



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 5, 2007

Mr. Dib Waldrip
District Attorney
Comal County
150 North Seguin, Suite 307
New Braunfels, Texas 78130-5161

OR2007-03854

Dear Mr. Waldrip:

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# 273909.

The Comal County Disaster Coordinator (the "county") received a request for information related to a 2005-2006 disaster declaration. You state that you will release some of the requested information. You claim that the submitted information is excepted from disclosure under sections 552.103, 552.108, and 552.111 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that any person may submit comments stating why information should or should not be released).

Initially, you assert that some of the submitted information does not qualify as "public information" under the Public Information Act because it falls under section 552.027.

¹Although you raise rule 192.5 of the Texas Rules of Civil Procedure as a potential exception to disclosure, the information for which you claim this privilege is not subject to section 552.022 of the Government Code. Therefore, rule 192.5 does not apply in this instance. *See* Open Records Decision No. 676 at 4 (2002).

Section 552.027 of the Government Code provides:

(a) A governmental body is not required under this chapter to allow the inspection of or to provide a copy of information *in a commercial book or publication purchased or acquired by the governmental body for research purposes* if the book or publication is commercially available to the public.

(b) Although information *in a book or publication* may be made available to the public as a resource material, such as a library book, a governmental body is not required to make a copy of the information in response to a request for public information.

(c) A governmental body shall allow the inspection of information *in a book or publication* that is made part of, incorporated into, or referred to in a rule or policy of a governmental body.

[Emphasis added]. This section is designed to alleviate the burden of providing copies of commercially available books, publications, and resource materials maintained by governmental bodies, such as telephone directories, dictionaries, encyclopedias, statutes, and periodicals. Therefore, section 552.027 may exclude commercially available research material from the definition of “public information.” However, if any information in a book or publication is “made part of, incorporated into, or referred to in a rule or policy of” the district, the district must allow inspection of that information. Gov’t Code § 552.027(c).

You state that the information in Exhibit J is commercially available at little to no cost on the internet, and that the information falls outside of the Public Information Act pursuant to section 552.027. However, in this instance the requestor seeks information relative to particular subjects, and has not requested commercially available publications in particular. Further, you state that the information at issue reveals legal basis and deliberative process behind the county actions at issue. Due to the nature of the request and the connection between this information and the county’s policy decisions, we do not consider these materials to fall within the ambit of section 552.027. Accordingly, we find that all information in Exhibit J constitutes “public information” that is subject to the Public Information Act. *See* Gov’t Code § 552.002.

Section 552.103 of the Government Code 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). 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 on the date the governmental body received the request for information, 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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You state, and provide documentation showing, that a lawsuit, Cause Number 2005-1400C, was filed against the county in Comal County District Court prior to the county receiving the request at issue, and that this litigation is currently on appeal in the Third Court of Appeals. Thus, litigation was pending when the county received the current request. You assert that the litigation pertains to the declaration of disaster and restriction on use of fireworks that is at issue in the current request. You further assert that the documents in Exhibit J represent the legal basis on which the firework restriction was based. Based on your representations, and our review, we find that Exhibit J is related to the pending litigation, and that it may be withheld under section 552.103.

We note, 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 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).

Next, we address your arguments under subsections 552.108(a)(1) and (b)(1). Section 552.108 provides in part:

(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;

...

(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[.]

Gov't Code § 552.108 (a)(1), (b)(1). Subsection 552.108(a)(1) protects information, the release of which would interfere with a particular pending criminal investigation or prosecution, while subsection 552.108(b)(1) encompasses internal law enforcement and prosecution records, the release of which would interfere with on-going law enforcement and prosecution efforts in general. Upon review, we find that you have failed to explain how release of Exhibit K would interfere with a particular criminal investigation. Thus you have not established that section 552.108(a)(1) applies to Exhibit K, and therefore, none of the information may be withheld under this exception.

Next, this office has stated that under the statutory predecessor to section 552.108(b)(1), a governmental body may withhold information that would reveal law enforcement techniques or procedures. *See, e.g.*, Open Records Decision Nos. 531 (1989) (release of detailed use of force guidelines would unduly interfere with law enforcement), 456 (1987) (release of forms containing information regarding location of off-duty police officers in advance would unduly interfere with law enforcement), 413 (1984) (release of sketch showing security measures to be used at next execution would unduly interfere with law enforcement), 409 (1984) (if information regarding certain burglaries exhibit a pattern that reveals investigative techniques, information is excepted under predecessor to section 552.108), 341 (1982) (release of certain information from Department of Public Safety would unduly interfere with law enforcement because release would hamper departmental efforts to detect forgeries of drivers' licenses), 252 (1980) (predecessor to section 552.108 is designed to protect investigative techniques and procedures used in law enforcement), 143 (1976) (disclosure of specific operations or specialized equipment directly related to investigation or detection of crime may be excepted).

To claim this exception, a governmental body must explain how and why release of the requested information would interfere with law enforcement and crime prevention. Gov't Code §§ 552.108(b)(1), .301; Open Records Decision No. 562 at 10 (1990). Generally known policies and techniques may not be withheld under section 552.108. *See, e.g.*, Open Records Decision Nos. 531 at 2-3 (Penal Code provisions, common law rules, and constitutional limitations on use of force are not protected under predecessor to

section 552.108), 252 at 3 (governmental body did not meet burden because it did not indicate why investigative procedures and techniques requested were any different from those commonly known).

You state that the contents of Exhibit K describe the response of law enforcement personnel to certain events, and that knowledge of this information would unduly interfere with law enforcement and prosecution. Upon review of your arguments and the submitted information, we find that the department has established that knowledge of the information we have marked would interfere with law enforcement. However, the remaining portions of the submitted information contain only generally known or administrative information, and the county has not explained how release of this information would interfere with law enforcement. Therefore, the county has failed to demonstrate how subsection 552.108(b)(1) is applicable to any of the remaining information in Exhibit K. Accordingly, we conclude that the county may withhold only the information we have marked under section 552.108(b)(1).

In summary, you may withhold Exhibit J under section 552.103. You may withhold the information we have marked in Exhibit K under section 552.108(b)(1). The remaining 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, 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,

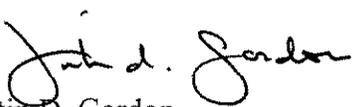
toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

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,



Justin D. Gordon
Assistant Attorney General
Open Records Division

JDG/sdk

Ref: ID# 273909

Enc. Submitted documents

c: Mr. Douglas Kirk
1850 Old Sattler Road
Canyon Lake, Texas 78132
(w/o enclosures)