



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

November 30, 1994

Ms. Tamara A. Armstrong
Assistant County Attorney
County of Travis
P.O. Box 1748
Austin, Texas 78767

OR94-793

Dear Ms. Armstrong:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 29445.

The Sheriff of Travis County ("the county") received a request for the personnel file of a former employee. The request is from a representative of the former employee. The county seeks to withhold the requested information from public disclosure based on section 552.103 of the Government Code.

We note that the fact that a requestor is an employee does not mean that the employee has a special right of access to information in his personnel file. See Open Records Decision No. 444 (1986). Likewise, the right of a former employee to his personnel file is coextensive with the right of the public to the file. See Open Records Decision No. 386 (1983). Consequently, though we are concerned here with a request for a former employee's own personnel file, we must consider whether the requested file is excepted from public disclosure under one of the exceptions to required public disclosure in the Open Records Act.

Section 552.103(a) of the Government Code applies to information

(1) relating to litigation of a civil or criminal nature or settlement negotiations, 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; and

(2) that the attorney general or the attorney of the political subdivision has determine should be withheld from public inspection.

To secure the protection of section 552.103(a), a governmental body must demonstrate that requested information "relates" to a pending or reasonably anticipated judicial or quasi-judicial proceeding. Open Records Decision No. 551 (1990). You inform us of two pending civil cases in which both the county and the former employee are named as defendants. You state that one of the cases concerns an automobile accident involving the former employee and the other concerns allegations of wrongful arrest. In regard to the action for wrongful arrest, you state that the personnel file relates to the issue of wrongful arrest and the credibility of the employee as a witness.

We believe that the requested information relates to the pending litigation. We, therefore, conclude that the county may withhold the requested information based on section 552.103 of the Government Code.

In reaching this conclusion, however, we assume that the opposing party to the pending litigation has not previously had access to the records at issue; absent special circumstances, once information has been obtained by all parties to the litigation, e.g., through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349, 320 (1982). If the opposing parties in the litigation have seen or had access to any of the information in these records, there would be no justification for now withholding that information from the requestor pursuant to section 552.103(a). We also note that 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).

Finally, you advise that in the suit for wrongful arrest, it is not clear whether the former employee here is being sued in his individual or official capacity or both. You say that if the plaintiff specifies that the former employee is being sued in his individual capacity only, the county will release the personnel file to the former employee because you believe that the due process clause requires that you do so.

This office has determined that if a governmental entity releases requested information to a co-defendant because the entity concludes that the due process clause of the United States Constitution requires it do so, such release is not a voluntary disclosure of the information for purposes of section 14(a) of former V.T.C.S. article 6252-17a, now section 552.007 of the Government Code. See Open Records Decision No. 454 (1986) at 3. In the situation at hand, therefore, if the plaintiff in the pending litigation specifies that the former employee is being sued in his individual capacity only and the county releases the personnel file to the employee because it believes the United States Constitution requires it do so, the county will not have released the file voluntarily for purposes of section 552.007 of the Government Code. Such a release, therefore, would not waive the county's right to assert that section 552.103 excepts the personnel file from disclosure to the public.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink, appearing to read "Kay Guajardo". The signature is fluid and cursive, written in a professional style.

Kay Guajardo
Assistant Attorney General
Open Government Section

KHG/TCC/rho

Ref.: ID# 29445

Enclosures: Submitted documents

cc: Mr. Douglas J. Powell
Attorney at Law
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