



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 15, 2011

Mr. Gerald A. Calderon
Assistant Criminal District Attorney
Bexar County Criminal District Attorney's Office
300 Dolorosa, Fourth Floor
San Antonio, Texas 78205

OR2011-18495

Dear Mr. Calderon:

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# 439042.

The Bexar County Sheriff's Office (the "sheriff") received a request for personnel information pertaining to two specified deputies. You claim the submitted information is excepted from disclosure under section 552.103 of the Government Code.¹ We have considered the exception you claim and reviewed the submitted information.

We note some of the submitted information falls within the scope of section 552.022 of the Government Code. Section 552.022(a) provides in relevant part the following:

Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or 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[.]

¹Although you raise section 552.101 of the Government Code, you have not submitted arguments in support of that exception; therefore, we assume you have withdrawn it. See Gov't Code §§ 552.301, .302.

Gov't Code § 552.022(a)(1). We have marked completed evaluations that are subject to disclosure under section 552.022(a)(1). You do not claim section 552.108 of the Government Code. Although you assert the marked evaluations are excepted from disclosure under section 552.103 of the Government Code, that exception is discretionary and does not make information confidential under the Act. *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 Gov't Code § 552.103); Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the marked evaluations may not be withheld under section 552.103 of the Government Code but must instead be released pursuant to section 552.022(a)(1) of the Government Code.

Section 552.103 of the Government Code provides:

(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 sheriff 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 was 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 sheriff 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 sheriff's receipt of the present request for information, the deputies at issue were named as defendants in a lawsuit styled *Dan Napier and Dana Napier v. Bexar County, Tex.*; *James Hutmacher, individually and in his official capacity*; and *John Doe, individually and in his official capacity*, Civil Action No. 3:11-cv-736, U.S. District Court, Western District of Texas, San Antonio Division. Accordingly, we agree litigation to which the sheriff is a party was pending on the date the sheriff received the present request. Further, we find the information at issue is

related to the pending litigation. Thus, we conclude the sheriff may withhold the remaining information under section 552.103 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 it must be disclosed. Further, the applicability of section 552.103(a) ends when the litigation has concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2.

In summary, the sheriff must release the information we have marked under section 552.022(a)(1) of the Government Code. The sheriff 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,



Paige Lay
Assistant Attorney General
Open Records Division

PL/ag

Ref: ID# 439052

Enc. Submitted documents

cc: Requestor
(w/o enclosures)