



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 20, 2009

Ms. Luz E. Sandoval-Walker
Assistant City Attorney
City of El Paso
2 Civic Center Plaza
El Paso, Texas 79901-1196

OR2009-03643

Dear Ms. Sandoval-Walker:

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# 337728.

The El Paso Police Department and the El Paso County Sheriff's Department (collectively, the "department") received three requests from the same requestor for several classes of information relating to three arrests for driving while intoxicated, including mug shots, internal affairs records and field sobriety test training records for eight named police officers, intoxilyzer training records for one named police officer, maintenance and calibration records for a specified intoxilyzer, and maintenance records for video equipment in patrol cars. You state the department has released some of the requested information. You claim that the submitted information is excepted from disclosure under sections 552.103 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.108 provides, in pertinent 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[.]

Gov't Code § 552.108(a)(1). 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 submitted three mug shots and intoxilyzer maintenance records for our review. You state that the submitted information constitutes records relating to three ongoing criminal prosecutions being conducted by the Office of the District Attorney for the 34th Judicial District (the "district attorney"). The district attorney represents that the release of the information relating to Cause Numbers 20080C11105 and 20080C12314 would interfere with those pending criminal prosecutions. Based on this representation and our review, we conclude the release of the submitted information regarding those cases would interfere with the detection, investigation, or prosecution of crime. *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). Therefore, the department may withhold the information relating to Cause Numbers 20080C11105 and 20080C12314 under section 552.108(a)(1).

However, the district attorney does not object to the release of the information relating to Cause Number 20080C11538, and states that the case has been disposed of. We find that you have failed to explain how release of the information relating to Cause Number 20080C11538 would interfere with a particular criminal prosecution. Thus, you have not established that section 552.108(a)(1) applies to the information relating to Cause Number 20080C11538. Therefore, that information may not be withheld under section 552.108. We will therefore address your argument under section 552.103 for this information.

Section 552.103 of the Government Code provides:

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

You claim that section 552.103 excepts the submitted information relating to Cause Number 20080C11538 from required disclosure. We note, however, that the department is not a party to this litigation. See Gov't Code § 552.103(a); Open Records Decision No. 575 at 2 (1990) (stating that predecessor to section 552.103 only applies when governmental body is party to litigation). In such a situation, we require an affirmative representation from the governmental body with the litigation interest that the governmental body wants the information at issue withheld from disclosure under section 552.103. You have not provided such a representation from the district attorney. In fact, as noted above, the district attorney states that this case has been disposed of. Further, the district attorney does not represent that an appeal is pending or reasonably anticipated. Once litigation is neither reasonably anticipated nor pending, section 552.103(a) is no longer applicable. Open Records Decision Nos. 551 at 4 (1990), 350 (1982); see *Thomas v. El Paso County Cmty. Coll. Dist.*, 68 S.W.3d 722, 726 (Tex. App.—El Paso 2001, no pet.). Therefore, the department may not withhold information relating to Cause Number 20080C11538 under section 552.103 of the Government Code.

In summary, the submitted information relating to Cause Numbers 20080C11105 and 20080C12314 may be withheld pursuant to section 552.108(a)(1). The submitted information relating to Cause Number 20080C11538 must be released.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information

under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,

A handwritten signature in cursive script, appearing to read "Karen Stack".

Karen E. Stack
Assistant Attorney General
Open Records Division

KES/sdk

Ref: ID# 337728

Enc. Submitted documents

c: Requestor
(w/o enclosures)