



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

October 2, 2009

Mr. Tommy L. Coleman  
Assistant District Attorney  
Williamson County District Attorney  
405 M.L.K., No. 1  
Georgetown, Texas 78626

OR2009-13912

Dear Mr. Coleman:

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# 357101.

The Williamson County District Attorney (the "district attorney") received a request for all e-mails sent by the district attorney during a specified time period. You claim that the some of the requested information is excepted from disclosure under sections 552.103, 552.108, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

You claim that some of the submitted exhibits are excepted from disclosure under section 552.103 of the Government Code. Section 552.103 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). The district attorney 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) that litigation was pending or reasonably anticipated on the date of the receipt of the request for information and (2) that the information at issue is related to the pending or anticipated 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 [1<sup>st</sup> 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).

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." Open Records Decision No. 452 at 4 (1986). When the governmental body is the prospective plaintiff or prosecutor in the anticipated litigation, 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 section 552.103 and that litigation is "reasonably likely to result"). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. See Open Records Decision No. 452 at 4 (1986).

In this instance, you state that the some of the submitted information relates to an employment dispute of the Williamson County Children's Advocacy Center (the "advocacy center"). You further state that a grievance has been filed with the Texas Workforce Commission against the advocacy center. We note, however, that you have failed to demonstrate that the district attorney is a party to this civil 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). Furthermore, you have not provided this office with an affirmative representation from a governmental body with a litigation interest that it seeks to withhold the information at issue pursuant to section 552.103. Thus, we find you have failed to establish the district attorney reasonably anticipated litigation when it received this request for information. Accordingly, we conclude none of the submitted information may be withheld under section 552.103.

Next, you claim section 552.108(a)(1) of the Government Code for some of the submitted exhibits. Section 552.108 excepts from 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[.]” Gov’t Code § 552.108(a)(1). A governmental body must reasonably explain how and why section 552.108 is applicable to the information at issue. *See id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state that Exhibits 5 and 58 relate to ongoing criminal investigations. In addition, you state that Exhibits 8 and 12 relate to pending criminal prosecutions. Based on your representation, we conclude that the district attorney may withhold Exhibits 5, 8, 12, and 58 under section 552.108(a)(1) of the Government Code. *See Houston Chronicle Publ’g Co. v. City of Houston*, 531 S.W.2d 77 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref’d n.r.e. per curiam*, 536 S.W.2d 59 (Tex. 1976) (court delineates law enforcement interests that are present in active cases).

Next, you seek to withhold Exhibits 32, 49, 67, and 68 under section 552.108(a)(4) and 552.108(b)(3) of the Government Code. 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:

...

(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:

...

(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.

Gov't Code § 552.108(a)(4), (b)(3). As stated above, 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 the governmental body seeks to withhold. *See id.* §§ 552.108, .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986). You contend the information at issue reflects the mental impressions and legal reasoning of the district attorney relating to the preparation of criminal cases, and you indicate that this information was prepared by attorneys representing the state. Upon review, we agree the documents in Exhibits 32, 49, 67, and 68 were either prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation or reflect the mental processes or legal reasoning of an attorney representing the state. Therefore, the district attorney may withhold Exhibits 32, 49, 67, and 68 under sections 552.108(a)(4) and 552.108(b)(3) of the Government Code.

Finally, section 552.137 of the Government Code provides "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act]," unless the owner of the e-mail address has affirmatively consented to its public disclosure. Gov't Code § 552.137(a)-(b). The types of e-mail addresses listed in section 552.137(c) may not be withheld under this exception. Act of May 15, 2001, 77th Leg., R.S., ch. 356, § 1, 2001 Tex. Gen. Laws 651, 651-52, *amended by* Act of May 27, 2009, 81st Leg., R.S., ch. 962, § 7, 2009 Tex. Sess. Law Serv. 2555, 2557 (Vernon) (to be codified as an amendment to Gov't Code § 552.137(c)). Thus, the district attorney must withhold the personal e-mail addresses we have marked under section 552.137, unless the owners of the e-mail addresses have affirmatively consented to their public disclosure. We note that the submitted information also includes an e-mail address that may be the personal e-mail address of the district attorney. Because we are unable to discern whether this e-mail address is a personal e-mail address, we must rule conditionally. To the extent that the other e-mail address we have marked is the personal e-mail address of the district attorney, the district attorney must withhold it under section 552.137. However, if the e-mail address at issue is the district attorney's work e-mail address, it must be released.

In summary, the district attorney may withhold Exhibits 5, 8, 12, and 58 under section 552.108(a)(1) of the Government Code. The district attorney may also withhold Exhibits 32, 49, 67, and 68 under sections 552.108(a)(4) and 552.108(b)(3) of the Government Code. The district attorney must withhold the personal e-mail addresses we have marked under section 552.137, unless the owners of the e-mail addresses have affirmatively consented to their public disclosure. In addition, to the extent that the other e-mail address we have marked is the personal e-mail address of the district attorney, the district attorney must withhold it under section 552.137. The remaining information 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](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, toll free, at (888) 672-6787.

Sincerely,



Tamara Wilcox  
Assistant Attorney General  
Open Records Division

TW/dls

Ref: ID# 357101

Enc. Submitted documents

c: Requestor  
(w/o enclosures)