



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

May 27, 2009

Ms. Meredith Ladd  
Brown & Hofmeister, L.L.P.  
740 East Campbell Road  
Suite 800  
Richardson, Texas 75081

OR2009-07194

Dear Ms. Ladd:

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# 344108.

The City of McKinney (the "city"), which you represent, received a request for 22 categories of information pertaining to specified city personnel and policies. You claim that the submitted information is excepted from disclosure under sections 552.103, 552.117, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>1</sup>

Pursuant to section 552.301 of the Government Code, a governmental body that seeks to withhold requested information must submit to this office a copy of the information unless the governmental body has received a previous determination for the information at issue. Gov't Code §§ 552.301(a), .301(e)(1)(D). A portion of the information you submitted to this office has been redacted. You do not assert, nor does our review of the records indicate, that you have been authorized to withhold any of the redacted information without seeking a

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<sup>1</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.

ruling from this office. *See id.* § 552.301(a); Open Records Decision No. 673 (2001) (discussing standard for issuance of previous determinations). *But see* Gov't Code § 552.147 (governmental body may redact living persons' social security numbers from public release without the necessity of requesting a decision from this office under the Act); Open Records Decision No. 670 (2001) (concluding that all governmental bodies subject to Act may withhold information that is subject to predecessor to section 552.117(a)(2) without necessity of seeking decision from this office). In accordance with section 552.301, responsive information must be submitted in a manner that enables this office to determine whether the information comes within the scope of an exception to disclosure. In this instance, we can discern the nature of the redacted information; thus, being deprived of that information does not inhibit our ability to make a ruling. In the future, however, the city should refrain from redacting, unless authorized to do so, any information it submits to this office in seeking an open records ruling. Redaction of such information may result in a determination that the information must be released. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ).

You assert that the submitted information is excepted from disclosure under section 552.103. Section 552.103 of the Government Code provides in 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 city 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 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, 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 city must meet both prongs of this test for information to be excepted under 552.103(a).

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To demonstrate that litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* This office has held that "litigation" within the meaning of section 552.103 includes contested cases conducted in a quasi-judicial forum. *See, e.g.,* Open Records Decision Nos. 474 (1987), 368 (1983), 301 (1982). For instance, this office has held that cases conducted under the Texas Administrative Procedure Act, chapter 2001 of the Government Code, constitute "litigation" for purposes of section 552.103. *See, e.g.,* Open Records Decision Nos. 588 (1991) (proceeding of former State Board of Insurance), 301 (1982) (proceeding of Public Utilities Commission). In determining whether an administrative proceeding is conducted in a quasi-judicial forum, this office has considered the following factors: 1) whether the dispute is, for all practical purposes, litigated in an administrative proceeding where a) discovery takes place, b) evidence is heard; c) factual questions are resolved, d) a record is made; and 2) whether the proceeding is an adjudicative forum of first jurisdiction, *i.e.*, whether judicial review of the proceeding in district court is an appellate review and not the forum for resolving a controversy on the basis of evidence. *See* ORD 588.

You inform us that after the requestor was terminated by the city's fire department, he filed a formal appeal of his termination. However, you do not explain how the formal appeal process constitutes litigation of a judicial or quasi-judicial nature for purposes of section 552.103. *See id.*; *see generally* Open Records Decision No. 301 (1982) (discussing meaning of "litigation" under predecessor to section 552.103). We also find you have not otherwise established that the city reasonably anticipated litigation when it received the request for information.<sup>2</sup> Thus, the city may not withhold the submitted information under section 552.103.

Section 552.117(a)(1) of the Government Code excepts from public disclosure the present and former 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 such information be kept confidential under section 552.024. Gov't Code § 552.117(a)(1). Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). The city may only withhold information under section 552.117(a)(1) on behalf of current or former officials or employees who made a request for confidentiality

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<sup>2</sup>Among other examples, this office has concluded that litigation was reasonably anticipated where the opposing party took the following objective steps toward litigation: (1) filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); (2) hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and (3) threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

under section 552.024 prior to the date on which the request for this information was made. Accordingly, if the employees whose information is at issue in Exhibit C timely elected to keep this information confidential pursuant to section 552.024, the city must withhold the information we have marked in Exhibit C under section 552.117(a)(1). To the extent these employees did not so elect, this information must be released. The employee whose information is at issue in Exhibit E elected to keep his home address, home telephone number, social security number, and family member information confidential. Thus, the city must withhold the information we have marked in Exhibit E under section 552.117(a)(1). Finally, you seek to withhold the requestor's personal information under section 552.117(a)(1). The requestor has a special right of access to his own private information that would otherwise be excepted from public disclosure. See Gov't Code § 552.023; Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning himself). Accordingly, you may not withhold the requestor's personal information under section 552.117.

The city also asserts that some of the remaining information is excepted under section 552.137 of the Government Code. Section 552.137 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). 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 private e-mail addresses at issue do not appear to be of a type specifically excluded by section 552.137(c). Therefore, the city must withhold the private e-mail addresses we have marked under section 552.137, unless the owners of the e-mail addresses affirmatively consent to their release.

We note that a portion of Exhibit E is subject to section 552.101 of the Government Code.<sup>3</sup> Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. This section encompasses the doctrine of common-law privacy, which protects information that (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). This office has found that a public employee's election of optional health and insurance coverages is a personal financial decision that is generally protected by common-law privacy. See Open Records Decision Nos. 600 (1992) (employee's designation of retirement beneficiary, choice of insurance carrier, election of optional coverages, direct deposit authorization, forms allowing employee to allocate pre-tax compensation to group insurance, health care or dependent

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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. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

care), 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history). We have marked the information that reveals personal financial decisions for which there is no legitimate public interest. You must withhold this information under section 552.101 in conjunction with common-law privacy.

Exhibit E also contains Texas motor vehicle record 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." *Id.* § 552.130. Accordingly, the city must withhold the Texas motor vehicle record information we have marked pursuant to section 552.130 of the Government Code.

Finally, Exhibit C contains a credit or debit card account number. Section 552.136 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." *Id.* § 552.136(b). The city must withhold the credit or debit account number marked under section 552.136 of the Government Code.

In summary, if the employees whose information is at issue in Exhibit C made proper elections pursuant to section 552.024, the city must withhold the information we have marked in Exhibit C under section 552.117(a)(1). To the extent these employees did not so elect, this information may not be withheld. The city must withhold the information in Exhibit E that we have marked under section 552.117(a)(1). The city must also withhold the private e-mail addresses we have marked under section 552.137. The city must withhold the information we have marked under section 552.101 in conjunction with common-law privacy. The city must withhold the Texas motor vehicle record information we have marked under section 552.130. Finally, the city must withhold the credit or debit card account information we have marked under section 552.136(b).<sup>4</sup> As you raise no other exceptions to disclosure, the remaining information must be released.

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.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php),

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<sup>4</sup>Because you have submitted records in electronic form we have not marked all of the information that is excepted from disclosure under sections 552.117, 552.136, and 552.137. However, we have printed a representative sample of this information and marked it in accordance with this ruling. These documents will be returned to the city for reference in complying with this ruling.

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 must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Bob Davis  
Assistant Attorney General  
Open Records Division

RSD/cc

Ref: ID# 344108

Enc. Submitted documents

cc: Requestor  
(w/o enclosures)