



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 26, 2013

Ms. Cheryl Elliott Thornton
Assistant County Attorney
Harris County
1019 Congress, 15th Floor
Houston, Texas 77002

OR2013-20665

Dear Ms. Thornton:

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# 506989 (CA File #13PIA0465).

The Harris County Constable Precinct 4 (the "constable's office") received a request for the audio and video recordings of a specified incident. You claim the submitted information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, we note the request only seeks the audio and video recordings of the specified incident. Accordingly, the remaining information you have submitted is not responsive to the instant request for information. This ruling does not address the public availability of non-responsive information, and the constable's office need not release such information in response to the request.

Next, the requestor asserts the requested information was previously released to the media. In support of his claim, the requestor has provided a link to a news story that depicts some of the requested audio and video. The Act does not permit selective disclosure of information to the public. *See* Gov't Code §§ 552.007(b), .021; Open Records Decision No. 463 at 1-2 (1987). Information that has been voluntarily released to a member of the public may not subsequently be withheld from another member of the public, unless public disclosure of the information is expressly prohibited by law or the information is confidential under law. *See* Gov't Code § 552.007(a); Open Records Decision Nos. 518 at 3 (1989), 490

at 2 (1988). Although you seek to withhold the responsive information under section 552.103, this section is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *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. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). As such, section 552.103 does not expressly prohibit the release of information to the public nor does it make information confidential under the Act. Therefore, to the extent the constable's office previously voluntarily released any of the responsive information to a member of the public, it may not now withhold any such information from the present requestor under section 552.103 of the Government Code.

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 sufficient to establish the applicability of section 552.103 to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate: (1) that litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) that the information at issue is related to that litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See* Open Records Decision No. 551 at 4 (1990).

You contend the responsive information is related to pending litigation in which employees of the constable's office in their employment capacities are named as defendants. You state, and provide documentation showing, prior to the constable's office's receipt of the present request for information, a lawsuit styled *David Scherz, Jr. v. Harris County, Texas et al.*, Civil Action No. 4:13-cv-2562, was filed in the United States District Court Southern

Division of Texas, Houston Division. You further state the responsive information is related to the litigation at issue. Based on your representations and our review, we find litigation was pending when the constable's office received the present request for information, and the information at issue is related to the pending litigation for purposes of section 552.103. Accordingly, the constable's office may withhold the responsive information that has not previously been released to a member of the public under section 552.103 of the Government Code.

We note, however, 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 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.

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Nneka Kanu
Assistant Attorney General
Open Records Division

NK/akg

Ref: ID# 506989

Enc. Submitted documents

c: Requestor
(w/o enclosures)