



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 19, 2009

Ms. Julie Renken
County Attorney
Washington County
100 East Main, Suite 200
Brenham, Texas 77833

OR2009-06804

Dear Ms. Renken:

~~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# 343460.~~

The Washington County Sheriff's Office (the "sheriff") received a request for the personnel file and any disciplinary action pertaining to a named police officer. 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.

Initially, we note that a portion of the submitted information is 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 includes a completed investigation report made by the sheriff. A completed investigation must be released under section 552.022(a)(1), unless the information is excepted from disclosure under section 552.108 or expressly confidential under other law. You claim that the submitted information is excepted under section 552.103 of the Government Code. 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 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); 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 (2000) (discretionary exceptions generally). As such, section 552.103 does not constitute "other law" that makes information confidential. Accordingly, we conclude that the sheriff may not withhold the completed report, which we have marked, under section 552.103. We note, however, that a portion of the completed report is subject to section 552.130 of the Government Code.¹ Section 552.130 is "other law" for the purposes of 552.022(a)(1). Therefore, we will consider whether this exception is applicable to the submitted report.

Section 552.130 of the Government Code provides that information relating to a motor vehicle operator's license, driver's license, motor vehicle title, or registration issued by a Texas agency is excepted from public release. Gov't Code § 552.130(a)(1), (2). The sheriff must withhold the Texas motor vehicle record information we have marked in the completed report under section 552.130. The remaining information in the completed report that is subject to section 552.022 must be released to the requestor.²

You assert that the remaining information is excepted under section 552.103 of the Government Code, which provides in 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 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.

¹The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

²We note that section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

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 on the date the governmental body received the request for information 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 indicate the requested information relates to a pending criminal prosecution by the Washington County Attorney (the “county attorney”), styled *State of Texas vs. Anthony Ackley*, Cause No. 08-560. You provide documentation showing that this litigation was pending when the sheriff received this request. However, the sheriff is not a party to the 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. As the county attorney, you request that the information at issue be withheld under section 552.103 and represent that release of the information would harm your position in this pending litigation. You state the requested information pertains to an officer that assisted with the investigation of the defendant in the pending litigation. Based on your representations and our review of the submitted information, we agree that litigation was pending as of the date the request was received. We further find that the requested records relate to the pending litigation. Accordingly, the sheriff may withhold the remaining information pursuant to section 552.103 of the Government Code.

We note, however, that once the information has been obtained by all parties to the pending litigation, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). We also note that the applicability of section 552.103(a) ends when the litigation has concluded. Attorney General Opinion MW-575 (1982) at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2 (1982).

In summary, with the exception of the Texas motor vehicle information we have marked under section 552.130, the sheriff must release the completed report we have marked pursuant to section 552.022(a)(1) of the Government Code. The sheriff may withhold the remaining information under section 552.103 of the Government Code.

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, 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,



Adam Leiber
Assistant Attorney General
Open Records Division

ACL/jb

Ref: ID# 343460

Enc. Submitted documents

c: Requestor
(w/o enclosures)