



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

March 30, 2015

Mr. Sam Shobassy  
Assistant City Attorney  
City of Port Arthur  
P.O. Box 1089  
Port Arthur, Texas 77641-1089

OR2015-06015

Dear Mr. Shobassy:

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# 558030.

The Port Arthur Police Department (the "department") received a request for nineteen categories of information pertaining to two named individuals, a specified address, and a specified lawsuit. You state the department has no information responsive to seven of the nineteen categories in the request.<sup>1</sup> You claim the submitted information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.<sup>2</sup>

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<sup>1</sup> The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dism'd); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

<sup>2</sup> We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Initially, we note some of the submitted information, which we have marked, is not responsive to the instant request because it was created after the date the request was received. This ruling does not address the public availability of any information that is not responsive to the request and the department is not required to release such information in response to this request.

Next, we note a portion of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

...

(17) information that is also contained in a public court record[.]

Gov't Code § 552.022(a)(17). The submitted information contains a court-filed document subject to section 552.022(a)(17). The department must release the information subject to subsection 552.022(a)(17) unless it is made confidential under the Act or other law. *See id.* You seek to withhold the information subject to section 552.022 under section 552.103 of the Government Code. However, this section is discretionary and does not make information confidential under the Act. *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 Gov't Code § 552.103); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Thus, the information subject to section 552.022 may not be withheld under section 552.103 of the Government Code. As you raise no other exceptions to disclosure for this information, which we have marked, the department must release it. However, we will address your argument under section 552.103 of the Government Code for the information not subject to section 552.022.

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 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 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, orig. proceeding); *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 from disclosure under section 552.103(a).

You state, and provide documentation showing, a lawsuit styled *State of Texas v. Zahi Hammad, et al*, Case No. D-194953, was pending in the 136<sup>th</sup> District Court of Jefferson County, Texas, prior to the date the department received the request. We note the department, which received the request for information, 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 whose litigation interests are at stake that it seeks to withhold the information from disclosure under section 552.103, as well as a demonstration of how that exception applies to the requested information. You state the Office of the Attorney General (the "OAG") objects to release of the remaining information because it relates to pending litigation in which the State of Texas is a party and the OAG is representing the State of Texas in the litigation at issue. Based on these representations and our review, we determine the litigation was pending on the date the department received the request for information and the information at issue is related to the pending litigation for the purposes of section 552.103. Therefore, we agree section 552.103(a) is applicable to the remaining information.

However, once information has been obtained by all parties to the pending litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. See Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the pending litigation is not excepted from disclosure under section 552.103(a). We note the opposing party to the pending litigation has seen or had access to some of the information at issue, which we have marked. Therefore, the department may not withhold this information under section 552.103(a). However, we agree the department may withhold the remaining information under section 552.103(a). We note the applicability of section 552.103(a) ends once the litigation

has been concluded. Attorney General Opinion MW-575 at 2 (1982); Open Records Decision No. 350 (1982).

We note some of the information that the opposing party to the pending litigation has seen or had access to contains information subject to sections 552.137 and 552.1175 of the Government Code.<sup>3</sup> Section 552.137 of the Government Code excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov’t Code § 552.137(a)-(c). The e-mail address at issue is not of a type excluded by subsection(c). Therefore, the department must withhold the personal e-mail address we have marked under section 552.137 of the Government Code, unless the owner affirmatively consents to its public disclosure.

Section 552.1175 of the Government Code protects the home address, home telephone number, emergency contact information, date of birth, social security number, and family member information of certain individuals, when that information is held by a governmental body in a non-employment capacity and the individual elects to keep the information confidential. *Id.* § 552.1175(b). Section 552.1175 applies, in part, to “current and former employees of the office of the attorney general who are or were assigned to a division of that office the duties of which involve law enforcement.” *Id.* § 552.1175(a)(9). Section 552.1175 also encompasses a personal cellular telephone or pager number, unless the cellular telephone or pager service is paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988). Thus, to the extent the individual whose cellular telephone number we have marked elects to restrict access to this information in accordance with section 552.1175(b) and the cellular telephone service is not paid for by a governmental body, the department must withhold the information we have marked under section 552.1175 of the Government Code. However, if no election is made or the cellular telephone service is paid for by a governmental body, then the department may not withhold this information under section 552.1175 of the Government Code.

In summary, the department must release the information we have marked under section 552.022(a)(17) of the Government Code. With the exception of the information that the opposing party to the pending litigation has seen or had access to, the department may withhold the remaining information under section 552.103(a) of the Government Code. The department must withhold the personal e-mail address we have marked under section 552.137 of the Government Code, unless the owner affirmatively consents to its public disclosure. To the extent the individual whose cellular telephone number we have marked elects to restrict access to this information in accordance with section 552.1175(b)

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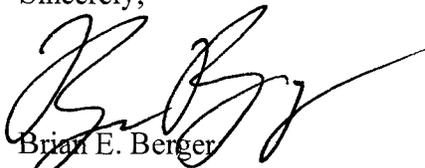
<sup>3</sup> The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

and the cellular telephone service is not paid for by a governmental body, the department must withhold the information we have marked under section 552.1175 of the Government Code. The remaining information must be released.<sup>4</sup>

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.texasattorneygeneral.gov/open/orl\\_ruling\\_info.shtml](http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml), 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Brian E. Berger  
Assistant Attorney General  
Open Records Division

BB/akg

Ref: ID# 558030

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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<sup>4</sup> We note the information being released includes the requestor's e-mail address to which he has a right of access. *See* Gov't Code § 552.137(b). Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including an e-mail address of a member of the public under section 552.137, without the necessity of requesting an attorney general decision. Accordingly, if the department receives another request from an individual other than this requestor, the department is authorized to withhold the e-mail address under section 552.137 without the necessity of requesting an attorney general decision.