



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 21, 2007

Ms. Elizabeth Guerrero Christ
Denton, Navarro, Rocha & Bernal
2517 North Main Avenue
San Antonio, Texas 78212

OR2007-12321

Dear Ms. Christ:

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# 289715.

The City of Jersey Village (the "city") received a request for "any and all records which recite the name of [a specified individual] including but not limited to his personnel file." You claim that the requested information is excepted from disclosure under sections 552.103, 552.117, and 552.119 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that portions of the submitted information are subject to section 552.022 of the Government Code, which provides in relevant part the following:

(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:

¹Although you assert section 552.1175, the proper exception in this instance is section 552.117 of the Government Code because section 552.117 applies to information the city maintains as the employer of the officer at issue.

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body[;]

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public funds by a governmental body; [and]

...

(17) information that is also contained in the public court record[.]

Gov't Code § 552.022(a)(1), (3), (17). The submitted information includes completed evaluations, information relating to the expenditure of public funds, and a court-filed document. Section 552.022 makes this information expressly public. Therefore, the city may withhold this information, which we have marked, only to the extent it is made confidential under other law. Although the city raises section 552.103 of the Government Code for this information, this exception is discretionary and, thus, does not make information confidential. *See, e.g., 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 section 552.103); Open Records Decision Nos. 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived), 522 at 4 (1989) (discretionary exceptions in general). Accordingly, the city may not withhold the information subject to section 552.022 of the Government Code pursuant to section 552.103. However, because section 552.117 is “other law” for purposes of section 552.022, we will address your argument regarding this section for the information that is subject to section 552.022.

Section 552.117(a)(2) excepts from disclosure “information that relates to the home address, home telephone number, or social security number” of a peace officer, or information that reveals whether the peace officer has family members, regardless of whether the officer complies with section 552.024 or section 552.1175.² Gov't Code § 552.117(a)(2). Accordingly, we conclude that the city must withhold the information we have marked pursuant to section 552.117(a)(2).

The information subject to section 552.022 also contains bank account and routing numbers. Section 552.136 is also other law for purposes of section 552.022.³ Section 552.136 of the

²Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. *See* Crim. Proc. Code art. 2.12.

³The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Government Code states that “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” *Id.* § 552.136. Accordingly, the city must withhold the bank account and routing numbers we have marked pursuant to section 552.136.

We now turn to your arguments for the information not subject to section 552.022. Section 552.103 provides in part:

(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.

Id. § 552.103(a), (c). A governmental body 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 governmental body receives the request for information, and (2) the information at issue is related to that litigation. *See Thomas v. Cornyn*, 71 S.W.3d 473, 487 (Tex. App.—Austin 2002, no pet.); *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 governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You assert that the submitted information is related to pending litigation. You state that the requestor is the plaintiff in a lawsuit filed against the city. We note that the petition was filed before the date of the city’s receipt of this request for information. You further explain that the matter was decided by the trial court but has been appealed by the requestor. You state, and provide documentation showing, that the case is now on active status with the United States Court of Appeals for the 5th Circuit. Section 552.103(b) of the Government Code provides that “[f]or purposes of this section, the state or a political subdivision is considered to be a party to litigation of a criminal nature until the applicable statute of limitations has expired or until the defendant has exhausted all appellate and postconviction remedies in

state and federal court.” Gov’t Code § 552.103(b). Based on your representations and the submitted pleadings, we conclude that the city was a party to pending litigation when it received this request for information. Additionally, you state that the named officer was one of the arresting officers and was a fact witness in the trial. Therefore, we agree that a that the remaining information is related to the pending litigation. Accordingly, this information may be withheld under section 552.103 of the Government Code.⁴

The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information that is related to litigation through discovery procedures. *See* Open Records Decision No. 551 at 4-5 (1990). If the opposing party has seen or had access to information that is related to litigation, through discovery or otherwise, then there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Therefore, to the extent that the opposing party in the pending litigation has seen or had access to the information that is not subject to section 552.022 such information is not excepted from disclosure under section 552.103 and must be released. We note that the applicability of section 552.103 ends once the related litigation has been concluded. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, with the exception of the information we have marked under sections 552.117 and 552.136 of the Government Code, the city must release the information we have marked under section 552.022. The city may withhold the remaining information under section 552.103 of the Government Code.

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).

⁴As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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); *Texas 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 Office of the Attorney General 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,



Melanie J. Villars
Assistant Attorney General
Open Records Division

MJV/jb

Ref: ID# 289715

Enc. Submitted documents

c: Ms. Carol Davis
20 Terravale Court
The Woodlands, Texas 77381
(w/o enclosures)