ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 11, 2009

Ms. Dorothy G. Palumbo
City Attorney
City of Highland Village
1000 Highland Village Road
Highland Village, Texas 75077

OR2009-11156

Dear Ms. Palumbo:

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# 352770.

The City of Highland Village (the "city") received a request for copies of all the requestor's fire and EMS training records, and hours that may be included for Fire/EMS CEs from January 2008 to the date of the request. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note a portion of the submitted information, which we have marked, is non-responsive because it lists the requestor's hours prior to January 2008. The city need not release non-responsive information in response to this request, and this ruling will not address that information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. App–San Antonio 1978, writ dism'd).

Next, we will address your arguments against disclosure of the responsive information. We begin with section 552.103 of the Government Code, as this section has the potential to be the most encompassing exception you raise. Section 552.103 provides in relevant 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 exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date that 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 section 552.103.

You state, and provide documentation showing, that the requestor filed a claim of discrimination with the Equal Employment Opportunity Commission (the "EEOC") prior to the date of the city's receipt of this request for information. This office has stated that a pending EEOC complaint indicates that litigation is reasonably anticipated. *See* Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982). Thus, we agree the city reasonably anticipated litigation on the date it received the present request for information. You indicate the information at issue is related to the anticipated litigation. Based on your representations and our review, we conclude section 552.103 is applicable to the responsive information.

We note, however, the requestor, who is also the opposing party, appears to have seen or had access to the requested information. 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 the litigation to obtain such information through discovery procedures. *See* ORD at 4-5. Thus, when the opposing party has seen or had access to information relating to pending litigation, there is no interest in withholding that information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). In this case, the responsive information consists of the requestor's continuing education course completion certificates, transcripts and examination results, the requestor's professional certifications, a letter of recommendation regarding the requestor from an instructor, and the requestor's fire department activity and training hours. Accordingly, the city may not withhold any of the responsive information which the requestor has seen or had access to under section 552.103. We further note the applicability of section 552.103 ends once the related litigation concludes or is no longer anticipated. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

You also raise section 552.101 of the Government Code. This section excepts from disclosure "information considered to be confidential by law, either constitutional, statutory,

or by judicial decision." Gov't Code § 552.101. You raise section 552.101 in conjunction with the common-law informer's privilege, which Texas courts have long recognized. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969). The informer's privilege protects the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided that the subject of the information does not already know the informer's identity. *See* Open Records Decision Nos. 515 at 3 (1998), 208 at 1-2 (1978). The privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." *See* Open Records Decision No. 279 at 2 (1981) (citing Wigmore, Evidence, § 2374, at 767 (McNaughton rev. ed. 1961)). The report must be of a violation of a criminal or civil statute. *See* Open Records Decision Nos. 582 at 2 (1990), 515 at 4-5 (1988). The privilege excepts the informer's statement only to the extent necessary to protect the informer's identity. *See* Open Records Decision No. 549 at 5 (1990).

In this instance, you do not inform us that the submitted information pertains in any way to an individual who has reported a violation of a criminal or civil statute. Accordingly, you have failed to demonstrate that the informer's privilege applies to any of the submitted information. Therefore, the city may not withhold any of the submitted information under section 552.101 in conjunction with the informer's privilege.

Finally, we understand you to raise section 552.108(a)(1) of the Government Code. Section 552.108 provides in part:

> (a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of Section 552.021 if:
>
> > (1) release of the information would interfere with the detection, investigation, or prosecution of crime[.]

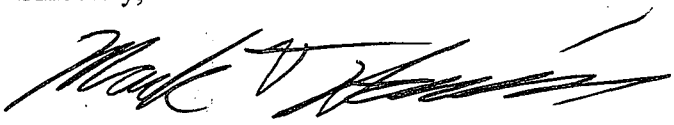
Gov't Code § 552.108(a). A governmental body claiming subsection 552.108(a)(1) must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See* Gov't Code §§ 552.108(a)(1), 552.301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You do not inform us that the responsive information is information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime. Furthermore, you do not explain how release of the submitted information would interfere in some way with the detection, investigation, or prosecution of crime. Therefore, you have not met your burden under section 552.108(a)(1). Accordingly, we find you have failed to demonstrate that the city may withhold the responsive information under section 552.108 of the Government Code.

In summary, to the extent the requestor has not seen or had access to the information at issue, the city may withhold it under section 552.103 of the Government Code. To the extent the requestor has seen or had access to the information, it must be released.[1]

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, 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,



Mack T. Harrison
Assistant Attorney General
Open Records Division

MTH/eeg

Ref: ID# 352770

Enc. Submitted documents

c: Requestor
(w/o enclosures)

---

[1]The submitted information contains social security numbers. We note that section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act. The requestor, however, has a right to her own social security number. *See generally* Gov't Code § 552.023(b) (governmental body may not deny access to person to whom information relates, or that person's representative, solely on grounds that information is considered confidential by privacy principles).