



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 8, 2012

Ms. Lee Ann Reno
Attorney for the City of Borger
Sprouse Shrader Smith, P.C.
P.O. Box 15008
Amarillo, Texas 79105-5008

OR2012-03503

Dear Ms. Reno:

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# 447286.

The Borger Police Department (the “department”), which you represent, received two requests for information regarding a named officer, as well as information related to a specified event.¹ You state the department does not maintain some of the requested information.² 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. We have also received and considered comments from the requestor. *See* Gov’t Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Initially, you state the department received a second request from the same requestor on January 4, 2012. Although you claim the information requested in the second request for information is “almost identical to the requested information” in the first request for

¹As you did not submit a copy of the second request, we take our description from your brief.

²In responding to a request for information under the Act, a governmental body is not required to disclose information that did not exist at the time the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 563 at 8 (1990), 555 at 1-2 (1990).

information, you have not submitted the second request for information for our review, nor have you submitted any additional information for our review. *See id.* 552.301(e)(2), (4). Accordingly, we will consider your arguments under section 552.103 of the Government Code for the information submitted in response to the first request for information. However, to the extent the information requested in the second request is not encompassed by the first request, we assume the department has released this information. If you have not released any such information, you must do so at this time. *See id.* §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

Next, we note portions of Exhibit C, which we have marked, consist of completed use of force reports, which are 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 made confidential under the Act or other law. Gov’t Code § 552.022(a)(1). Although you assert this information is 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). As such, section 552.103 is not a confidentiality provision for purposes of section 552.022(a)(1), and the department may not withhold the information subject to section 552.022 on that basis. However, we note portions of the information at issue are subject to section 552.130 of the Government Code.³ Because section 552.130 can make information confidential for purposes of section 552.022, we will address the applicability of this exception to the information subject to section 552.022. We will also consider your arguments under section 552.103 for the information not subject to section 552.022.

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.

...

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).

(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 department 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 that (1) litigation was pending or reasonably anticipated on the date of the receipt of the request for information and (2) the information at issue is related to the pending or anticipated 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 department must meet both prongs of this test for information to be excepted under section 552.103(a).

You claim the information not subject to section 552.022 pertains to pending litigation. You state, and have provided documentation showing, a lawsuit styled *William Charles Lee v. Terry Homan*, Case No. 2-11CV-252-J, was filed and is pending against a department police officer in his capacity as a city employee in the United States District Court, Northern District of Texas, Amarillo Division. Based on your representations and our review, we determine this litigation was pending on the date the department received the request for information. You state the information at issue relates to issues raised in the pending litigation. Based on your representations and our review, we find the information not subject to section 552.022 is related to the pending litigation for the purposes of section 552.103. Accordingly, the department may withhold the information not subject to section 552.022 under section 552.103 of the Government Code.

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). Further, the applicability of section 552.103(a) ends once the litigation has concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Section 552.130 of the Government Code excepts from disclosure information related to a motor vehicle operator's or driver's license or permit issued by an agency of this state or another state or country. *See* Gov't Code § 552.130(a)(1). We find the department must withhold the driver's license numbers we have marked in the information subject to section 552.022 under section 552.130 of the Government Code.

In summary, the department may withhold the information not subject to section 552.022 of the Government Code under section 552.103 of the Government Code. The department must withhold the driver's license numbers we have marked in the information subject to

section 552.022 of the Government Code under section 552.130 of the Government Code. The remaining information must be released.⁴

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,



Vanessa Burgess
Assistant Attorney General
Open Records Division

VB/dls

Ref: ID# 447286

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁴We note the remaining information contains (1) the requestor's driver's license information, which is generally confidential under section 552.130 of the Government Code and (2) the requestor's and other individuals' social security numbers, which may generally be withheld under section 552.147 of the Government Code. However, because sections 552.130 and 552.147 protect personal privacy, the requestor has a right to his own information under section 552.023 of the Government Code. See Gov't Code § 552.023(a); ORD 481 at 4. We note section 552.130(c) of the Government Code authorizes a governmental body to redact information protected by section 552.130(a)(1) without the necessity of requesting a decision under the Act. Gov't Code § 552.130(c). Additionally, we note section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act. *Id.* § 552.147(b). Thus, if the department receives another request for this same information from a person who does not have such a right of access, sections 552.130(c) and 552.147(b) authorize the department to redact the requestor's driver's license information and social security number, respectively.