



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

March 12, 2009

Mr. James D. Saint  
Assistant City Attorney  
City of Arlington  
P.O. Box 90231  
Arlington, Texas 76004-3231

OR2009-03266

Dear Mr. Saint:

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# 337182.

The Arlington Police Department (the "department") received a request for the personnel files of two named police officers. You claim the requested information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.117, 552.1175, 552.119, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note the submitted information includes documents that are subject to section 552.022 of the Government Code. Section 552.022 provides, in relevant part:

(a) 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 submitted information contains completed evaluations made for and by the department, which are expressly public under section 552.022(a)(1). Although you claim the submitted information is excepted from disclosure under section 552.103 of the Government Code, we note this exception to disclosure is a discretionary exception under the Act that does not constitute "other law" for purposes of section 552.022.<sup>1</sup> Thus, department may not withhold the information subject to section 552.022, which we have marked, under section 552.103 of the Government Code.

However, the completed evaluations contain the named officers' social security numbers. Section 552.117(a)(2) of the Government Code excepts from disclosure the current and former home addresses and 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.<sup>2</sup> *Id.* § 552.117(a)(2). We have marked the social security numbers that must be withheld under section 552.117(a)(2). The remaining information subject to section 552.022 must be released.

We next address your claim under section 552.103 of the Government Code for the information not subject to section 552.022. Section 552.103 provides in part:

(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 department has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular

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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 which implicates the interests of third parties. *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 No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Discretionary exceptions, therefore, do not constitute "other law" that makes information confidential.

<sup>2</sup>"Peace officer" is defined by Article 2.12 of the Texas Code of Criminal Procedure.

situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the governmental body receives the request for information, and (2) the information at issue is related to that litigation. See *Thomas v. Cornyn*, 71 S.W.3d 473, 487 (Tex.App.-Austin 2002, no pet.); *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 [1<sup>st</sup> 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 the information at issue is related to an ongoing criminal prosecution. We note, however, the department is not a party to this pending criminal litigation. See Gov't Code § 552.103(a); Open Records Decision No. 575 at 2 (1990). 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 have submitted an affidavit from the Tarrant County District Attorney's Office (the "district attorney") that states the information at issue pertains to a pending criminal case. The district attorney states the named officers were involved in the arrest of the defendant at issue and release of the information could interfere with the prosecution of the criminal case. Based on these representations and our review, we agree litigation was pending as of the date the request was received. We further find the information at issue relates to the pending litigation. Accordingly, the department may withhold the remaining information pursuant to section 552.103 of the Government Code.<sup>3</sup>

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). Thus, information that has either been obtained from or provided to all other parties in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded or is no longer realistically anticipated. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, the department must withhold the information we have marked in the submitted evaluations pursuant to section 552.117(a)(2) of the Government Code. The remaining information in the submitted evaluations must be released pursuant to section 552.022(a)(1) of the Government Code. The information not subject to section 552.022 may be withheld pursuant to section 552.103 of the Government Code.

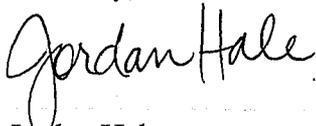
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<sup>3</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure.

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](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 at (512) 475-2497.

Sincerely,

A handwritten signature in cursive script that reads "Jordan Hale".

Jordan Hale  
Assistant Attorney General  
Open Records Division

JH/jb

Ref: ID# 337182

Enc. Submitted documents

cc: Requestor  
(w/o enclosures)