



ATTORNEY GENERAL OF TEXAS
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August 2, 2012

Mr. Leonard V. Schneider
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OR2012-12093

Dear Mr. Schneider:

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# 460919.

The Huntsville Police Department (the "department"), which you represent, received a request for "any file pertaining to [the requestor]," a former officer of the department. You state the department has released the requestor's employment file and a portion of the submitted information. You claim the rest of the submitted information is excepted from disclosure under sections 552.101, 552.103, and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the information you submitted.

We first note some of the submitted information falls within the scope of 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 made confidential under the Act or other law or excepted from disclosure under section 552.108 of the Government Code. Gov't Code § 552.022(a)(1). We have marked a completed report and records of a completed investigation that are subject to section 552.022(a)(1). Although the department seeks to withhold the marked 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.* § 552.007; *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 does not make information confidential for purposes of section 552.022(a)(1). Therefore, the department may not withhold the information that is subject to section 552.022(a)(1) under section 552.103. We note the department also seeks to withhold the completed report under section 552.101 of the Government Code, which makes information confidential for purposes of section 552.022(a)(1). Additionally, sections 552.117(a)(2) and 552.136 of the Government Code, which also make information confidential for purposes of section 552.022(a)(1), are or may be applicable to information in the completed investigation.¹ Accordingly, we will address sections 552.101, 552.117(a)(2), and 552.136. We also will consider the department's claims under section 552.103 for the information that is not subject to section 552.022(a)(1) and under section 552.108 of the Government Code for the submitted police report.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information other statutes make confidential. You claim section 552.101 in conjunction with section 1703.306 of the Occupations Code, which provides in part:

(a) A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person other than:

(1) the examinee or any other person specifically designated in writing by the examinee[.]

Occ. Code § 1703.306. We agree pages 25 through 29 consist of information acquired from a polygraph examination that is generally confidential under section 1703.306. In this instance, the requestor is the polygraph examinee. We note the department has discretion to release the information in question to the polygraph examinee pursuant to section 1703.306(a)(1). *See* Open Records Decision No. 481 at 9 (1987) (statutory predecessor to Occ. Code § 1703.306 permitted, but did not require, examination results to be disclosed to polygraph examinees). You indicate the department does not wish to release the information in question. We therefore conclude the department must withhold the

¹This office will raise sections 552.117 and 552.136 on behalf of a governmental body, as these sections are a mandatory exceptions to disclosure. *See* Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

information acquired from the polygraph examination under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code.

Section 552.117(a)(2) of the Government Code excepts from disclosure the home address, home telephone number, emergency contact information, and social security number of a peace officer, as well as information that reveals whether the officer has family members, regardless of whether the officer complies with sections 552.024 or 552.1175 of the Government Code. *See* Gov't Code §§ 552.117, .024. Section 552.117(a)(2) adopts the definition of peace officer found at article 2.12 of the Code of Criminal Procedure. We note section 552.117(a)(2) protects a peace officer's personal cellular telephone number or pager number if the officer pays for the cellular telephone or pager service with his or her personal funds. *See* Open Records Decision No. 670 at 6 (2001). We have marked a cellular telephone number the department must withhold under section 552.117(a)(2) of the Government Code if the officer concerned pays for the cellular telephone service with his personal funds.

Section 552.136 of the Government Code states that "[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136(b); *see id.* § 552.136(a) (defining "access device"). We have marked a cellular telephone account number the department must withhold under section 552.136. The department must release the rest of the submitted information that is subject to section 552.022(a)(1).

Next, we address your claim under section 552.103 of the Government Code for the remaining information at issue. This exception provides in 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.

Id. § 552.103(a), (c). A governmental body claiming section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of the exception to the information at issue. To meet this burden, a governmental body must demonstrate that (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) the information at issue is related to the pending or anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See Open Records Decision No. 551 at 4 (1990).*

You contend the remaining information at issue is related to pending litigation to which the department is a party. You inform us the requestor has filed a petition with the Texas Commission on Law Enforcement Officer Standards and Education (“TCLEOSE”) to correct a separation of licensee report, also known as a form F-5, the department submitted to TCLEOSE. *See Occ. Code § 1701.4525(a)* (subject of employment termination report may contest information contained in report by submitting petition to law enforcement agency and TCLEOSE). You state, and have provided documentation confirming, the petition was filed prior to the department’s receipt of the request for the information at issue. You explain a proceeding to correct a form F-5 is a contested case under the Texas Administrative Procedure Act (the “APA”), chapter 2001 of the Government Code. *See id.* § 1701.4525(d); 37 T.A.C. § 217.8(c). We note a contested case under the APA constitutes litigation for purposes of section 552.103. *See Open Records Decision No. 588 (1991).* Based on your representations and documentation and our review, we conclude section 552.103 of the Government Code is generally applicable to the remaining information at issue.

We note section 552.103 does not permit the department to withhold basic front-page information contained in the submitted police report. *See Open Records Decision Nos. 597 (1991)* (basic information in offense report disclosed to defendants in related criminal case could not be withheld under statutory predecessor to Gov’t Code § 552.103), 362 (1983) (names of officers who executed search warrant could not be withheld under statutory predecessor). Instead, the department must release the basic front-page offense and arrest report information held to be public in *Houston Chronicle Publishing Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App. -- Houston [14th Dist.] 1975), writ ref’d n.r.e. per curiam, 536 S.W.2d 559 (Tex. 1976). *See* 531 S.W.2d at 186-88; *Open Records Decision No. 127 at 3-4 (1976)* (delineating information that must be disclosed under *Houston Chronicle*).²

²We note basic information includes an arrested person’s social security number. 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.

We also note the requestor, as the opposing party in the pending litigation, has already seen some of the remaining information at issue. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information related to litigation through discovery procedures. *See* ORD 551 at 4-5. If the opposing party has seen or had access to information related to pending litigation, through discovery or otherwise, then there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, the department must release the information we have marked that the requestor has already seen. The department may withhold the remaining information at issue under section 552.103 of the Government Code.³ We note the applicability of this exception ends once the related litigation concludes. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

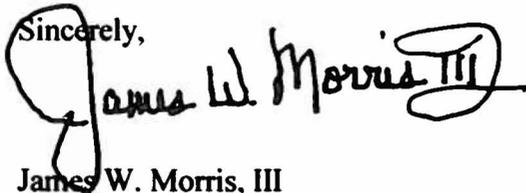
In summary, the department (1) must withhold the information acquired from a polygraph examination under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code; (2) must withhold the marked account number under section 552.136 of the Government Code; (3) must withhold the marked cellular telephone number under section 552.117(a)(2) of the Government Code if the officer concerned pays for the cellular telephone service with his personal funds; (4) must release the rest of the marked information that is subject to section 552.022(a)(1) of the Government Code; and (5) may withhold the remaining information at issue under section 552.103 of the Government Code, except for the basic front-page offense and arrest information in the police reports and the marked information the requestor has already seen, which 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.

³As we are able to make this determination, we need not address the department's claim under section 552.108 of the Government Code, except to note section 552.108 does not except from disclosure "basic information about an arrested person, an arrest, or a crime." Gov't Code § 552.108(c); *see Houston Chronicle*, 531 S.W.2d at 186-88; ORD 127 at 3-4.

⁴We note the records that must be released contain information the department would ordinarily be required to withhold to protect the requestor's privacy. The requestor has a right, however, to her own private information. *See* Gov't Code § 552.023(a); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning herself). Should the department receive another request for these same records from a different requestor, the department should resubmit them and request another decision. *See* Gov't Code §§ 552.301, .302.

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,


James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/bhf

Ref: ID# 460919

Enc: Submitted documents

c: Requestor
(w/o enclosures)