



July 23, 2002

Ms. Marva M. Gay  
Senior Assistant County Attorney  
Harris County  
1019 Congress, 15<sup>th</sup> Floor  
Houston, Texas 77002-1700

OR2002-4041

Dear Ms. Gay:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 166055.

The Harris County Sheriff's Department (the "department") received a request for information regarding disciplinary actions against department employees during a specified time period, a listing, daily floor assignment, and ethnic make-up of deputies under the command of a named sergeant, the number of African-Americans hired and terminated from 1992 to the present, and certain personnel information regarding a department lieutenant. The Harris County Attorney (the "county attorney") received a request for several categories of information pertaining to discrimination lawsuits and EEOC complaints filed against the department from 1992 to the present. You state that you have released some responsive information to the requestor. You advise that the department has informed you that it has no information responsive to one item of the request to the department, and that you have no information responsive to four of the items of the request to the county attorney.<sup>1</sup> You claim that the remaining information requested from the department and the county attorney is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and have reviewed the submitted information, a portion of which consists of representative samples.<sup>2</sup>

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<sup>1</sup>The Public Information Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.--San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

<sup>2</sup>We assume that the "sample" of records submitted to this office is truly representative of those 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 that those records contain substantially different types of information than that submitted to this office.

Initially, we note that only the first page of the information submitted as Exhibit D-2 is responsive to the portion of the request seeking the number of African-Americans hired and terminated from 1992 to the present. Accordingly, we do not address whether the remaining nonresponsive information in Exhibit D-2 is subject to disclosure under the Public Information Act (the "Act").

Next, we must note a procedural matter. 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 (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. You did not, however, submit to this office the information responsive to the request to the department for personnel records relating to the department lieutenant within fifteen business days of receiving the request for information. Thus, you have failed to comply with the procedural requirements of section 552.301(e) with regard to this information.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to timely 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). Compelling reasons exist when the information is made confidential by law or affects the interest of a third party. Open Records Decision No. 630 at 3 (1994). Section 552.103, which serves to protect a governmental body's position in litigation, is a discretionary exception and does not provide a compelling reason to overcome the presumption of openness. *See* Open Records Decision Nos. 551 (1990) (section 552.103 does not itself make information confidential), 522 at 4 (1989) (discretionary exceptions in general). Therefore, you may not withhold this information, and it must be released, with the following exception.

Section 552.117(2) excepts from public disclosure information that reveals a peace officer's home address, home telephone number, social security number, and whether the officer has family members.<sup>3</sup> Accordingly, we have marked the information that the department and the county attorney must withhold under section 552.117(2) of the Government Code. *See also* Open Records Decision No. 670 (2001) (providing that a governmental body may withhold information under section 552.117(2) without requesting a decision from this office).

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<sup>3</sup> "Peace officer" is defined by article 2.12 of the Code of Criminal Procedure.

We now address your claim under section 552.103 with respect to the remaining submitted information. Section 552.103 provides as follows:

(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). You claim that the submitted information relates to various litigation both pending and anticipated when the department and the county attorney received the requests. Section 552.103 was intended to prevent the use of the Act as a method of avoiding the rules of discovery in litigation. Attorney General Opinion JM-048 at 4 (1989). The litigation exception enables a governmental body to protect its position in litigation by requiring information related to the litigation to be obtained through discovery. Open Records Decision No. 551 at 3 (1990). A governmental body that raises section 552.103 has the burden of providing relevant facts and documents sufficient to establish the applicability of the exception to the information that it seeks to withhold. To show that the litigation exception is applicable, the county attorney must demonstrate that (1) litigation was pending or reasonably anticipated on the date the county attorney received the requests and (2) the information at issue is related to that litigation. *See* Gov't Code § 552.103(a), (c); *see also* *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).

You state that the requestor is the plaintiff in a lawsuit pending against Harris County, styled *James Manual "Smokie" Phillips v. Harris County*. You advise that this suit, which involves allegations of racial discrimination by the department, is currently pending in the Houston Division of the United States District Court for the Southern District of Texas. You have provided a copy of the plaintiff's third amended complaint. Furthermore, you advise that five charges have been filed with the Equal Employment Opportunity Commission ("EEOC") alleging racial discrimination by the department, and you have submitted the relevant notice forms. *See* Open Records Decision No. 336 (1982) (litigation was reasonably anticipated where the opposing party filed a complaint with the EEOC). Based on your representations and our review of the information at issue, we conclude that you have made the requisite showing that most of the information at issue relates to pending and anticipated

litigation on the date the requests were received. Therefore, the department and county attorney may withhold this information under section 552.103. 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. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing parties in a pending lawsuit is not excepted from disclosure under section 552.103(a), and must be disclosed.<sup>4</sup>

We find that you have not demonstrated how the remaining information, which we have marked, relates to the pending or anticipated litigation involving claims of racial discrimination. Therefore, you may not withhold this information under section 552.103 and it must be released.

In summary, we have marked information that must be withheld pursuant to section 552.117. We have marked information that does not relate to the pending or anticipated litigation for purposes of section 552.103, which must be released. The remaining information may be withheld at this time under section 552.103.

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

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<sup>4</sup> 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).

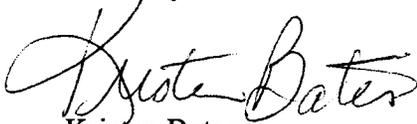
that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

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); *Texas Department of Public 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 Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



Kristen Bates  
Assistant Attorney General  
Open Records Division

KAB/seg

Ref: ID# 166055

Enc. Submitted documents

c: Mr. J. M. "Smokie" Phillips, Jr.  
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(w/o enclosures)