



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 17, 2012

Ms. Emily E. Helm
General Counsel
Texas Alcoholic Beverage Commission
P.O. Box 13127
Austin, Texas 78711-3127

OR2012-11061

Dear Ms. Helm:

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# 459039.

The Texas Alcoholic Beverage Commission (the "commission") received a request for (1) all time records pertaining to a named individual, (2) records regarding the named individual's use of a commission vehicle for a specified time period, (3) all e-mails between the named individual and four other named individuals during the same specified time period, and (4) any office of professional responsibility investigations related to one of the four other named individuals. You claim 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.

Initially, we note you have only submitted information responsive to items (2) and (4) of the instant request. Therefore, to the extent information responsive to the remainder of the request existed at the time the commission received the request for information, we assume you have released it to the requestor. If you have not released any such information, you must do so at this time. See Gov't Code §§ 552.301(a),.302; Open Records Decision No. 664 (2000) (noting if governmental body concludes no exceptions apply to requested information, it must release information as soon as possible under circumstances).

Next, we note the submitted information in Exhibit D consists of a completed investigation. Section 552.022(a)(1) of the Government Code provides for the required public disclosure of “a completed report, audit, evaluation, or investigation made of, for, or by a governmental body,” unless it is excepted by 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 claim section 552.103 of the Government Code for this information, we note section 552.103 is a discretionary exception that protects a governmental body’s interests and does not make information confidential under the Act. *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). Therefore, the commission may not withhold any of the submitted information in Exhibit D under section 552.103 of the Government Code. As you raise no further exceptions for this information, the commission must release it.

We will now consider your argument under section 552.103 of the Government Code for the remaining information not subject to section 552.022 of the Government Code. 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.

...

(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 that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is 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). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103.

You inform us, and have provided documentation showing, that a lawsuit styled *Richard M. Scaman v. Larry Pamplin, Trent Pamplin, and Alan Ray Steen*, Cause No. 38182, was filed in the 82nd District Court of Falls County prior to the receipt of the instant request for information. Further, you have provided documentation indicating that a commission employee is named as a defendant in this lawsuit in his official capacity. You state the information at issue is related to the pending lawsuit. Based on your representations and our review, we agree that litigation was pending on the date the commission received the request. We further find that the information at issue relates to the pending litigation. Therefore, we find section 552.103 is generally applicable to the information at issue.

We note, however, that the purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to that litigation to obtain it through discovery procedures. *See* ORD 551 at 4-5. Therefore, if the opposing party has seen or had access to information relating to anticipated litigation through discovery or otherwise, there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). In this instance, the opposing party in the anticipated litigation has already seen or had access to the information at issue outside of his scope of employment with the commission. As such, the commission may not withhold the information at issue from the requestor under section 552.103.

Section 552.117(a)(2) of the Government Code excepts from public disclosure the home addresses, home telephone numbers, emergency contact information, and social security number of a peace officer, as well as information that reveals whether the peace officer has family members, regardless of whether the peace officer complies with section 552.024 or section 552.1175 of the Government Code.¹ Gov't Code § 552.117(a). We note section 552.117 is also applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). We have marked some personal information, including a cellular telephone number, of individuals currently or formerly employed by the commission. It is unclear, however, whether or not the individuals at issue are currently licensed peace officers as defined by article 2.12. Thus, if the individuals are currently licensed peace officers as defined by article 2.12, the commission must withhold the personal information we have marked under section 552.117(a)(2) of the Government Code; however, the commission may only withhold the cellular telephone number if the cellular service is not paid for by a governmental body. If, however, the individuals at issue are not currently licensed peace officers, their personal information may not be withheld under section 552.117(a)(2) of the Government Code.

¹"Peace officer" is defined by Article 2.12 of the Texas Code of Criminal Procedure.

If the individuals are currently not licensed peace officers, then the personal information we have marked may be subject to section 552.117(a)(1) of the Government Code, which excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who request this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. If the individuals whose information is at issue are currently not licensed peace officers and made timely elections under section 552.024, the commission must withhold the personal information we have marked under section 552.117(a)(1) of the Government Code; however, the commission may only withhold the cellular telephone number if the cellular service is not paid for by a governmental body. If these individuals are currently not licensed peace officers and did not make a timely election under section 552.024, the information at issue may not be withheld under section 552.117(a)(1) of the Government Code.

Lastly, we note that a portion of the submitted information is 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, if the individuals whose information is at issue are currently licensed peace officers as defined by article 2.12 of the Texas Code of Criminal Procedure, the commission must withhold the personal information we have marked under section 552.117(a)(2) of the Government Code; however, the commission may only withhold the cellular telephone number if the cellular service is not paid for by a governmental body. If the individuals whose information is at issue are no longer licensed peace officers and made timely elections under section 552.024 of the Government Code, the commission must withhold the personal information we have marked under section 552.117(a)(1) of the Government Code; however, the commission may only withhold the cellular telephone number if the cellular service is not paid for by a governmental body. The commission must release the remaining information; however, any information subject to copyright only may be released in accordance 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,



Sean Nottingham
Assistant Attorney General
Open Records Division

SN/bhf

Ref: ID# 459039

Enc. Submitted documents

c: Requestor
(w/o enclosures)