



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 26, 2006

Ms. Pamela Smith
Assistant General Counsel
Texas Department of Public Safety
Box 4087
Austin, Texas 78773-0001

OR2006-04178

Dear Ms. Smith:

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# 245978.

The Texas Department of Public Safety (the "department") received two requests for information from the same requestor. The first is for a specific internal department investigation. The second is for a particular promotional background investigation of a named employee. You claim that the requested 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. We have also considered comments submitted by both the requestor and the Office of the Governor ("governor"). *See Gov't Code* § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Initially, we must address the applicability of section 552.022 of the Government Code to the submitted information. Section 552.022 provides, in relevant part:

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under 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[.]

Gov't Code § 552.022(a)(1). The requestor claims that the internal investigation has been completed. The department, however, states that the internal investigation is "still undergoing legal and administrative review." The question of whether the submitted internal investigation has been completed is a question of fact. This office cannot resolve factual issues in the opinion process. See Open Records Decision 592 at 2 (1991), 552 at 4 (1990), 435 at 4 (1986). We therefore must rely on a governmental body's representations with regard to such issues, unless the contrary is clearly shown as a matter of law. See Open Records Decision No. 564 (1990). Accordingly, we must accept the department's representation that the internal investigation is ongoing. Therefore, we conclude that the internal investigation is not subject to section 552.022(a)(1).

However, the information responsive to the request for the promotional background investigation, which you have submitted as Attachment 12, is a completed report subject to section 552.022. A completed report must be released under section 552.022(a)(1) unless the information is excepted from disclosure under section 552.108 or is expressly confidential under other law. You claim that Attachment 12 is excepted under section 552.103. However, section 552.103 is a discretionary exception that is intended to protect only the interests of the governmental body and may be waived. See *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76; Open Records Decision No. 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation and does not itself make information confidential); see also Open Records Decision No. 665 at 2 n.5. As such section 552.103 does not constitute "other law" that makes information confidential. Accordingly, we conclude that the department may not withhold Attachment 12 under section 552.103.

However, the governor argues that Attachment 12 contains information subject to section 552.108, which provides, in relevant part:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of Section 552.021 if:

...

(3) it is information relating to a threat against a peace officer collected or disseminated under Section 411.048;

...

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from the requirements of Section 552.021 if:

(1) release of the internal record or notation would interfere with law enforcement or prosecution[.]

Gov't Code § 552.108(a)(3), (b)(1). Section 552.108(b)(1) excepts from public disclosure an internal record of a law enforcement agency that is maintained for internal use in matters relating to law enforcement or prosecution if "release of the internal record or notation would interfere with law enforcement or prosecution." *See City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet.) (Section 552.108(b)(1) protects information that, if released, would permit private citizens to anticipate weaknesses in police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate state laws). A governmental body that relies on section 552.108(b)(1) must sufficiently explain how and why the release of the information would interfere with law enforcement and crime prevention. *See Open Records Decision Nos. 562 at 10 (1990), 531 at 2 (1989); see also Open Records Decision No. 413 (1984) (release of sketch showing security measures to be used at next execution would interfere with law enforcement). The named employee at issue was, at the time the records were created, the head of the Governor's Protective Detail. Accordingly, the governor seeks to withhold a portion of Attachment 12 under section 552.108(b)(1) as it relates to security for the governor and his family, including the security of the governor's official residence. Based on the governor's arguments and our review of Attachment 12, we have marked the information that the department may withhold under section 552.108(b)(1) of the Government Code. However, we find that release of the remaining information in Attachment 12 would not interfere with law enforcement, and it may not be withheld under section 552.108(b)(1). Additionally, section 552.108(a)(3) is inapplicable as none of the submitted information relates to a threat against a peace officer. See Gov't Code § 552.108(a)(3).*

We note that portions of Attachment 12 are subject to section 552.117 of the Government Code, which excepts from disclosure the current and former home addresses and home telephone numbers, social security numbers, and family member information of a peace officer regardless of whether the officer requested confidentiality under section 552.024 or 552.1175 of the Government Code.¹ Section 552.117 also encompasses a personal cellular telephone number, provided that the cellular phone 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 mobile phone numbers paid for by governmental body and intended for official use). We have marked the information that must be withheld under section 552.117(a)(2). Additionally, if the department does not pay for the cellular service*

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

of the peace officer at issue, the officer's cellular phone number must be withheld under section 552.117(a)(2); otherwise, the cellular number must be released. The remainder of Attachment 12 must be released.

Turning to the remaining information, section 552.103 of the Government Code provides 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). The 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 a showing that (1) litigation is pending or reasonably anticipated, 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). The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You state, and provide documentation showing, that a lawsuit was filed against the department by the requestor before the request for the internal investigation was received. Based on your representations, the supporting documentation that you have submitted, and our review of the information at issue, we conclude that the department has demonstrated that litigation was pending on the date it received the request for information. Furthermore, we find that the internal investigation is related to the pending litigation for purposes of section 552.103. Therefore, the remaining information is generally excepted from disclosure under section 552.103 of the Government Code.

We note, however, that the internal investigation contains the requestor's affidavit. Absent special circumstances, 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 and it must be disclosed. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, the department may withhold the portions of the internal investigation that the requestor has not seen or had access to. The department may withhold these documents during the pendency of the litigation under section 552.103(a). See Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982) (stating that applicability of section 552.103(a) ends once litigation has been concluded). However, to the extent that the requestor has seen or had access to documents contained in the internal investigation, the department may not now withhold them from disclosure under section 552.103(a).

In summary, the department may withhold the portions of the internal investigation that the requestor has not seen or had access to under section 552.103 of the Government Code. We have marked the information in Attachment 12 that may be withheld under section 552.108(b)(1) of the Government Code and that must be withheld under section 552.117(a)(2) of the Government Code. Additionally, if the department does not pay for the cellular service of the peace officer at issue, the officer's cellular phone number in Attachment 12 must be withheld under section 552.117(a)(2); otherwise, the cellular number must be released. The remainder of Attachment 12 must be released.

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Dep't of Pub. 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 Schless at the Office of the Attorney General 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. 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,



José Vela III
Assistant Attorney General
Open Records Division

JV/krl

Ref: ID# 245978

Enc. Submitted documents

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