



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

March 18, 2020

Mr. Robert Schell
Assistant Ellis County & District Attorney
Ellis County
109 South Jackson
Waxahachie, Texas 75165

OR2020-08488

Dear Mr. Schell:

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# 817283.

The Ellis County Sheriff’s Office (the “sheriff’s office”) received a request for the incident report pertaining to a specified incident involving the requestor. The sheriff’s office claims the submitted information is excepted from disclosure under sections 552.103, 552.108, and 552.130 of the Government Code.¹ We have considered the exceptions the sheriff’s office claims and reviewed the submitted information.

Initially, we note the submitted information includes information concerning the analysis of the arrestee’s blood alcohol content. Full information concerning the analysis of the specimen must be made available upon the request of the person who has given the specimen at the request of a peace officer. *See* Transp. Code § 724.018. Here, the requestor is the individual who submitted the specimen. The sheriff’s office seeks to withhold this information under sections 552.103 and 552.108 of the Government Code. However, we note a statutory right of access generally prevails over the exceptions to public disclosure under the Act. *See, e.g.,* Open Records Decision Nos. 613 at 4 (1993) (exceptions in Act cannot impinge on statutory right of access to information), 451 (1986) (specific statutory right of access provisions overcome general exception to disclosure under the Act).

¹ Although you also raise section 552.101 of the Government Code for the submitted information in your brief, you provide no arguments explaining the applicability of this exception. Therefore, we assume you have withdrawn it. *See* Gov’t Code §§ 552.301, .302.

Therefore, the sheriff's office must release the information we marked to this requestor pursuant to section 724.018 of the Transportation Code.

Next, we note the remaining information includes a court-filed document. Section 552.022(a)(17) of the Government Code provides for required public disclosure of "information that is also contained in a public court record[.]" unless the information is expressly made confidential under the Act or other law. Gov't Code § 552.022(a)(17). The sheriff's office seeks to withhold the information at issue under section 552.103 of the Government Code. However, this exception is a discretionary exception to disclosure that protects a governmental body's interests and does not make information confidential under the Act. *See id.* § 552.007; *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 Gov't Code § 552.103); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the sheriff's office may not withhold the submitted Magistrate's Warning under section 552.103. As you raise no other exceptions to disclosure for this information, it must be released. However, we will address the sheriff's office's arguments against disclosure of the remaining information.

Next, we address the sheriff's office's argument under section 552.103 of the Government Code against release of the remaining information. Section 552.103 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.

...

(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 governmental body has the burden of providing relevant facts and documents to show 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, orig. proceeding); *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 state the incident at issue relates to a criminal case pending with the Ellis County & District Attorney's Office (the "district attorney's office"). We note the sheriff's office is not a party to the pending case and, thus, does not have a litigation interest in the case for purposes of section 552.103. *See* Gov't Code § 552.103(a); Open Records Decision No. 575 at 2 (1990) (statutory predecessor to section 552.103 only applies when governmental body is party to litigation). Under these circumstances, we require an affirmative representation from the governmental body with the litigation interest that it wants the information at issue withheld from disclosure under section 552.103. Thus, we understand you to request, as the assistant district attorney for the district attorney's office, that the information at issue be withheld because the release of the information at issue would interfere with the prosecution of the pending criminal case. Based on your representations and our review, we conclude the sheriff's office may generally withhold the information at issue on behalf of the district attorney's office under section 552.103 of the Government Code.

We note, however, the information at issue involves alleged criminal activity. Information normally found on the front page of an offense or incident report is generally considered public. *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); *see* Open Records Decision No. 127 (1976). This office has stated basic information about a crime may not be withheld under section 552.103 of the Government Code even if it is related to the litigation. Open Records Decision No. 362 (1983). Thus, we find the basic offense information from the incident report at issue may not be withheld on the basis of section 552.103. Basic front-page information refers to the information held to be public in *Houston Chronicle*. 531 S.W.2d at 186-87; *see also* ORD 127 (summarizing types of information considered to be basic information). Therefore, with the exception of basic information, the city may generally withhold the information at issue under section 552.103.

We note 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. *See* 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. Upon review, we find the submitted DIC-24 form was released to the opposing party to the litigation and may not be withheld under section 552.103. Therefore, with the exception of basic information and the DIC-24 form, the information at issue may be withheld under section 552.103 of the Government Code.² We also note 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).

² As our ruling is dispositive, we need not address your remaining argument against disclosure of this information, except to note basic information held to be public in *Houston Chronicle* is generally not excepted from public disclosure under section 552.108 of the Government Code. Gov't Code § 552.108(c).

We now address your remaining arguments against disclosure for the DIC-24 form. You argue the information at issue is excepted under section 552.108 of the Government Code, which provides the following:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of Section 552.021 if:

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

(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[.]

...

(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 the requirements of Section 552.021 if:

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

(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[.]

Gov't Code § 552.108(a)(1)-(2), (b)(1)-(2). A governmental body raising section 552.108 must explain the applicability of section 552.108. *See id.* § 552.301(e)(1)(A) (governmental body must provide comments explaining why exceptions raised should apply to information requested). You state the information at issue relates to criminal cases that are pending and have not resulted in conviction or deferred adjudication. A governmental body claiming section 552.108(a)(1) or section 552.108(b)(1) must explain how and why the release of the requested information would interfere with law enforcement. *See id.* § 552.108(a)(1), (b)(1); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). Generally, the release of information pertaining to an open case is presumed to interfere with the criminal investigation. *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). However, as noted above, the DIC-24 form at issue has previously been provided to the arrestee. Because this document has previously been released to the arrestee, we find the sheriff's office has not shown its release will interfere with the detection, investigation, or prosecution of crime, and this document may not be withheld under section 552.108(a)(1) or section 552.108(b)(1). *See Gov't Code* § 552.108(a)(1), (b)(1).

A governmental body claiming section 552.108(a)(2) or section 552.108(b)(2) must demonstrate the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. *See id.* § 552.108(a)(2), (b)(2). As noted above, the sheriff's office contends the information at issue pertains to pending criminal cases. Thus, you have failed to demonstrate the information relates to a criminal investigation or prosecution that concluded in a final result other than a conviction or deferred adjudication. The sheriff's office has failed to demonstrate the applicability of either section 552.108(a)(2) or section 552.108(b)(2) to the information at issue and the sheriff's office may not withhold any of it under either of those sections of the Government Code.

In summary, the sheriff's office must release the information we marked to this requestor pursuant to section 724.018 of the Transportation Code. The sheriff's office must release the submitted Magistrate's Warning pursuant to section 552.022 of the Government Code. With the exception of the basic information and the DIC-24 form, which also must be released, the sheriff's office may withhold the remaining information under section 552.103 on behalf of the district attorney's office.³

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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,

Michelle Garza
Assistant Attorney General
Open Records Division

MRG/jxd

³ We note this requestor has a special right of access to some of the information being released: *See* Transp. Code § 724.018; *see also* Gov't Code § 552.023(a) (government body may deny access to person to whom information relates, or that party's representative, solely on grounds that information is considered confidential by privacy principles); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individuals request information concerning themselves). Therefore, if the city receives another request for this information from a different requestor, the city must again seek a ruling from this office.

Mr. Robert Schell - Page 6

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Enc. Submitted documents

c: Requestor
(w/o enclosures)