



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

June 3, 2020

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

OR2020-15320

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# 831351.

The Ellis County Sheriff's Office (the "sheriff's office") received a request for information pertaining to a specified report number. You state the sheriff's office does not have information responsive to a portion of the request.¹ You claim some of the requested information was not properly requested pursuant to section 1701.661 of the Occupations Code. You also claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.108, 552.1175, and 552.130 of the Government Code. We have considered your arguments and reviewed the submitted information, a portion of which consists of a representative sample.²

Initially, you note, and we agree, the requested information includes police officers' body worn camera recordings. Body worn cameras are subject to chapter 1701 of the

¹ The Act does not require a governmental body to release information that did not exist when it received a request, create responsive information, or obtain information that is not held by the governmental body or on its behalf. *See Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

² We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

Occupations Code. Chapter 1701 provides the procedures a requestor must follow when seeking a body worn camera recording. Section 1701.661(a) provides:

A member of the public is required to provide the following information when submitting a written request to a law enforcement agency for information recorded by a body worn camera:

- (1) the date and approximate time of the recording;
- (2) the specific location where the recording occurred; and
- (3) the name of one or more persons known to be a subject of the recording.

Occ. Code § 1701.661(a). In this instance, the requestor does not provide the requisite information under section 1701.661(a). As the requestor did not properly request the body worn camera recordings pursuant to chapter 1701, our ruling does not reach this information and it need not be released. However, pursuant to section 1701.661(b), a “failure to provide all the information required by Subsection (a) to be part of a request for recorded information does not preclude the requestor from making a future request for the same recorded information.” *Id.* § 1701.661(b).

Next, we note the submitted information includes a grand jury indictment. The judiciary is expressly excluded from the requirements of the Act. Gov’t Code § 552.003(1)(B). This office has determined for purposes of the Act, a grand jury is a part of the judiciary and therefore not subject to the Act. *See* Open Records Decision No. 411 (1984). Further, records kept by a governmental body that is acting as an agent for a grand jury are considered records in the constructive possession of the grand jury, and are also not subject to the Act. *See* Open Records Decision Nos. 513 (1988), 411, 398 (1983). The fact that information collected or prepared by another person or entity is submitted to the grand jury does not necessarily mean such information is in the grand jury’s constructive possession when the same information also is held in the other person’s or entity’s own capacity. Information held by another person or entity but not produced at the direction of the grand jury may well be protected under one of the Act’s specific exceptions to disclosure, but such information is not excluded from the reach of the Act by the judiciary exclusion. *See* ORD 513. Thus, to the extent the sheriff’s office holds the information at issue solely as an agent of the grand jury, such information consists of records of the judiciary that are not subject to disclosure under the Act, and the sheriff’s office is not required to release that information in response to the instant request.³ To the extent the sheriff’s office holds the information at issue in its own capacity and not solely as an agent of the grand jury, we will address your arguments against disclosure.

Section 552.103 of the Government Code provides, in part, the following:

³ As we are able to make this determination, we need not address your arguments against disclosure of this information.

(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 sheriff's office 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 sheriff's office 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). The sheriff's office must meet both prongs of this test for information to be excepted under section 552.103(a).

You state the information at issue relates to a criminal prosecution pending in the 443rd Judicial Court of Ellis County. 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 an assistant district attorney for the Ellis County & District Attorney's Office (the "district attorney's office"), that the information at issue be withheld because its release 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.

However, the information at issue involves alleged criminal activity. We note 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). We note basic information includes, among other items, a detailed description of the offense and the identities of the complainants, but does not include the identities of any witnesses

or victims who are not complainants, dates of birth, or motor vehicle record information encompassed by section 552.130 of the Government Code. *See* ORD 127 at 3-4. Accordingly, with the exception of the basic information, the sheriff's office may withhold the remaining information under section 552.103 of the Government Code on behalf of the district attorney's office.⁴

Generally, 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. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to all parties to the anticipated litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. Further, the applicability of section 552.103(a) ends litigation has concluded or is no longer anticipated. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

In summary, as the requestor did not properly request the body worn camera recordings at issue pursuant to section 1701.661 of the Occupations Code, our ruling does not reach this information and the sheriff's office need not release it. To the extent the sheriff's office holds the grand jury indictment solely as an agent of the grand jury, such information consists of records of the judiciary that are not subject to disclosure under the Act, and the sheriff's office is not required to release such information in response to the present request. With the exception of the basic information, which must be released, the sheriff's office may withhold the remaining information under section 552.103 of the Government Code on behalf of the district attorney's office.

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,

Blake Brennan
Assistant Attorney General
Open Records Division

⁴ As our ruling is dispositive, we need not address your remaining arguments against disclosure for this information, except to note basic information described in *Houston Chronicle* is generally not excepted from public disclosure under section 552.108 of the Government Code. Open Records Decision No. 597 (1991).

Mr. Robert Schell - Page 5

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Ref: ID# 831351

Enc. Submitted documents

c: Requestor
(w/o enclosures)