



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 18, 2009

Mr. David M. Swope
Assistant County Attorney
Harris County
1019 Congress, 15th Floor
Houston, Texas 77002

OR2009-17955

Dear Mr. Swope:

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# 364988 (C.A. File No. 09GEN1731).

The Harris County Sheriff's Department Civil Service Commission (the "commission") received a request for the following: (1) the civil service rules and regulations; (2) postings of notifications of all open meetings over a specified time period; (3) copies of the minutes of meetings, and all correspondence regarding a change in classification from detective to sergeant; (4) the names of any sergeant that was transitioned from the rank of detective to the rank of sergeant that retired, was promoted, demoted or resigned; (5) the names of any deputy who was promoted to the rank of sergeant based on retirement, promotion, demotion or resignation of a sergeant transitioned to the rank of sergeant from the rank of detective; and (6) all records indicating the effective date of any promotion to the rank of major over a specified time period. You state that you do not maintain information responsive to category numbers four, five, and six of the request.¹ You claim that the submitted information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

¹We note that the Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

Initially, we note portions of the submitted information consist of notices and agendas of commission meetings. The notices and agendas of a governmental body's public meetings are specifically made public under the Open Meetings Act, chapter 551 of the Government Code. *See* Gov't Code §§ 551.022 (minutes and tape recordings of open meeting are public records and shall be available for public inspection and copying upon request), 551.043 (notice of meeting of governmental body must be posted in a place readily accessible to general public at least 72 hours before scheduled time of meeting), 551.053-.054 (district governing bodies required to post notice of meeting at a place convenient to the public in administrative office of district). Accordingly, the notices and agendas of the commission meetings, which we have marked, must be released in accordance with section 551.022 of the Government Code.

Next, we note that the remaining information contains the commission's civil service regulations which are published on the commission's website. This information is subject to disclosure under section 552.022(a)(15) of the Government Code, which provides for required disclosure of "information regarded as open to the public under an agency's policies[.]" Gov't Code § 552.022(a)(15). Although you claim the information at issue is excepted from disclosure under section 552.103 of the Government Code, section 552.103 is a discretionary exception that protects a governmental body's interests and may be waived. *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 Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.103 is not other law that makes information confidential for purposes of section 552.022. Therefore, the commission may not withhold the civil service regulations, which we have marked, under section 552.103 of the Government Code. As you raise no further exceptions to disclosure of this information, it must be released to the requestor.

We now address your argument to withhold the remaining information under section 552.103 of the Government Code, which provides in 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 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 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). The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You inform us, and provide documentation showing that, prior to the commission's receipt of the present request for information, the commission was named as a defendant in a lawsuit filed by the requestor, styled *Wendell Wayne Kuhlman, Jr. v. Harris County Sheriff's Department Civil Service Commission and Harris County Sheriff Adrian Garcia In His Official Capacity*, cause number 2009-52873. We therefore agree that litigation was pending on the date the commission received the request. Furthermore, you state that the submitted information relates to the pending litigation for purposes of section 552.103. Based upon your arguments and representations, we find that the information at issue is related to the pending litigation for purposes of section 552.103. Therefore, the commission may withhold the remaining information under section 552.103 of the Government Code.

We note, however, that once the information has been obtained by all parties to the pending litigation, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). We also note that the applicability of section 552.103(a) ends when the litigation has concluded. Attorney General Opinion MW-575 (1982) at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2 (1982).

In summary, the commission must release the information we have marked under section 551.022 of the Government Code and section 552.022(a)(15) of the Government Code. The commission may withhold the remaining information under section 552.103 of the Government Code.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free,

at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Adam Leiber
Assistant Attorney General
Open Records Division

ACL/rl

Ref: ID# 364988

Enc. Submitted documents

cc: Requestor
(w/o enclosures)