



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

July 1, 2008

Ms. Zindia Thomas
Assistant Attorney General
Public Information Coordinator
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

OR2008-08886

Dear Ms. Thomas:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 313407.

The Office of the Attorney General (the "OAG") received a request for 1) information pertaining to investigations of voter fraud since January 1, 2005; 2) procedures concerning such investigations; and 3) PowerPoint presentations concerning items one and two. The OAG released some information and asserts the remainder is excepted from disclosure under sections 552.101, 552.103, 552.107(2), 552.108, 552.130, and 552.137 of the Government Code.¹ We have considered the OAG's claimed exceptions to disclosure and have reviewed the submitted sample of information.²

¹The OAG has withheld social security numbers pursuant to section 552.147(b) of the Government Code, which 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. In addition, although the OAG originally asserted that section 552.107(2) of the Government Code excepts Exhibit F from public disclosure, it subsequently informed this office it has released some of Exhibit F. It asserts sections 552.103, 552.107(2) and 552.108 except from disclosure the rest of Exhibit F that is the same as the information in Exhibit C.

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.

The OAG contends sections 552.103 and 552.107(2) except Exhibits D - F from public disclosure. Exhibits D - F contain completed reports and investigations and a court record subject to section 552.022(a) of the Government Code, which provides the following information is public information and not excepted from disclosure unless it is 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; [and]

...

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

Gov't Code § 552.022(a)(1), (17). Section 552.103 is a discretionary exception and does not make information confidential; therefore, the OAG may not withhold Exhibits E and F and most of Exhibit D under section 552.103. Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 473 (1987) (section 552.103 may be waived). However, sections 552.107(2) and 552.130 are other laws that make information confidential. Thus, we will consider these provisions for the information subject to section 552.022.

Section 552.130 excepts from public disclosure information relating to a Texas driver's license or motor vehicle title or registration. Thus, we agree the OAG must withhold the Texas motor vehicle information we and it marked in Exhibit D under section 552.130.

Section 552.107(2) provides information that is excepted from disclosure if "a court by order has prohibited disclosure of the information." Gov't Code § 552.107(2). The OAG explains Judge T. John Ward, United States District Court for the Eastern District of Texas, Marshall Division, ordered Exhibit F, produced in *Willie Ray v. State of Tex.*, No. 2:06-CV-385, be kept confidential and used solely for the prosecution of the litigation. The court ordered "Confidential Information" shall not be disseminated. "Confidential Information" is defined as "information containing confidential proprietary and business information and/or trade secrets." The order further found that the litigating parties "may assert that public dissemination and disclosure of Confidential Information could severely injure or damage the party disclosing or producing the Confidential Information and could place that party at a competitive disadvantage." The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It

differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939). The records at issue are criminal investigation records such as offense reports. We are unable to discern how these records are “Confidential Information” subject to the court order. On June 3, 2008 and pursuant to section 552.303 of the Government Code, we asked the OAG to explain how the records submitted as Exhibit F fall under the scope of information made confidential by the court order. *See* Gov’t Code § 552.303 (this office may request additional information from agency that is necessary to render decision). In its June 10, 2008 response, the OAG provided no explanation as to how the offense reports are “confidential proprietary and business information and/or trade secrets.” Accordingly, we conclude because the OAG failed to demonstrate the applicability of the court order to the information in Exhibit F, the OAG may not withhold the information under section 552.107(2).

Next, we consider the OAG’s section 552.103 assertion for the information in Exhibit D that is not subject to section 552.022. Section 552.103, the litigation exception, 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 OAG 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 OAG must meet both prongs of this test for information to be excepted under section 552.103(a).

The OAG explains that before its receipt of the request for information, it has been in litigation “concerning the constitutionality of certain election law violations.” The OAG also states the information relates to this pending and anticipated litigation. After reviewing the OAG’s arguments and the submitted records, we conclude the OAG has shown that litigation was pending before its receipt of the request for information and the information relates to the litigation. Thus, the OAG may withhold the remaining information in Exhibit D that we marked under section 552.103.

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). Further, 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).

Lastly, we consider the OAG’s section 552.108 arguments. Section 552.108(a) 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(a)(1) must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See* Gov’t Code §§ 552.108(a)(1), .301(e)(1)(a); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977).

The OAG argues section 552.108(a)(1) is applicable because Exhibit B relates to a pending criminal investigation conducted by its Criminal Investigations and Criminal Prosecutions Divisions. Based upon this representation, we conclude release of Exhibit B 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).

Section 552.108(a)(2) excepts from disclosure information concerning an investigation that concluded in a result other than conviction or deferred adjudication. A governmental body claiming section 552.108(a)(2) must demonstrate that the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication.

The OAG argues section 552.108(a)(2) is applicable to Exhibit C and the same information in Exhibit F because the criminal investigations conducted by the OAG’s Criminal Investigations and Criminal Prosecutions Divisions resulted in conclusions other than

conviction or deferred adjudication. Because the information pertains to cases that concluded in results other than conviction or deferred adjudication, we agree the OAG may withhold the information under section 552.108(a)(2).

However, section 552.108 does not except from disclosure basic information about an arrested person, an arrest, or a crime. Gov't Code § 552.108(c). Basic information refers to the information held to be public in *Houston Chronicle Publishing 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). Thus, with the exception of the basic front page offense and arrest information, the OAG may withhold Exhibit B under section 552.108(a)(1) and Exhibit C and the same information in Exhibit F under section 552.108(a)(2). Because section 552.108 is dispositive, we do not address the OAG's other arguments.

In summary, the OAG must withhold the Texas motor vehicle information we and it marked in Exhibit D under section 552.130. With the exception of basic information, the OAG may withhold Exhibit B under section 552.108(a)(1) and Exhibit C and the same information in Exhibit F under section 552.108(a)(2). Furthermore, pursuant to section 552.103, the OAG may withhold the information in Exhibit D that is not subject to section 552.022. The OAG must release the remainder.

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). If the governmental body does not file suit over 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).

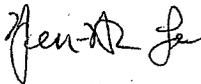
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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,



Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL/sdk

Ref: ID# 313407

Enc: Marked documents

c: Mr. Jim Cornell
948 Columbia
Houston, Texas 77008
(w/o enclosures)