



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 29, 2007

Mr. Michael F. Miller
Senior Assistant City Attorney
City of Galveston
P. O. Box 779
Galveston, Texas 77553-0779

OR2007-03483

Dear Mr. Miller:

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# 274739.

The City of Galveston (the "city") received a request for a specified memorandum from the Fire Chief regarding training, copies of any and all letters or statements by training officials regarding the requestor's client, a copy of two named individuals' employment files, and a specified agreement between the city and one of the named individuals regarding his administrative leave. You claim that the requested information is excepted from disclosure under section 552.103 of the Government Code. We have considered your claimed exception and the submitted arguments. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Initially, we note that you have redacted information from the submitted documents. Pursuant to section 552.147(b) of the Government Code, all governmental bodies may redact social security numbers without the necessity of requesting a decision from this office. *See* Gov't Code § 552.147(b). Accordingly, the city may withhold social security numbers without seeking a decision from this office. You do not assert, nor does our review of our records indicate, that you have been authorized to withhold any of the remaining redacted information without seeking a ruling from this office. *See* Gov't Code § 552.301(a); Open Records Decision 673 (2000). Because we can discern the nature of the information that has been redacted, being deprived of this information does not inhibit our ability to make a ruling

in this instance. Nevertheless, be advised that a failure to provide this office with requested information generally deprives us of the ability to determine whether information may be withheld and leaves this office with no alternative other than ordering that the redacted information be released. *See* Gov't Code §§ 552.301(e)(1)(D) (governmental body must provide this office with copy of "specific information requested" or representative sample), 552.302.

Next, we note that in addition to the requestor's brief, the requestor has submitted information the city has previously released to him. Upon review of the documents, we conclude that the city has previously released Exhibit 2 to the requestor. The Act does not permit the selective disclosure of information to the public. *See* Gov't Code §§ 552.007(b), .021; Open Records Decision No. 463 at 1-2 (1987). If a governmental body voluntarily releases information to a member of the public, such information may not later be withheld unless its disclosure is expressly prohibited by law. *See* Gov't Code § 552.007. Although you assert that this information is protected under section 552.103 of the Government Code, this exception is discretionary and may be waived. As such, section 552.103 does not make information confidential for purposes of section 552.007. *See id.* (prohibiting selective disclosure of information that governmental body has voluntarily made available to any member of the public); Open Records Decision No. 542 at 4 (1990) (statutory predecessor to section 552.103 subject to waiver); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). Accordingly, the information in Exhibit 2 may not be withheld pursuant to section 552.103. As you raise no further exceptions against the disclosure of this information, it must be released to the requestor.

Section 552.103 provides in 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 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 receives the request for information, and (2) the information at issue is related to that litigation. *See Thomas v. Cornyn*, 71 S.W.3d 473, 487 (Tex. App.—Austin 2002, no pet.); *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 assert that the submitted information is related to a racial discrimination petition that was filed by the requestor's client, a former employee of the city, against the city and the city's Fire Fighters' and Police Officers' Civil Service Commission. The petition was filed before the date of the city's receipt of this request for information. You explain that the matter was decided by the trial court but has been appealed by the requestor. You state, and provide documentation showing, that the case is now on active status with the 14th Court of Appeals. Based on your representations and the submitted pleadings, we conclude that the city was a party to pending litigation when it received this request for information. Additionally, we agree that a portion of the submitted information is related to the pending litigation. Section 552.103 is applicable to Exhibits 1, 3A, and 5. Accordingly, these Exhibits may be withheld on that basis. However, you have failed to demonstrate how Exhibits 3B and 4 are related to the pending litigation. Therefore, Exhibits 3B and 4 may not be withheld under section 552.103.

The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information that is related to litigation through discovery procedures. *See* Open Records Decision No. 551 at 4-5 (1990). If the opposing party has seen or had access to information that is related to litigation, through discovery or otherwise, then there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Therefore, to the extent that the opposing party in the pending litigation has seen or had access to Exhibits 1, 3A, or 5, such information is not excepted from disclosure under section 552.103 and must be released. We note that the applicability of section 552.103 ends once the related litigation has been concluded. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

We note that Exhibits 3B and 4 contain information which is confidential by law.¹ Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses the common-law right of privacy, which protects

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

information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The types of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. In addition, this office has found that the following types of information are excepted from required public disclosure under common-law privacy: an individual's criminal history when compiled by a governmental body, personal financial information not relating to a financial transaction between an individual and a governmental body, some kinds of medical information or information indicating disabilities or specific illnesses, and identities of victims of sexual abuse. The city must withhold the information we have marked pursuant to section 552.101 of the Government Code in conjunction with common-law privacy.

Next, we note that a portion of the remaining information is confidential pursuant to section 552.117 of the Government Code. Section 552.117 excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who timely request that this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code § 552.117(a)(1). However, information subject to section 552.117(a)(1) may not be withheld from disclosure if the current or former employee made the request for confidentiality under section 552.024 after the request for information was received by the governmental body. Whether a particular piece of information is public must be determined at the time the request is received by the governmental body. *See* Open Records Decision No. 530 at 5 (1989). The submitted documents contain an election form on which the employee whose information is at issue elected to keep her home address and phone number confidential prior to the date on which the city received this request. Accordingly, the city must withhold the information we have marked pursuant to section 552.117(a)(1) of the Government Code.

We note that the remaining information contains information subject to section 552.130 of the Government Code. Section 552.130 excepts from disclosure "information [that] relates to . . . a motor vehicle operator's or driver's license or permit issued by an agency of this state [or] a motor vehicle title or registration issued by an agency of this state." Gov't Code § 552.130. Accordingly, the city must withhold the Texas driver's license information we have marked pursuant to section 552.130 of the Government Code.

The remaining information contains account numbers. Section 552.136 of the Government Code states that "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136. Therefore, the city must withhold the account numbers we have marked pursuant to section 552.136 of the Government Code.

Next, we note that the remaining information contains e-mail addresses. 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). Section 552.137 does not apply to a government employee’s work e-mail address because such an address is not that of the employee as a “member of the public,” but is instead the address of the individual as a government employee. The e-mail addresses we have marked in the remaining information are not of a type specifically excluded by section 552.137(c). Therefore, the city must withhold the e-mail addresses we have marked in accordance with section 552.137 unless the city receives consent for their release.

Finally, we note that the documents also contain a social security number. Section 552.147 of the Government Code provides that “[t]he social security number of a living person is excepted from” required public disclosure under the Act. Gov’t Code § 552.147. Therefore, the city must withhold the social security number contained in the submitted documents under section 552.147.

In summary, the city may withhold Exhibits 1, 3A, and 5 pursuant to section 552.103 of the Government Code. The city must withhold the information we have marked under section 552.101 in conjunction with common-law privacy. The city must also withhold the address and phone number we have marked pursuant to section 552.117, the account numbers we have marked pursuant to section 552.136, the private e-mail addresses we have marked pursuant to section 552.137, and the social security number we have marked in accordance with section 552.147 of the Government Code. The remaining information must be released.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the

statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Office of the Attorney General at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Jordan Johnson
Assistant Attorney General
Open Records Division

JJ/krl

Ref: ID# 274739

Enc. Submitted documents

c: Mr. Anthony P. Griffin
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(w/o enclosures)