



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 19, 2012

Ms. Evelyn W. Njuguna
Staff Attorney
City of Houston Police Department
1200 Travis
Houston, Texas 77002-6000

OR2012-20527

Dear Ms. Njuguna:

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# 474218 (HPD ORU No. 12-5730).

The Houston Police Department (the "department") received a request for several categories of information pertaining to expenditure of funds, offense reports, the number of officers, charges, and convictions of the Vice and FAST units from specified periods of time. You state you have released some of the requested information to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.103, 552.108, and 552.152 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information, a portion of which is a representative sample.²

Initially, we note the department did not fully comply with section 552.301 of the Government Code. Subsection (b) of section 552.301 requires a governmental body

¹Although you initially raised sections 552.101 through 552.151 of the Government Code, you have withdrawn your claim under the remaining sections.

²We assume the "representative sample" of information submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than those submitted to this office.

requesting an open records ruling from this office to “ask for the attorney general’s decision and state the exceptions that apply within a reasonable time but not later than the tenth business-day after the date of receiving the written request.” Gov’t Code § 552.301(b). While you raised sections 552.101 through 552.151 within the ten-business-day time period required by subsection 552.301(b), you did not raise section 552.152 until after the ten-business-day deadline had passed. Accordingly, with respect to section 552.152, we conclude the department failed to comply with the procedural requirements mandated by section 552.301 of the Government Code.

Pursuant to section 552.302 of the Government Code, a governmental body’s failure to comply with the requirements of section 552.301 results in the legal presumption the requested information is public and must be released unless a compelling reason exists to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); *see also* Open Records Decision No. 630 (1994). Generally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third party interests are at stake. Open Records Decision No. 150 at 2 (1977). Because section 552.152 of the Government Code can provide a compelling reason to withhold information, we will consider the applicability of this exception to the information at issue.

Next, we note portions of the submitted information are subject to section 552.022 of the Government Code. This section provides, in pertinent part:

(a) 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; [and]

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov’t Code § 552.022(a)(1), (3). In this instance, Exhibits 3 and 4 contain completed reports that are subject to subsection 552.022(a)(1) and must be released unless they are excepted

under section 552.108 or made confidential under the Act or other law. Exhibit 3 also contains information relating to the expenditure of public funds subject to subsection 552.022(a)(3) that must be released unless it is made confidential under the Act or other law. Although you raise section 552.103 of the Government Code for the information at issue, this section is a discretionary exception to disclosure and does not make information confidential under the Act. *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 section 552.103); Open Records Decision Nos. 665 at 2 n.5 (discretionary exceptions generally), 663 (1999) (governmental body may waive section 552.103). As such, section 552.103 does not make information confidential for the purposes of section 552.022. Therefore, none of the information subject to subsections 552.022(a)(1) and 552.022(a)(3) may be withheld under section 552.103 of the Government Code. However, information subject to subsection 552.022(a)(1) may be withheld if it is excepted by section 552.108. Therefore, we will address your arguments under section 552.108 for the information subject to section 552.022(a)(1). In addition, because section 552.152 makes information confidential under the Act, we will address its applicability to the information at issue. We will also address your claims under sections 552.103 and 552.108 for the information not subject to section 552.022.

Section 552.108(a)(1) of the Government Code excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]” Gov’t Code § 552.108(a)(1). Generally, a governmental body claiming section 552.108(a)(1) must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state portions of Exhibits 3 and 4 relate to pending criminal prosecutions. Based upon your representation and our review, we conclude that the release of the information you have indicated in Exhibits 3 and 4 would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ’g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975) (court delineates law enforcement interests that are present in active cases), *writ ref’d n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Thus, section 552.108(a)(1) is applicable to the information you have indicated in Exhibits 3 and 4.

Section 552.108(a)(2) of the Government Code excepts from disclosure information concerning an investigation that did not result in conviction or deferred adjudication. *See* Gov’t Code § 552.108(a)(2). A governmental body claiming section 552.108(a)(2) must demonstrate that the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. *See id.* § 552.301(e)(1)(A) (governmental body must provide comments explaining why exceptions raised should apply to information requested). You explain portions of Exhibit 4 pertain to criminal investigations that did not result in convictions or deferred adjudications. Based on

your representations and our review, we find that section 552.108(a)(2) is applicable to the information you have indicated in Exhibit 4.

However, section 552.108 does not except from disclosure basic information about an arrested person, an arrest, or a crime. *Id.* § 552.108(c). Basic information refers to the information held to be public in *Houston Chronicle*. See 531 S.W.2d at 186-88; see also Open Records Decision No. 127 at 3-4 (1976) (summarizing types of information deemed public by *Houston Chronicle*). Thus, with the exception of basic information, the department may withhold the information you have indicated in Exhibits 3 and 4 under section 552.108(a)(1) of the Government Code and the information you have indicated in Exhibit 4 under section 552.108(a)(2) of the Government Code.³

Next, we address 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:

(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 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.);

³As our ruling is dispositive, we need not address your remaining argument under section 552.103 of the Government Code for this information, except to note that basic information held to be public in *Houston Chronicle* is generally not excepted from public disclosure under section 552.103. See Open Records Decision No. 597 (1991).

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 Exhibits 5, 6, and 7 pertain to pending litigation. You state, and have provided documentation showing, a lawsuit styled *D. Houston, Inc. and Ali Davari v. City of Houston, Nirja S. Aiyer, in her official and individual capacities, and Matthew Dexter, in his official and individual capacities*, CV No. H-12-2038, was filed and is pending in the United States District Court, Southern District of Texas, Houston Division. Based on your representations and our review, we determine the litigation was pending on the date the department received the request for information. You state the requested information relates to issues raised in the pending litigation. Based on your representations and our review, we find Exhibits 5, 6, and 7 are related to the pending litigation for the purposes of section 552.103. Accordingly, the department may withhold Exhibits 5, 6, and 7 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 552.152 of the Government Code provides the following:

Information in the custody of a governmental body that relates to an employee or officer of the governmental body is excepted from the requirements of Section 552.021 if, under the specific circumstances pertaining to the employee or officer, disclosure of the information would subject the employee or officer to a substantial threat of physical harm.

Gov't Code § 552.152. You seek to withhold the names and identification numbers of undercover officers you have marked in the remaining and basic information. You represent release of the identifying information of the undercover officers would "cause the officers to face imminent threat of physical danger." Based on your representation, we find the department has demonstrated release of the information at issue would subject the undercover officers to a substantial threat of physical harm. Therefore, we conclude the department must withhold the identifying information of the undercover officers you have marked in the remaining information under section 552.152 of the Government Code.

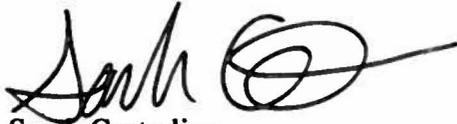
In summary, with the exception of basic information, the department may withhold the information you have indicated in Exhibits 3 and 4 under section 552.108(a)(1) of the Government Code and the information you have indicated in Exhibit 4 under section 552.108(a)(2) of the Government Code. The department may withhold Exhibits 5, 6, and 7 under section 552.103 of the Government Code. The department must withhold the

identifying information of the undercover officers you have marked in the remaining information under section 552.152 of the Government Code. The remaining information must be released.

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,

A handwritten signature in black ink, appearing to read 'Sarah Casterline', with a large, stylized flourish extending to the right.

Sarah Casterline
Assistant Attorney General
Open Records Division

SEC/tch

Ref: ID# 474218

Enc. Submitted documents

c: Requestor
(w/o enclosures)