



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 28, 2011

Ms. Jennifer C. Cohen
Assistant General Counsel
Texas Department of Public Safety
P.O. Box 4087
Austin, Texas 78773-0001

OR2011-17449

Dear Ms. Cohen:

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# 437184 (PIR# 11-2184).

The Texas Department of Public Safety (the "department") received a request for all records pertaining to the "Criminal Investigations Division/Drug Section Captain's Promotional examinations and oral board interviews of July 2011." You claim the submitted officer personnel and examination records are 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.

You claim the submitted department officers' personnel records are excepted from disclosure under section 552.101 of the Government Code in conjunction with section 411.00755 of the Government Code. We note this office issued Open Records Letter No. 2010-12863 (2010), a previous determination authorizing the department to withhold personnel records of commissioned officers of the department under section 552.101 of the Government Code in conjunction with section 411.00755 of the Government Code, unless the exceptions to confidentiality listed in section 411.00755(b)(1)-(12) or the release provisions listed in section 411.00755(c) are applicable. *See* Gov't Code § 411.00755(b)(1)-(12), (c). In this instance, the submitted personnel records include the requestor's personnel records. Section 411.00755(c)(3) states the "department may release any personnel record of a commissioned officer . . . with written authorization of the officer who is the subject of the record." *Id.* § 411.00755(c)(3). Thus, we find the release provision in section 411.00755(c)(3) is applicable to the requestor's submitted personnel records. As such, the department may not withhold the requestor's personnel records under section 411.00755 pursuant to Open Records Letter No. 2010-12863. As you have not

claimed any other exceptions to disclosure for this information, the department must release the requestor's submitted personnel records to the requestor.

As for the remaining submitted personnel records, we note some of the information is subject to section 411.00755(b)(1)-(12), but there is no indication the release provisions listed in section 411.00755(c) apply. Therefore, with the exception of any information subject to section 411.00755(b)(1)-(12), the department must withhold the remaining submitted personnel records under section 552.101 of the Government Code in conjunction with section 411.00755 of the Government Code pursuant to Open Records Letter No. 2010-12863. *See* Open Records Decision No. 673 (2001) (governmental body may rely on previous determination when elements of law, facts, and circumstances have not changed, decision concludes specific, clearly delineated category of information is excepted, and governmental body is explicitly informed it need not seek a decision from this office to withhold information in response to future requests). To the extent the remaining submitted personnel records are subject to section 411.00755(b)(1)-(12) of the Government Code, you have not claimed any other exceptions to disclosure for those records and, thus, the department must release those records.

We note a portion of the submitted examination records is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

Without limiting the amount or kind of information that is public information under [the Act], the following categories of information are public information and not excepted from required disclosure unless made confidential under [the Act] or other law:

(15) information regarded as open to the public under an agency's policies[.]

Act of May 30, 2011, 82nd Leg., R.S., S.B. 602, § 2 (to be codified as an amendment to Gov't Code § 552.022(a)). The submitted examination records contain a job posting. Although you assert this information is excepted from disclosure under section 552.103 of the Government Code, this section is discretionary and does not make information confidential under the Act. *Id.* §§ 3-26, 28-37 (providing for "confidentiality" of information under specified exceptions); *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. 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the department may not withhold the job posting subject to section 552.022, which we have marked, under section 552.103 of the Government Code. As you have not claimed any other exceptions to disclosure, the department must release the marked job posting.

You claim the remaining examination records are excepted from disclosure under section 552.103 of the Government Code, which provides, in relevant part:

(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). A governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing (1) litigation was 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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You state, and provide documentation showing, the department received the request for information after lawsuits styled *Garza v. Texas Department of Public Safety*, Cause Nos. 08-CV-20-JRN and 10-CV-896-JRN, were filed by the requestor in the United States District Court for the Western District of Texas, Austin Division. Based on your representation and our review, we conclude litigation involving the department was pending when the department received the request. You also state the remaining examination records are related to the pending litigation because they pertain to the issues that help form the bases of the lawsuits. Based on your representations and our review, we find the remaining examination records are related to the pending litigation for purposes of section 552.103(a). Therefore, we conclude the department may withhold the remaining examination records under section 552.103(a) of the Government Code.

We note, 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 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. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

In summary, the department must release the requestor's personnel records. With the exception of any information subject to section 411.00755(b)(1)-(12) of the Government Code, which must be released, the department must withhold the remaining personnel records under section 552.101 of the Government Code in conjunction with section 411.00755 of the Government Code pursuant to Open Records Letter No. 2010-12863. The department must release the marked job posting pursuant to section 552.022(a)(15) of the Government Code. The department may withhold the remaining examination records under section 552.103(a) 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,



Leah B. Wingerson
Assistant Attorney General
Open Records Division

LBW/dls

Ref: ID# 437184

Enc. Submitted documents

c: Requestor
(w/o enclosures)