



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 13, 2008

Ms. Beverly West Stephens
Assistant City Attorney
City of San Antonio
P.O. Box 839966
San Antonio, Texas 78283-3996

OR2008-08134

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# 313034.

The City of San Antonio (the "city") received a request for the photographs and civil service files of three named police officers and one firefighter medic. You state that you will withhold social security numbers from the submitted information pursuant to section 552.147 of the Government Code.¹ You claim that the remaining information is excepted from disclosure under sections 552.101, 552.103, 552.119, 552.130, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that you have redacted a peace officer's personal information in the submitted records. This office has issued a previous determination allowing all governmental bodies to redact certain personal information of peace officers under section 552.117(a)(2).² See Open Records Decision No. 670 (2001) (authorizing all governmental bodies that are subject to the Act to withhold home addresses, home telephone numbers, personal cellular telephone numbers, personal pager numbers, social security numbers and family member information of peace officers without the necessity of requesting an attorney general decision under section 552.117(a)(2); see also Gov't Code § 552.301(a); Open Records Decision No. 673 (2001) (delineating circumstances under which attorney general decision constitutes previous determination under Gov't Code

¹We 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.

²"Peace officer" is defined by article 2.12 of the Code of Criminal Procedure.

§ 552.301). Accordingly, the city must withhold the peace officer's personal information under section 552.117(a)(2).

Next, we note that some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides in pertinent 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). Upon review, we find that the submitted information contains a completed investigation report made by or for the city, which is expressly public under section 552.022(a)(1). You claim that the submitted information is excepted under section 552.103 of the Government Code. However, section 552.103 is a discretionary exception that is intended to protect only the interests of the governmental body and may be waived. *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); Open Records Decision No. 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation and does not itself make information confidential); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Accordingly, 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 some of the information that is subject to section 552.022 is excepted from disclosure under sections 552.119, 552.130, and 552.137 of the Government Code, which are other laws for purposes of section 552.022. Accordingly, we will consider the applicability of these exceptions to the information subject to section 552.022.

Section 552.119 of the Government Code provides:

(a) A photograph that depicts a peace officer as defined by Article 2.12, Code of Criminal Procedure, the release of which would endanger the life or physical safety of the officer, is excepted from [required public disclosure] unless:

- (1) the officer is under indictment or charged with an offense by information;
- (2) the officer is a party in a civil service hearing or a case in arbitration; or
- (3) the photograph is introduced as evidence in a judicial proceeding.

- (b) A photograph excepted from disclosure under Subsection (a) may be made public only if the peace officer gives written consent to the disclosure.

Gov't Code § 552.119. In this instance, you state that the peace officers whose photographs you have marked, are currently assigned to undercover positions with the city police department and that release of their photographs would endanger their lives and physical safety. Thus, we find that you have demonstrated the applicability of section 552.119 to the photographs you have marked. Furthermore, none of the exceptions to section 552.119 appear to apply. Therefore, the city must withhold the submitted photographs which you have marked under section 552.119.

You also claim that portions of the completed investigation are excepted from disclosure under section 552.130 of the Government Code. Section 552.130 of the Government Code excepts from disclosure information that relates to a driver's license or permit issued by an agency of this state. Gov't Code § 552.130. Therefore, the city must withhold the Texas driver's license numbers you have marked under section 552.130 of the Government Code.

Section 552.137 states in part that "[e]xcept as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act]," unless the owner of the e-mail address has affirmatively consented to its public disclosure. Gov't Code § 552.137(a). The types of e-mail addresses listed in section 552.137(c) may not be withheld under this exception. *See id.* § 552.137(c). Likewise, section 552.137 is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees. Thus, the city may withhold the e-mail addresses you have marked, except as we have marked for release.

We now address your argument under section 552.103 of the Government Code for the remaining information that is 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). The city has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in this particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date that the request for information is received, 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 section 552.103(a).

You state, and provide documentation showing that, prior to the receipt of this request, a lawsuit styled *Ernest Bustos v. Martini Club Inc.*, Cause No. SA-07-CV-0667-XR, was filed and is currently pending in the United States District Court for the Western District of Texas. You also state that the city and police department are parties to this litigation. Further, you explain how the submitted information is related to the pending litigation. Based on your representations and our review, we determine that litigation was pending when the city received the request. We further find that the submitted information relates to the pending litigation for purposes of section 552.103(a). Thus, the city may withhold the remaining information under section 552.103 of the Government Code.

Generally, 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 party 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. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).³

In summary, with regard to the information that is subject to section 552.022 of the Government Code, which we have marked for release, the city must withhold (1) the photographs you marked under section 552.119, (2) the Texas driver's license numbers under section 552.130, and (3) the e-mail addresses you have marked under section 552.137, except as we have marked for release. The city may withhold the remaining information that is not subject to section 552.022 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

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

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,



Henisha D. Anderson
Assistant Attorney General
Open Records Division

HDA/mcf

Ref: ID# 313034

Enc. Submitted documents

c: Mr. Ernest Bustos
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San Antonio, Texas 78209
(w/o enclosures)