



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 17, 2007

Mr. Charles Wallace
City of New Braunfels
Office of the City Attorney
P.O. Box 311747
New Braunfels, Texas 78130

OR2007-16655

Dear Mr. Wallace:

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# 297378.

The City of New Braunfels (the "city") received a request for eight categories of information related to "Water Recreation Shuttle Permits and Regulations," including citations issued to three named individuals and the city employees who issued the citations. You state that some responsive information has been released to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.103, 552.108, and 552.142 of the Government Code.¹ We have considered the exception you claim and reviewed the submitted representative sample of information.²

We note that section 552.022 of the Government Code is applicable to some of the submitted information. Section 552.022(a)(1) provides for required public disclosure of "a completed

¹Although you also raised sections 552.026, 552.101, 552.102, 552.114, 552.115, 552.117, 552.1175, 552.119, 552.136, 552.137, 552.140, and 552.147 of the Government Code as exceptions to disclosure, you have not submitted arguments in support of the applicability of those exceptions. Therefore, we assume you no longer urge these exceptions. *See* Gov't Code §§ 552.301(e)(1)(A), .302.

²We assume that 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 that those records contain substantially different types of information than that submitted to this office.

report, audit, evaluation, or investigation made of, for, or by a governmental body[,]" unless the information is expressly confidential under other law or excepted from disclosure under section 552.108 of the Government Code. Gov't Code § 552.022(a)(1). In this instance, the submitted information includes completed reports and evaluations that are subject to section 552.022(a)(1). Section 552.103 is not other law that makes information expressly confidential for the purposes of section 552.022(a)(1). *See id.* § 552.007; *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 No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the completed reports and evaluations that we have marked may not be withheld under section 552.103. As you raise no other exception to disclosure of the completed evaluations, they must be released to the requestor. However, the city claims that the completed reports are excepted under section 552.108; therefore, we will consider the city's claim under section 552.108 for that information, as well as for the remaining information not subject to section 552.022 for which the city claims 552.108. We also will consider the city's claim under section 552.103 with respect to the remaining information that is not subject to section 552.022(a)(1), and under section 552.142 for the information you seek to withhold under that exception.

Section 552.142 of the Government Code pertains to records of certain deferred adjudications. This section provides in part:

(a) Information is excepted from the requirements of Section 552.021 if an order of nondisclosure with respect to the information has been issued under Section 411.081(d).

(b) A person who is the subject of information that is excepted from the requirements of Section 552.021 under this section may deny the occurrence of the arrest and prosecution to which the information relates and the exception of the information under this section, unless the information is being used against the person in a subsequent criminal proceeding.

Gov't Code § 552.142. Section 411.081(d) of the Government Code authorizes a person placed on deferred adjudication for certain offenses to petition the court "for an order of nondisclosure," which prohibits criminal justice agencies from disclosing to the public criminal history record information related to the offense giving rise to the deferred adjudication. *Id.* § 411.081(d). Under this provision, a criminal justice agency may only disclose criminal history record information that is the subject of the order to other criminal justice agencies, for criminal justice or regulatory purposes; non-criminal justice agencies listed in section 411.081(i); or the person who is the subject of the order. *Id.* In this instance, you represent that information responsive to category six of the request includes "records related to deferred adjudications meeting the requirements of section 552.142." Thus, we understand you to indicate that these records are related to deferred adjudications for which orders of nondisclosure were issued pursuant to section 411.081(d) of the

Government Code prohibiting the release of the submitted information. The requestor is not an entity or individual entitled to receive information protected by section 411.081. Accordingly, the city must withhold the information at issue under section 552.142 of the Government Code.³

You claim that some of the submitted records, including the completed reports that are subject to section 552.022(a)(1), are excepted from public disclosure under section 552.108 of the Government Code. Section 552.108 of the Government Code excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime.” Gov’t Code § 552.108(a)(1). Generally, a governmental body claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state that the records at issue relate to pending criminal prosecutions. Based upon this representation, we conclude that the release of the information you have marked would interfere with the detection, investigation, or prosecution of crime. *See 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) (court delineates law enforcement interests that are present in active cases). Accordingly, the city may withhold the information you have marked, including the completed reports that are subject to section 552.022(a)(1), under section 552.108(a)(1) of the Government Code.⁴

You assert that the remaining information is excepted from public disclosure under section 552.103 of the Government Code, which 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

³Because our ruling is dispositive, we need not address your section 552.103 claim for this information.

⁴Because our ruling is dispositive, we need not address your remaining argument for this information.

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 city 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 received the request, 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 city must meet both prongs of this test for information to be excepted under 552.103(a).

In this instance, you inform us that the information at issue relates to three pending criminal prosecutions in the city's municipal court. Based on your representations and our review of the submitted information, we find that litigation was pending when the city received the present request. We also find that the information at issue relates to the pending litigation for the purposes of section 552.103. Therefore, the city may withhold the information at issue pursuant to section 552.103 of the Government Code.

We note, however, that 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 all other parties in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded or is no longer realistically anticipated. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, the completed evaluations must be released to the requestor pursuant to section 552.022(a)(1) of the Government Code. The city must withhold records related to deferred adjudications for which orders of nondisclosure were issued under section 552.142 of the Government Code. The city may withhold the marked information under section 552.108(a)(1) of the Government Code, and the remaining information pursuant to 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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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, 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 challenge 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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/mcf

Ref: ID# 297378

Enc. Submitted documents

c: Mr. Paul Fletcher
Earl & Associates
Riverview Towers
111 Soledad, Suite 1111
San Antonio, Texas 78205
(w/o enclosures)