



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

May 1, 2015

Ms. Nneka Kanu
Assistant City Attorney
Legal Department
City of Houston
P.O. Box 368
Houston, Texas 77001-0368

OR2015-08492

Dear Ms. Kanu:

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# 561950 (GC No. 22090).

The City of Houston (the "city") received a request for mobile data terminal transmissions pertaining to a specified incident and the personnel files of two named officers involved in the incident. You state the city will release some information to the requestor. 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

Initially, we note the submitted information contains police officers' Texas Commission on Law Enforcement ("TCOLE") identification numbers. In Open Records Decision No. 581 (1990), this office determined certain computer information, such as source codes, documentation information, and other computer programming, that has no significance other than its use as a tool for the maintenance, manipulation, or protection of public property is

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 those records contain substantially different types of information than that submitted to this office.

not the kind of information made public under section 552.021 of the Government Code. We understand a TCOLE identification number is a unique computer-generated number assigned to an officer for identification in the commissioner's electronic database and may be used as an access device number on the TCOLE website. Accordingly, we find the TCOLE numbers in the submitted information do not constitute public information under section 552.002 of the Government Code. Therefore, the TCOLE numbers in the submitted information are not subject to the Act and need not be released to the requestor.

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; [and]

...

(15) information regarded as open to the public under an agency's policies[.]

Gov't Code § 552.022(a)(1), (15). Some of the submitted information consists of a completed investigation, which is subject to section 552.022(a)(1). The city must release this information pursuant to section 552.022(a)(1) unless it is excepted from disclosure under section 552.108 of the Government Code, or is made confidential under the Act or other law. *See id.* § 552.022(a)(1). Additionally, the submitted information includes a job description, which is generally open to the public as part of a job posting. If the city regards the submitted job description as open to the public, then this information is subject to section 552.022(a)(15), and the city may only withhold the job description we have marked if it is made confidential under the Act or other law. We note the city does not raise section 552.108 for the information subject to section 552.022(a)(1). Although the city asserts the information subject to section 552.022 is excepted from disclosure under section 552.103 of the Government Code, 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 section 552.103); Open Records Decision No. 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions). Therefore, the information subject to section 552.022 of the Government Code may not be withheld under section 552.103 of the Government

Code. As you raise no further exceptions for the information subject to section 552.022, the city must release the completed investigation pursuant to section 552.022(a)(1) of the Government Code. Additionally, if the city regards the submitted job description as open to the public, then the city must release it under section 552.022(a)(15) of the Government Code. If the city does not regard the job description at issue as open to the public, then we will consider your argument under section 552.103 for that information. Further, we will address your argument under section 552.103 for the remaining information not subject to section 552.022.

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.

You seek to withhold the remaining information under section 552.103 of the Government Code. You inform us, and have provided documentation demonstrating, litigation styled *David Allen v. The City of Houston, et. al*, cause no. 4:13-cv-01416, is pending in the United States District Court for the Southern District of Texas, Houston Division. Further, you contend the submitted information is related to the pending lawsuit because the officer whose personnel file is at issue is a defendant in the lawsuit and, thus, his information will likely be used by the opposing party in the case at issue. Based on your representations and our review of the remaining information, we find litigation was pending when the city received

this request for information and the information at issue is related to the pending litigation for the purposes of section 552.103. Therefore, the city may withhold the remaining information 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 TCOLE numbers in the submitted information are not subject to the Act and need not be released to the requestor. The city must release the completed investigation pursuant to section 552.022(a)(1) of the Government Code. Additionally, if the city regards the submitted job description as open to the public, then the city must release it under section 552.022(a)(15) of the Government Code. The city 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,



Lee Seidlits
Assistant Attorney General
Open Records Division

CLS/som

Ref: ID# 561950

Enc. Submitted documents

c: Requestor
(w/o enclosures)