



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 19, 2011

Mr. Ben Stool
Assistant District Attorney
Dallas County District Attorney's Office
411 Elm Street, Suite 500
Dallas, Texas 75202-3384

OR2011-13520

Dear Mr. Stool:

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# 430310.

The Dallas County Constable, Precinct 1 (the "county") received a request for the investigation file and personnel file and information pertaining to the termination of a named individual. You claim the submitted information is excepted from disclosure under sections 552.103 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹ We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we note the requested information includes the deputy's personnel file. Although you state you have submitted a representative sample of the requested information, the submitted representative sample consists exclusively of records of the county's investigation and termination of the deputy. Thus, we find the submitted information is not representative of the information responsive to the part of the request seeking the deputy's personnel file. We therefore assume the county has released any other personnel records relating to the

¹We assume the "representative sample" of records submitted to this office is truly representative of the requested records at issue. This ruling neither reaches nor authorizes the county to withhold any information that is substantially different from the submitted information. *See* Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 (1988), 497 (1988).

former deputy that existed when the county received the request for information. If the county has not released any such information, it must do so at this time.² *See id.* §§552.221, .301, .302; Open Records Decision No. 664 (2000) (if governmental body concludes no exceptions apply to requested information, it must release information as soon as possible).

Next, we must determine whether the county complied with section 552.301 of the Government Code in requesting this decision. Section 552.301 prescribes procedures a governmental body must follow in asking this office to determine whether information is excepted from public disclosure under the Act. *See* Gov't Code § 552.301(a). Section 552.301(e)(1)(A) requires the governmental body to submit to this office "written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld[.]" *Id.* § 552.301(e)(1)(A). Section 552.301(e-1) provides as follows:

A governmental body that submits written comments to the attorney general under Subsection (e)(1)(A) shall send a copy of those comments to the person who requested the information from the governmental body not later than the 15th business day after the date of receiving the written request. If the written comments disclose or contain the substance of the information requested, the copy of the comments provided to the person must be a redacted copy.

Id. § 552.301(e-1). You have provided our office with a copy of the written comments the county provided to the requestor pursuant to section 552.301(e-1). The requestor states, and we agree, that except for part of one sentence, the county has redacted its entire argument under section 552.108 of the Government Code from the requestor's copy of the county's comments. We note the redacted portion of the county's comments neither discloses nor contains the substance of the information requested. We therefore conclude the county failed to comply with section 552.301(e-1) of the Government Code in requesting a decision under section 552.108.

Section 552.108 is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 586 at 1-2 (1991) (statutory predecessor to Gov't Code § 552.108 may be waived), 177 at 3 (1977) (same). In failing to comply with section 552.301(e-1) with regard to its claim under section 552.108, the county has waived this exception because it is not a compelling reason to withhold the information. *See* Gov't Code § 552.302. Therefore, the

²We note the Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

county may not withhold any of the submitted information under section 552.108 of the Government Code.

Next, we note the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a)(1) provides for required public disclosure of “a completed report, audit, evaluation, or investigation made of, for, or by a governmental body,” unless the information is excepted from disclosure under section 552.108 of the Government Code or is expressly confidential under other law. *Id.* § 552.022(a)(1). In this instance, the submitted information consists of a completed investigation made by or for the county that is subject to section 552.022(a)(1). Although you seek to withhold the submitted information under section 552.103 of the Government Code, that section is a discretionary exception to disclosure that protects a governmental body’s interests and may be waived. *See id.* § 552.107; *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 Gov’t Code § 552.103); ORD 665 at 2 n.5. As such, section 552.103 is not other law that makes information expressly confidential for purposes of section 552.022(a)(1). Therefore, the county may not withhold any of the submitted information under section 552.103 of the Government Code. However, as section 552.101 of the Government Code is other law for purposes of section 552.022, we will consider the applicability of section 552.101 to the submitted information.³

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 1701.454 of the Occupations Code, which governs the public availability of information submitted to the Texas Commission on Law Enforcement Officer Standards and Education (“TCLEOSE”) under subchapter J of chapter 1701 of the Occupations Code. Section 1701.454 provides as follows:

- (a) All information submitted to [TCLEOSE] under this subchapter is confidential and is not subject to disclosure under Chapter 552, Government Code, unless the person resigned or was terminated due to substantiated incidents of excessive force or violations of the law other than traffic offenses.
- (b) Except as provided by this subchapter, a [TCLEOSE] member or other person may not release information submitted under this subchapter.

³The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Act of May 23, 2011, 82nd Leg., R.S., S.B. 545, § 4 (to be codified as an amendment to Occ. Code § 1701.454). The submitted information includes information that was submitted to TCLEOSE pursuant to subchapter J of chapter 1701 of the Occupations Code. Furthermore, the information at issue does not indicate the named officer resigned or was terminated due to substantiated incidents of excessive force or violations of the law other than traffic offenses. Therefore, the county must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code.

We note some of the materials at issue may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; see Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, the county must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code. The county must release the remaining information; however, any copyrighted information may only be released in compliance with copyright law.

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,



Claire V. Morris Sloan
Assistant Attorney General
Open Records Division

CVMS/agn

Ref: ID# 430310

Enc. Submitted documents

c: Requestor
(w/o enclosures)