



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 8, 2013

Ms. Mandy Smithers
Senior Paralegal & Custodian of Records
Denton County Sheriff's Office
127 North Woodrow Lane
Denton, Texas 76205

OR2013-03980

Dear Ms. Smithers:

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# 480556.

The Denton County Sheriff's Office (the "sheriff's office") received a request for pre- and post-employment investigations and documents, internal affairs documents, and disciplinary records pertaining to two named individuals. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107(2), and 552.117 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

Initially, we note some of the submitted information, which we have marked, consists of completed evaluations and a completed investigation. Section 522.022(a)(1) of the

¹Although you do not explicitly raise section 552.107(2) of the Government Code as an exception to disclosure in your brief, based on your argument directing our attention to a protective and confidentiality order related to the submitted information, we understand you to assert this section as an exception to disclosure of the submitted information.

²We assume the "representative sample" of records 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.

Government Code provides for required public disclosure of “a completed report, audit, evaluation, or investigation made of, for, or by a governmental body[,]” unless it is excepted from disclosure under section 552.108 of the Government Code or is expressly made confidential under the Act or other law. *See* Gov’t Code § 552.022(a)(1). Although you raise section 552.103 of the Government Code, this section is intended to protect a governmental body’s interests and may be waived. *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 section 552.103); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 542 at 4 (1990) (statutory predecessor to section 552.103 subject to waiver). As such, section 552.103 does not make information confidential under the Act. Therefore, the sheriff’s office may not withhold the information at issue under section 552.103. You also raise section 552.107(2) of the Government Code for this information. Section 552.107(2) allows a governmental body to withhold information if “a court by order has prohibited disclosure of the information.” Gov’t Code § 552.107(2). However, section 552.022(b) provides a court may not order a governmental body to withhold from public inspection any category of information described by section (a) unless the category of information is expressly made confidential under the Act or other law. *Id.* § 552.022(b). Because section 552.022(b) prohibits a court from ordering the withholding of documents subject to section 552.022, we conclude the sheriff’s office may not withhold the completed evaluations and completed investigation under section 552.107(2) of the Government Code. However, you also raise sections 552.101 and 552.117 of the Government Code, which make information confidential under the Act. Accordingly, we will consider the applicability of sections 552.101 and 552.117 of the Government Code for this information. We will also address your arguments under sections 552.103 and 552.107(2) for the information not subject to section 552.022.

We first address your arguments for the information not subject to section 552.022 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.

Id. § 552.103(a), (c). The sheriff's office 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 sheriff's office must meet both prongs of this test for information to be excepted under section 552.103(a).

You claim the information at issue pertains to pending litigation. You state, and have provided documentation showing, that a lawsuit styled *Kevin Bragg v. Benny Perkey, in his official capacity as Denton County Sheriff and Denton County, Texas* was filed and is pending in the 362nd Judicial District Court, Denton County, Texas. Based on your representations and our review, we determine litigation was pending on the date the sheriff's office received the request for information. You state the personnel files at issue pertain to a former sheriff's office employee who is the plaintiff in the litigation and a sheriff's office employee who is listed as a witness in the litigation. Based on your representations and our review, we find the information at issue is related to the pending litigation for the purposes of section 552.103. Accordingly, the sheriff's office may withhold the information not subject to section 552.022 under section 552.103 of the Government Code.³

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 been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Now we address your arguments for the information subject to section 552.022 of the Government Code. Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses information made confidential by other statutes, such as section 143.089 of the Local Government Code. The application of chapter 143 of the Local Government Code is delineated in section 143.002 of that code, which provides:

(a) This chapter applies only to a municipality:

(1) that:

³As our ruling is dispositive for this information, we need not address your remaining arguments against its disclosure.

(A) has a population of 10,000 or more;

(B) has a paid fire department or police department; and

(C) has voted to adopt this chapter or the law codified by this chapter; or

(2) whose election to adopt this chapter and whose acts subsequent to that election were validated by the law enacted by House Bill 822, Acts of the 73rd Legislature, Regular Session, 1993.

Local Gov't Code § 143.002(a). Thus, chapter 143 of the Local Government Code applies only to civil service municipalities that have voted to adopt the chapter. We note the sheriff's office is not a municipality. Furthermore, you have not explained how section 143.089 of the Local Government Code is applicable to information held by the sheriff's office. Accordingly, the sheriff's office may not withhold the information at issue under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code.

Section 552.117 of the Government Code provides in relevant part:

(a) Information is excepted from the requirements of Section 552.021 if it is information that relates to the home address, home telephone number, or social security number of the following person or that reveals whether the person has family members:

(1) a current or former official or employee of a governmental body, except as otherwise provided by Section 552.024;

(2) a peace officer as defined by Article 2.12, Code of Criminal Procedure . . . regardless of whether the officer complies with Section 552.024 or 552.1175, as applicable[.]

Gov't Code § 552.117(a)(1)-(2). We have marked the information that is generally subject to this section. Section 552.117(a)(2) applies to the personal information of peace officers as defined by article 2.12 of the Code of Criminal Procedure. It is unclear whether all of the individuals whose information we have marked are currently licensed peace officers as defined by article 2.12 of the Code of Criminal Procedure. Therefore, if the individuals at issue are licensed peace officers, the sheriff's office must withhold the information we have marked under section 552.117(a)(2) of the Government Code.

However, if any of the individuals at issue are not currently licensed peace officers, then the marked information may be subject to section 552.117(a)(1) of the Government Code. Section 552.117(a)(1) excepts from disclosure the personal information of a current or former official or employee of a governmental body who requests that this information be kept confidential under section 552.024 of the Government Code. *See id.* §§ 552.117, .024. 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 official or 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. Thus, if an individual whose information we marked is not a currently licensed peace officer but timely requested confidentiality under section 552.024, the sheriff's office must withhold the information we have marked under section 552.117(a)(1). Conversely, if an individual is not a currently licensed peace officer and did not make a timely election under section 552.024, the sheriff's office may not withhold such information under section 552.117(a)(1).⁴ However, the remaining information at issue does not consist of any current or former employees' home address, home telephone number, emergency contact information, social security number, or family member information. Accordingly, the remaining information may not be withheld under section 552.117 of the Government Code.

In summary, the sheriff's office may withhold the information not subject to section 552.022 of the Government Code under section 552.103 of the Government Code. If the individuals whose information we marked are currently licensed peace officers, the sheriff's office must withhold the information we marked under section 552.117(a)(2) of the Government Code. If any of those individuals are not currently licensed peace officers but timely requested confidentiality under section 552.024 of the Government Code, the sheriff's office must withhold such individuals' information under section 552.117(a)(1) of the Government Code. The remaining information subject to section 552.022 of the Government Code 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,

⁴We note even if an individual did not make a timely confidentiality election under section 552.024, section 552.147(b) of the Government Code permits a governmental body to withhold a living person's social security number without the necessity of requesting an opinion from this office. *See Gov't Code* § 552.147(b).

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 be 'S. Casterline', written over a horizontal line.

Sarah Casterline
Assistant Attorney General
Open Records Division

SEC/tch

Ref: ID# 480556

Enc. Submitted documents

c: Requestor
(w/o enclosures)