



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

July 26, 2017

Ms. Cynthia Reyna
General Counsel
Texas State Office of Administrative Hearings
P.O. Box 13025
Austin, Texas 78711-3025

OR2017-16818

Dear Ms. Reyna:

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# 666012.

The State Office of Administrative Hearings ("SOAH") received a request for documents related to a hearing regarding a named individual. You state you have released some information. You claim the some of submitted information is excepted from disclosure under section 552.101 of the Government Code. We have also received and considered comments from the Texas Commission on Law Enforcement ("TCOLE"). *See* Gov't Code § 552.304 (providing that interested party may submit written comments regarding why information should or should not be released). We have considered the submitted arguments and reviewed the submitted information.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. This section encompasses section 1701.454 of the Occupations Code, which governs the public availability of information submitted to TCOLE under subchapter J of chapter 1701 of the Occupations Code. Section 1701.454 provides as follows:

- (a) All information submitted to the [TCOLE] under this subchapter is confidential and is not subject to disclosure under [the Act], unless the person

resigned or was terminated due to substantiated incidents of excessive force or violations of the law other than traffic offenses.

(b) Except as provided by this subchapter, a [TCOLE] member or other person may not release information submitted under this subchapter.

Occ. Code § 1701.454. You state some of the submitted information is subject to section 1701.454. Upon review, we find the information we marked was submitted to TCOLE pursuant to subchapter J of chapter 1701 of the Occupations Code. You state and provide documentation showing the officers at issue were not terminated due to substantiated incidents of excessive force or violations of laws other than traffic offenses. Therefore, SOAH must withhold the information we marked under section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code. However, we find no portion of the remaining information was submitted to TCOLE under to subchapter J of chapter 1701 of the Occupations Code. Accordingly, SOAH may not withhold the remaining information under section 552.101 in conjunction with section 1701.454 of the Occupations Code.

TCOLE asserts the remaining information is excepted from disclosure under section 552.103 of the Government Code. Section 552.103 of the Government Code provides 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). A 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 (1) litigation was 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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

We note contested cases conducted under the Administration 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 SOAH is considered litigation for purposes of the APA. *See id.*

TCOLE contends the submitted information is related to active litigation to which the TCOLE is a party. TCOLE states SOAH Docket No. 407-17-2432 was pending at time the SOAH received the instant request. TCOLE contends the submitted information is related to the active administrative action.

We note, however, the opposing party has seen or had access to the remaining information. The purpose of section 552.103 of the Government Code is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to the litigation to obtain such information through discovery procedures. *See* ORD 551 at 4-5. Thus, 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). Accordingly, TCOLE may not withhold the remaining information under section 552.103 of the Government Code.

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.¹ Gov't Code § 552.1175(b). Section 552.1175 applies, in part, to "peace officers as defined by Article 2.12, Code of Criminal Procedure[.]" *Id.* § 552.1175(a)(1). Therefore, if the individual at issue is currently a licensed peace officer and elects to restrict access to her information in accordance with section 552.1175(b), SOAH must withhold the information we marked under section 552.1175. Otherwise, SOAH may not withhold this information under section 552.1175.

In summary, SOAH must withhold the information we marked under section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code. If the individual at issue is currently a licensed peace officer and elects to restrict access to her information in accordance with section 552.1175(b), SOAH must withhold the information we marked under section 552.1175. The remaining information must be released.

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).

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,



Patrick P. Mehaffy
Attorney
Open Records Division

PPM/eb

Ref: ID# 666012

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Third Party
(w/o enclosures)