



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 18, 2007

Ms. Beverly West Stephens
Assistant City Attorney
City of San Antonio
P.O. Box 839966
San Antonio, Texas 78283-3966

OR2007-16718

Dear Ms. Stephens:

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# 297543.

The City of San Antonio (the "city") received three requests for the suspensions and civil service files related to four named police officers involved in a specified incident.¹ You claim that the requested information is excepted from disclosure under sections 552.103, 552.117, 552.130, 552.137, and 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments submitted on behalf of one of the requestors. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Although the city also raises sections 552.101, 552.102, 552.107, 552.108, 552.1175, 552.119, and 552.136 of the Government Code, you have provided no arguments explaining how these exceptions are applicable to the submitted information. Thus, the city has waived its claims under sections 552.107 and 552.108. *See id.* § 552.301(e) (governmental body must provide comments explaining why exceptions raised should apply to information requested); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions in general). Further, the city has not demonstrated that any of the submitted

¹You state that the city received clarification regarding the second and third requests. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).

information is confidential for purposes of sections 552.101, 552.102, 552.1175, 552.119, or 552.136. *See* Gov't Code §§ 552.301, .302.

Next, we address the city's assertion the submitted documents contain a grand jury summons. This office has concluded that grand juries are not governmental bodies that are subject to the Act, so that records that are within the actual or constructive possession of a grand jury are not subject to disclosure under the Act. *See* Open Records Decision No. 513 (1988). When an individual or entity acts at the direction of the grand jury as its agent, information prepared or collected by the agent is within the grand jury's constructive possession and is not subject to the Act. *Id.* at 3. Information that is not so held or maintained is subject to the Act and may be withheld only if a specific exception to disclosure is applicable. *Id.* Thus, to the extent that the information at issue is in the custody of the city as an agent of the grand jury, it is not subject to disclosure under the Act. *Id.* at 4. However, to the extent that this information is not in the custody of the city as an agent of the grand jury, it is subject to disclosure under the Act. In that event, we address your argument for this information, as well as for the remaining submitted information.

Next, we note that the submitted information includes information that is subject to section 552.022 of the Government Code. Section 552.022 provides, in relevant part:

(a) 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:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). The submitted information contains a completed investigation report made for or by the city, which is expressly public under section 552.022(a)(1). Although you claim that this report is excepted from disclosure under section 552.103 of the Government Code, we note that this exception to disclosure is a discretionary exception under the Act that does not constitute "other law" for purposes of section 552.022.² Thus, the city may not withhold the information subject to section 552.022, which we have marked, under section 552.103 of the Government Code. However, you also claim that portions of the information that are subject to section 552.022 are excepted from disclosure under sections 552.117, 552.130, 552.137, and 552.147 of the Government Code. These exceptions constitute other law for purposes of section 552.022. Accordingly, we will

²Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or which implicates the interests of third parties. *See 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); ORD 665 at 2 n.5 (discretionary exceptions generally). Discretionary exceptions, therefore, do not constitute "other law" that makes information confidential.

consider the applicability of these exceptions to the documents that are subject to section 552.022, as well as the remaining information.

Next, we address your claim under section 552.103 of the Government Code for the remaining information not subject to section 552.022. Section 552.103 provides in relevant part 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). A governmental body has the burden of providing relevant facts and documents to show that the section 552.103 exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date that the governmental body received the request for information, 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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103.

You assert that the remaining submitted information is related to a pending lawsuit filed against the city. Case number 2007-CI-12978 was filed on September 7, 2007 in the 45th Judicial District of Bexar County, Texas. The suit was filed before the date of the city's receipt of this request for information. You have provided a copy of the petition and the notice, both of which name the city as a defendant. 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. We also conclude that the remaining information is related to the pending litigation. Therefore, section 552.103 is generally applicable to the remaining submitted information and it may be withheld on that basis.³

³As our ruling is dispositive, we need not address your remaining arguments against the disclosure of this information.

However, once the information at issue has been obtained by all parties to the anticipated litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to the information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, any submitted 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 must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has concluded or is no longer anticipated. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

We now address your claims under sections 552.117, 552.130, 552.137, and 552.147 of the Government Code for the information subject to section 552.022. Section 552.117(a)(2) excepts from disclosure the current and former home addresses and telephone numbers, social security numbers, and family member information regarding a peace officer regardless of whether the officer elected under section 552.024 or 552.1175 of the Government Code to keep such information confidential.⁴ We note that a portion of the information you have marked under section 552.117 does not belong to a peace officer. As such, this information may not be withheld under section 552.117(a)(2).⁵ Accordingly, with the exception of the information we have marked for release, you may withhold the information you have marked under section 552.117(a)(2).⁶

Section 552.130 excepts from disclosure “information [that] relates to. . . a motor vehicle operator’s or driver’s license or permit issued by an agency of this state [or] a motor vehicle title or registration issued by an agency of this state.” Gov’t Code § 552.130. Accordingly, the city must withhold the Texas driver’s license information you have marked pursuant to section 552.130 of the Government Code.

Section 552.137 excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See id.* § 552.137(a)-(c). The e-mail addresses we have marked in the remaining information are not of a type specifically excluded by section 552.137(c). Therefore, the city must withhold the e-mail addresses we have marked in accordance with section 552.137 unless the city receives consent for their release.

⁴We note that you state you have marked the social security numbers at issue under sections 552.117 and 552.147 of the Government Code. Because section 552.117(a)(2) is a mandatory exception, we conclude that the social security numbers belonging to the peace officers at issue must be withheld under this exception.

⁵“Peace officer” is defined by Article 2.12 of the Texas Code of Criminal Procedure.

⁶We note that in Open Records Decision No. 670 (2001), the attorney general determined that all governmental bodies may withhold information that reveals a peace officer’s home address, home telephone number, personal cellular phone number, personal pager number, social security number, and information that reveals whether the individual has family members without the necessity of requesting an attorney general decision as to whether the exception under section 552.117(a)(2) applies.

Finally, you assert that some of the remaining information is excepted under section 552.147 of the Government Code, which provides that “[t]he social security number of a living person is excepted from” required public disclosure under the Act. We agree that the city may withhold the social security numbers you have marked under section 552.147.⁷

In summary, the information held by the city as an agent of the grand jury is in the grand jury’s constructive possession and is not subject to the Act. The city may withhold the information not subject to section 552.022 under section 552.103. The city must withhold the information you have marked under section 552.117(a)(2), except where we have marked for release. The city must withhold the marked Texas driver’s license and motor vehicle record information under section 552.130. The e-mail addresses we have marked must be withheld under section 552.137 unless the city receives consent for their release. The marked social security numbers may be withheld under section 552.147. The remaining information must be released.

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).

⁷We note that section 552.147(b) of the Government Code authorizes a governmental body to redact a living person’s social security number from public release without the necessity of requesting a decision from this office under the Act.

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,



Jordan Johnson
Assistant Attorney General
Open Records Division

JJ/jb

Ref: ID# 297543

Enc. Submitted documents

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