



October 29, 2001

Mr. Steven D. Monté  
Assistant City Attorney  
City of Dallas  
2014 Main Street, Room 501  
Dallas, Texas 75201

OR2001-4934

Dear Mr. Monté:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 154146.

The City of Dallas Police Department (the "department") received a request for thirty-eight categories of information relating to General Order 804, the department's grooming and appearance policies, and the suspension of department police officers. You indicate that you have previously released some of the requested information. You claim that the remainder of the requested information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.

We note that you apparently released some of the requested information in response to a previous request from the requestor's clients. The requestor specifically indicates that this information need not be provided in response to the current request. Therefore, to the extent you have previously released to the requestor's clients information responsive to one of the thirty-eight categories of information in the instant request, you need not release the information again. However, the requestor also indicates that you did not provide information responsive to some of the categories of his clients' previous request. To the extent you possess information responsive to the requestor's clients' previous request that you did not release, you must release that information to the requestor now.<sup>1</sup> See Gov't Code §§ 552.021, .221, .301, .302.

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<sup>1</sup>We note that the department is allowed to withhold information from a requestor without the necessity of requesting a decision from our office to the extent that it has received a "previous determination" from our office allowing it to withhold the information at issue. See Gov't Code § 552.301(a). This office defined what constitutes a previous determination in Open Records Decision No 673 (2001).

In response to the instant request for information, you have submitted a representative sample of documents that appears to represent only a slight portion of the actual information requested. Pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request, among other things, a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. Although you submitted a representative sample of some of the documents responsive to the instant request, it does not appear that you have submitted a copy or representative sample of all of the information responsive to the request. Therefore, to the extent the department maintains information substantially different from the submitted documents that have not already been released to the requestor or his client, you have failed to fully comply with section 552.301(e).

Pursuant to section 552.302 of the Government Code, a governmental body's failure to submit to this office the information required in section 552.301(e) results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). You contend that the requested information is excepted from disclosure under section 552.103 of the Government Code. Section 552.103 is a discretionary exception and cannot provide a compelling reason for overcoming the presumption of openness. *See Open Records Decision No. 551 (1990)*. Therefore, to the extent you maintain responsive information that is substantially different from the submitted information and you have not previously provided the information to the requestor or his clients, you must release that information to the requestor.

With respect to the information you did submit, we note that some of the information is subject to section 552.022 of the Government Code. Section 552.022 provides in relevant part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

...

(10) a substantive rule of general applicability adopted or issued by an agency as authorized by law, and a statement of general policy or interpretation of general applicability formulated and adopted by an agency;

...

(13) a policy statement or interpretation that has been adopted or issued by an agency.

Thus, the personal appearance policies of the various Texas police departments are subject to section 552.022 and must be released unless they are confidential under other law. Section 552.103 is a discretionary exception and is not "other law" for the purpose of section 552.022. Open Records Decision Nos. 663 (1999) (governmental body may waive section 552.103). Therefore, you must release the submitted personal appearance policies of Texas police departments, which we have marked.

With respect to the remainder of the submitted information, we address your argument under section 552.103 on the contingency that this information was not responsive to the requestor's clients' previous request. Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state or a political subdivision is or may be a party. The department 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, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas 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 department must meet both prongs of this test for information to be excepted under section 552.103(a).

The mere chance of litigation will not trigger section 552.103(a). Open Records Decision No. 452 at 4 (1986). To demonstrate that litigation is reasonably anticipated, the governmental body must furnish *concrete* evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986). This office has stated that a pending Equal Employment Opportunity Commission (the "EEOC") complaint indicates litigation is reasonably anticipated. Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982).

You indicate that a department officer has filed a complaint against the department with the EEOC. You further state that the complaint concerns the department's hair policy included in General Order 804. Based on your contentions and our review of the submitted information, we agree that the out-of-state personal appearance policies relate to reasonably anticipated litigation involving the department. Therefore, unless the policies were responsive to the requestor's clients' first request, you may withhold the submitted out-of-state personal appearance policies under section 552.103 of the Government Code.

We note, however, that 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 that the applicability of section 552.103(a) ends when the litigation is concluded. Attorney General Opinion MW-575 (1982) at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2 (1982).

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

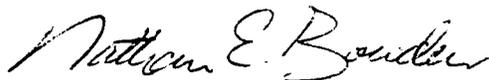
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Nathan E. Bowden  
Assistant Attorney General  
Open Records Division

NEB/sdk

Ref: ID# 154146

Enc: Submitted documents

c: Mr. Kennedy Barnes  
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(w/o enclosures)