



July 31, 2002

Ms. Angela M. DeLuca  
Assistant City Attorney  
City of College Station  
P.O. Box 9960  
College Station, Texas 77842

OR2002-4174

Dear Ms. DeLuca:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 166436.

The College Station Police Department (the “department”) received a written request for certain personnel records of a named police officer. You contend that the requested information is excepted from required public disclosure pursuant to sections 552.103 and 552.108 of the Government Code.

We note at the outset that some of the requested information is specifically made public under section 552.022(a)(2) of the Government Code, which makes public “the name, sex, ethnicity, salary, title, and dates of employment of each employee and officer of a governmental body.” These categories of information must be released to the public unless the information is made confidential by “other law.” *See* Gov’t Code § 552.022(a). Sections 552.103 and 552.108 of the Government Code are discretionary exceptions and not “other law” for purposes of section 552.022(a).<sup>1</sup> Consequently, we conclude that the department must release to the requestor all information coming within the scope of request item 12, which is made public under section 552.022(a)(2).

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<sup>1</sup>Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.*, Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 592 at 8 (1991) (governmental body may waive section 552.104, information relating to competition or bidding), 549 at 6 (1990) (governmental body may waive informer’s privilege), 522 at 4 (1989) (discretionary exceptions in general). Discretionary exceptions therefore do not constitute “other law” that makes information confidential.

We now address the applicability of section 552.103 of the Government Code to the remaining requested information. A governmental body raising section 552.103 has the burden of providing relevant facts and documents sufficient to establish that (1) the governmental body is a party to litigation that was pending or reasonably anticipated on the date of receipt of the request for information *and* (2) the information at issue is related to that litigation. *See University of Tex. Law Sch. v. Texas 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 [1<sup>st</sup> Dist.] 1984, writ ref'd n.r.e.); *see also* 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. *Id.*

You represent to this office that the requested information relates to a pending criminal prosecution. You indicate that the prosecution was pending when the department received this request for information. You do not inform us, however, that the department is a party to the pending criminal litigation. *See* Goy't Code § 552.103(a); Open Records Decision No. 575 at 2 (1990). In such a situation, we require an affirmative representation from the prosecuting attorney that he or she wants the submitted information withheld from disclosure under section 552.103.

You have submitted a letter from an Assistant County Attorney for Brazos County, stating that her office is prosecuting the pending case. The prosecutor states that “[t]he requested documents are personnel records of a State’s witness” in the criminal prosecution and asks that the requested information be withheld from disclosure to protect the prosecutor’s position in the pending litigation. We find that you have established that criminal litigation was pending when the department received this request for information. We also find that the submitted information relates to the pending criminal litigation. Therefore, based on your representations, the prosecutor’s letter, and our review of the information at issue, we conclude that the remaining submitted information is excepted from disclosure at this time under section 552.103 of the Government Code.<sup>2</sup>

In reaching this conclusion under section 552.103, we assume that the opposing party to the criminal case has not seen or had access to the marked information. 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* Open Records Decision No. 551 at 4-5 (1990). If the opposing party has seen or had access to information that relates to the pending litigation, through discovery or otherwise, then there is no interest in withholding that information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982).

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<sup>2</sup>Because we resolve your request under section 552.103, we need not address here the applicability of section 552.108 of the Government Code.

Furthermore, the applicability of section 552.103 ends once the related litigation concludes. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Denis C. McElroy  
Assistant Attorney General  
Open Records Division

DCM/RWP/sdk

Ref: ID# 166436

Enc: Submitted documents

c: Mr. Jim W. James  
P.O. Box 1146  
Bryan, Texas 77806  
(w/o enclosures)