



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 21, 2007

Ms. K. Jefferson Bray
Senior Legal Advisor
City of Plano
P.O. Box 860358
Plano, Texas 75086-0358

OR2007-10830

Dear Ms. Bray:

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# 287328.

The Plano Police Department (the "department") received a request for all information and personnel records from the past two years pertaining to a named department officer, as well as *incident and arrest reports* written or sponsored by the named officer for 30 days prior to August 11, 2006 and 30 days after a specified arrest.¹ We note that the Plano Police Department has a previous determination for incident reports.² Although you submitted the requested incident reports, you state that you are not seeking a ruling under 552.108; therefore, we do not address these incident reports in this ruling. You claim that the requested personnel records are excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

¹We note that the requestor agreed to allow the department to redact the officer's social security number and place of residence. *See* Gov't Code § 552.222 (governmental body may ask requestor to clarify or narrow scope of request). *As this information is no longer encompassed by the request, it is not responsive and we do not address its availability in this ruling.*

²*The Plano Police Department is not required to seek an Office of the Attorney General ruling to seek approval to withhold non front-page information of incident reports.*

Initially, we note that many of the submitted records are subject to section 552.022 of the Government Code. Section 552.022(a) provides in part that

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). Many of the personnel records you submitted to this office are completed evaluations of the named officer. The department must release information subject to section 552.022 unless it is excepted from disclosure under section 552.108 of the Government Code, or is expressly made confidential under other law. *See id.* You claim that this information is subject to section 552.103 of the Government Code. Section 552.103 of the Government Code is a discretionary exception to disclosure that protects the governmental body's interests and is therefore not "other law" that makes information expressly confidential for purposes of section 552.022(a). *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Consequently, the department may not withhold the completed evaluations pursuant to section 552.103 of the Government Code. As you have not raised any other exceptions to disclosure for the completed evaluations, they must be released.

We will address your section 552.103 argument for the remaining personnel records. Section 552.103 provides in relevant part 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 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 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 department must meet both prongs of this test for information to be excepted under section 552.103(a).

You state, and provide documentation showing, that there is pending prosecution. We note, however, that the department is not a party to this litigation. See Gov't Code § 552.103(a); Open Records Decision No. 575 at 2 (1990) (stating that predecessor to section 552.103 only applies when governmental body is party to litigation). In such a situation, we require an affirmative representation from the governmental body with the litigation interest that the governmental body wants the information at issue withheld from disclosure under section 552.103. You state that the Collin County District Attorney's Office (the "district attorney") is a party to the pending prosecution and that the district attorney has requested that the department not release "information regarding incidents that may result in criminal litigation" However, the letter, which you base this statement upon, is the district attorney's policy on the handling of "Kyles" letters by all Collin County law enforcement agencies. The letter does not provide our office with a representation from the district attorney that he wants these personnel records withheld. As you have not provided us with an adequate representation from the district attorney, the department may not withhold the remaining personnel records under section 552.103. Accordingly, all of the requested personnel information 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 Schloss 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,



M. Alan Akin
Assistant Attorney General
Open Records Division

MAA/mcf

Ref: ID# 287328

Enc. Submitted documents

c: Ms. Sharon Curtis
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(w/o enclosures)