



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 27, 2015

Mr. William S. Helfand
For the Harris County Constable's Office
Chamberlain, Hrdlicka, White, Williams & Aughtry, L.L.P.
1200 Smith Street, Suite 1400
Houston, Texas 77002

OR2015-17940

Dear Mr. Helfand:

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# 577376.

The Harris County Constable's Office Precinct One (the "constable's office"), which you represent, received multiple requests from two requestors for the personnel files of twelve named employees. 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.¹ We have also received and considered comments from one of the requestors. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

One of the requestors asserts she has a right of access to the submitted information under the Sixth Amendment of the United States Constitution (the "Sixth Amendment"). The Sixth Amendment states:

¹We assume 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.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. Const. amend. VI. Thus, in our system of justice, the Sixth Amendment provides the accused in “all criminal prosecutions” is entitled to certain rights, including the right to counsel, the right to be informed of the nature and cause of the accusation, the right to compulsory process to obtain defense witnesses, and the opportunity to cross-examine witnesses for the prosecution. *See Faretta v. California*, 422 U.S. 806, 818 (1975) (stating right to be informed of nature and cause of accusation, right to counsel, right of confrontation, and right to compulsory process are basic to criminal justice system and fundamental rights); *see also Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel); *Pointer v. Texas*, 380 U.S. 400 (1965) (right of confrontation); *Washington v. Texas*, 388 U.S. 14 (1967) (right to compulsory process); *Barker v. Wingo*, 407 U.S. 514 (1972) (right to speedy trial). However, here, the requestor is seeking information pursuant to the Act. As the Sixth Amendment guarantees the rights of an accused in criminal proceedings, it is not implicated in the context of a request for information under the Act, and, consequently, does not afford the requestor a right of access to the submitted information.

The requestor at issue also argues the Fourteenth Amendment guarantees her full access to exculpatory evidence to present a complete defense for her client. The Fourteenth Amendment prohibits the deprivation “of life, liberty, or property, without due process of law.” U.S. Const. amend. XIV, § 1. A court’s review of a due process claim requires a two-part analysis: (1) whether the liberty or property interests allegedly involved are entitled to procedural due-process protection; and (2) if so, what process is due. *Univ. of Tex. Med. Sch. v. Than*, 901 S.W.2d 926, 929 (Tex. 1995). Whether due process applies in the requestor’s pending case before the State Office of Administrative Hearings (the “SOAH”), and if so, what process is due, is a question the SOAH must decide after determining the relevant facts. However, here the requestor is seeking the information under the Act and, consequently, the guarantees of the requestor’s client under the Fourteenth Amendment, if any, are not implicated in this context and, thus, do not afford this requestor a right to the information at issue.

We note portions of the submitted information are 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:

(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 information at issue consists of completed evaluations subject to section 552.022(a)(1). The constable's office must release the completed evaluations pursuant to section 552.022(a)(1) unless they are excepted from disclosure under section 552.108 of the Government Code or expressly made confidential under the Act or other law. *See id.* Although you raise section 552.103 of the Government Code for the entirety of the submitted information, section 552.103 is a discretionary exception to disclosure 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); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions).

Therefore, none of the information subject to section 552.022(a)(1), which we have marked, may be withheld under section 552.103 of the Government Code. As no other exceptions have been raised for the information subject to section 552.022, the constable's office must release it. We will consider your argument under section 552.103 for the remaining information not subject to section 552.022 of the Government Code.

Section 552.103 of the Government Code provides, in relevant 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.

Gov't Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show section 552.103(a) applies in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the requested information is related to that litigation. *See 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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). *See* ORD 551 at 4. We note contested cases conducted under the Administrative Procedure Act (the “APA”), chapter 2001 of the Government Code, are considered litigation for purposes of section 552.103. *See* Open Records Decision No. 588 at 7 (1991). We further note a contested case before the SOAH is considered litigation for the purposes of the APA. *See id.*

You contend the remaining information is related to pending litigation to which the constable’s office is a party. You inform us, and have provided documentation demonstrating, litigation styled *Deputy Thomas Gehring v. Harris County*, case no. 4:15-CV-00726, was pending in the United States District Court for the Southern District of Texas, Houston Division, when the constable’s office received the requests for information. You also state the constable’s office was a party to a pending SOAH hearing, styled *Robert R. Perales v. Harris County Constable Precinct One*, SOAH Docket No. 407-15-0698.F5, when the constable’s office received the requests for information. You state the remaining information is related to the pending litigation. Based on your representations, the submitted documentation, and our review of the information at issue, we find litigation was pending when the constable’s office received the requests for information, and the remaining information not subject to section 552.022 is related to the pending litigation for the purposes of section 552.103. Therefore, the constable’s office may withhold the remaining information not subject to section 552.022 under section 552.103 of the Government Code.

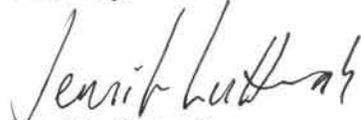
We note, however, the purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to that litigation to obtain it through discovery procedures. *See* ORD 551 at 4-5. Thus, if the opposing party has seen or had access to information relating to the pending litigation through discovery or otherwise, there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). We also note the applicability of section 552.103 ends once the related litigation concludes. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, the constable’s office must release the information we have marked pursuant to section 552.022(a)(1) of the Government Code. The constable’s office 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.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,



Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/akg

Ref: ID# 577376

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)