ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 21, 2010

Ms. Elizabeth S. Horn
Assistant City Attorney
City of Carrollton
P.O. Box 110535
Carrollton, Texas 75011-0535

OR2010-07369

Dear Ms. Horn:

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# 380196.

The City of Carrollton (the "city") received a request for the internal affairs records for a named police officer. The Carrollton Police Department (the "department") received a request for a specified incident report. The requestor also asked the department if a named officer's duties have changed, and, if so, what they are and since when. You claim that the submitted information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.[1]

Initially, we understand you to assert that the request to the department was an improper request. Section 552.301(c) of the Government Code provides that "a written request includes a request made in writing that is sent to the officer for public information, or the person designated by that officer, by electronic mail or facsimile transmission." Gov't Code

[1]We 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.

§ 552.301(c). You argue that because this e-mail request was made to a staff member of the department, instead of the custodian of records, this e-mail request was not a proper written request, and therefore did not require the department to respond. We note, however, that although the department was not required to respond, the department did treat the request for information as a proper written request and subsequently requested a decision from our office under the Act. Accordingly, we will rule on the information submitted in response to this request.

Next, you claim the department does not have information responsive to the portion of the request pertaining to a possible change in the named officer's duties. We note that the Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.— San Antonio 1978, writ dism'd); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990).

We note the information submitted in response to the request to the department consists of a completed incident report made by the department, which is subject to section 552.022(a)(1) of the Government Code. Section 552.022(a)(1) provides for the required public disclosure of "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). Although you raise section 552.103 of the Government Code, this section is a discretionary exception to disclosure that protects the governmental body's interests 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); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.103 is not "other law" that makes information confidential for the purposes of section 552.022. Therefore, the department may not withhold the submitted incident report under section 552.103 of the Government Code. However, we note portions of the incident report are subject to sections 552.101 and 552.130 of the Government Code.[2] Because information subject to section 552.022 may be withheld under sections 552.101 and 552.130, we will address the applicability of these sections to this information.

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses information made confidential by other statutes such as section section 411.192 of the Government Code, which governs the release of information maintained by the Texas Department of Public Safety ("DPS")

[2]The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

concerning the licensure of an individual to carry a concealed handgun. Section 411.192 provides, in part:

> (a) The [DPS] shall disclose to a criminal justice agency information contained in its files and records regarding whether a named individual or any individual named in a specified list is licensed under this subchapter. Information on an individual subject to disclosure under this section includes the individual's name, date of birth, gender, race, and zip code. Except as otherwise provided by this section and by Section 411.193, all other records maintained under this subchapter are confidential and are not subject to mandatory disclosure under the open records law, Chapter 552.

Gov't Code § 411.192(a). We have marked a portion of the submitted incident report that is related to a concealed handgun license. It appears the department obtained that information from DPS. In this instance, the requestor is not a criminal justice agency. Therefore, the department must withhold the concealed handgun license information we have marked pursuant to section 552.101 in conjunction with section 411.192 of the Government Code.

Next, section 552.130 of the Government Code 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. Gov't Code § 552.130(a)(1). Accordingly, the department must withhold the Texas license plate number we have marked in the incident report under section 552.130 of the Government Code.[3]

We now turn to your argument under section 552.103 for the information that is not subject to section 552.022. Section 552.103 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.
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> . . .
>
> (c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure

[3]We note that this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including a Texas license plate number under section 552.130, without the necessity of requesting an attorney general decision.

> 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.

Id. § 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, 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 552.103(a).

You state, and provide documentation showing, that prior to the city's receipt of this request, a lawsuit styled *Shomari Staten v. The City of Carrollton Texas, and Officer David Tatom,* Civil Action No. 3:10-CV-00342 was filed and is currently pending in the United States District Court for the Northern District of Texas, Dallas Division. You indicate the submitted internal affairs information is directly related to the pending litigation because it pertains to the officer who is named in the lawsuit. Based on your representation, we find this information is related to pending litigation to which the city was a party on the date the request was received and may be withheld under section 552.103 of the Government Code.

We note that once the information at issue has been obtained by all parties to the pending 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). We also note that 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).

In summary, the information we have marked in the incident report under sections 552.101 and 552.130 of the Government Code must be withheld. The remaining portions of the incident report must be released. The submitted internal affairs information may be withheld 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,

Tamara H Holland

Tamara H. Holland
Assistant Attorney General
Open Records Division

THH/jb

Ref: ID# 380196

Enc. Submitted documents

c: Requestor
(w/o enclosures)