *Id.* Upon review, we find that none of the remaining information is subject to common-law privacy. Therefore, none of the remaining information may be withheld under section 552.101 or section 552.102.

You also ask whether the information at Attachment F is subject to section 552.108 of the Government Code. Section 552.108 provides:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:

(1) release of the information would interfere with the detection, investigation, or prosecution of crime;

(2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication;

(3) it is information relating to a threat against a peace officer collected or disseminated under Section 411.048; or

(4) it is information that:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

(b) An 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 is excepted from [required public disclosure] if:

(1) release of the internal record or notation would interfere with law enforcement or prosecution;

(2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication; or

(3) the internal record or notation:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

(c) This section does not except [from public disclosure] information that is basic information about an arrested person, an arrest, or a crime.

Gov't Code § 552.108. 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 id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986). You have not explained how or why section 552.108 is applicable to the information at Attachment F. Therefore, the district attorney may not withhold any of the information at Attachment F under section 552.108.

In summary, other than the court-filed document, which we have marked, the information submitted at Attachments B, C, and D may be withheld under section 552.103 of the Government Code. The remaining submitted 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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Office of the Attorney General 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. 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,



L. Joseph James
Assistant Attorney General
Open Records Division

LJJ/dh

Ref: ID# 256262

Enc. Submitted documents

c: Mr. Stuart Leeds
303 Texas Avenue, Suite 1003
El Paso, Texas 79901
(w/o enclosures)