



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

September 10, 2009

Mr. Jason D. King  
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816 Congress Avenue, Suite 1725  
Austin, Texas 78701

OR2009-12838

Dear Mr. King:

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# 354879.

The City of Marfa (the "city") received requests for six categories of information related to: the city's contract with its city manager, Texas Workforce Commission (the "commission") quarterly reports related to the city, pay increases given to certain city employees, and documents containing city policies regarding its employees' personal activities. 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 information.

Exhibit B and Item 2 of Exhibit D contain ordinances adopted by the city. Because laws and ordinances are binding on members of the public, they are matters of public record and may not be withheld from disclosure under the Act. *See* Open Records Decision No. 551 at 2-3 (1990) (laws or ordinances are open records). We also find that the approved city budget submitted in Item 2 of Exhibit D, incorporated by reference into ordinance 08-06, is binding on the public and thus is a matter of public record which may not be withheld from disclosure. *Id.* Therefore, the submitted ordinances and approved city budget must be released.

The information submitted in Items 1 and 3 of Exhibit D consists of a notice of a public meeting of the city council and the minutes from that meeting. Notices of a governmental

body's public meetings and the minutes from public meetings are specifically made public under provisions of the Open Meetings Act, chapter 551 of the Government Code. *See Gov't Code §§ 551.022* (minutes of open meeting are public records and shall be available for public inspection and copying upon request), .041 (governmental body shall give written notice of date, hour, place, and subject of each meeting), .043 (notice of meeting of governmental body must be posted in place readily accessible to general public for at least 72 hours before scheduled time of meeting). As a general rule, the exceptions to disclosure found in the Act do not apply to information that other statutes make public. *See Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989)*. Accordingly, the submitted public meeting notice and minutes must be released in accordance with the Open Meetings Act.

Most of the remaining information is expressly made public under section 552.022 of the Government Code. Section 552.022 provides, in relevant part, as follows:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under 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;

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body;

...

(5) all working papers, research materials, and information used to estimate the need for or expenditure of public funds or taxes by a governmental body on completion of the estimate[.]

Gov't Code § 552.022(a)(1), (3), (5). The Texas Workforce Commission quarterly reports submitted in Exhibit B were completed by the city and submitted to the commission in the fourth quarter of last year and the first two quarters of this year. Upon review, we find these quarterly reports are completed reports made by the city and thus are expressly public under section 552.022(a)(1). The executed employment contract in Exhibit B, the golf course management contracts in Item 7 of Exhibit D, and the employee checks and attached vouchers in Items 5 and 6 of Exhibit D relate to the city's expenditure of public funds

through the execution of contractual obligations and payment of city employees' salaries. We therefore conclude these documents are subject to section 552.022(a)(3). The draft payroll worksheets submitted in Items 4 and 10 of Exhibit D were used by the city to estimate pay increases awarded to city employees. We understand that these estimates were completed, as the submitted documents reflect that the pay increases to which these documents relate were awarded. Therefore, these worksheets are subject to section 552.022(a)(5).

Generally, the city may only withhold information subject to section 552.022 if it is expressly confidential under other law. *Id.* § 552.022(a). Although you raise section 552.103 of the Government Code, section 552.103 is a discretionary exception to disclosure that protects the governmental body's interests and may be waived. *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); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 (1999) (governmental body may waive section 552.103). As such, section 552.103 is not "other law" that makes information confidential for the purposes of section 552.022. Therefore, the city may not withhold any information that is subject to section 552.022 under section 552.103. However, we note some of the information subject to section 552.022(a)(3) contains personal financial information subject to section 552.101 of the Government Code and account and routing numbers subject to section 552.136 of the Government Code.<sup>1</sup> Sections 552.101 and 552.136 are mandatory exceptions to disclosure, and thus are "other law" for purposes of section 552.022. We therefore consider whether section 552.101 or section 552.136 of the Government Code except from disclosure any information that is subject to section 552.022(a)(3).

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 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 a public employee's allocation of his salary to a voluntary investment program or to optional insurance coverage that is offered by his employer is a personal financial decision, and information about such decision is generally intimate or embarrassing and of no legitimate public concern. *See* Open Records Decision Nos. 600 (1992) (finding personal financial information to include designation of beneficiary of employee's retirement benefits and optional insurance coverage; choice of particular insurance carrier; direct deposit authorization; and forms allowing employee to allocate pretax compensation to group insurance, health care, or dependent care). Some of the

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<sup>1</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).

personal financial information pertains to the requestor's client. Government Code section 552.023(a) states that a person's authorized representative has a special right of access, beyond the right of the general public, to information held by a governmental body that relates to the person and is protected from public disclosure by laws intended to protect that person's privacy interests. Gov't Code § 552.023. Thus, pursuant to section 552.023, the requestor has a special right of access to information concerning his client, and this information may not be withheld under section 552.101. *See id.* Upon review, we find the information we marked reveals personal financial decisions of city employees other than the requestor's client for which there is no legitimate public interest. This information must be withheld under section 552.101 in conjunction with common-law privacy.

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). Section 552.136(a) defines "access device" as "a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to ... obtain money, goods, services, or another thing of value [or] initiate a transfer of funds other than a transfer originated solely by paper instrument." *Id.* § 552.136(b). Upon review, we conclude that the bank account numbers and routing numbers we marked in Items 5 and 7 in Exhibit D are access device numbers that must be withheld under section 552.136.

We next address your argument against release of the information not subject to section 552.022. Section 552.103 of the Government Code provides in pertinent 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, 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.); ORD 551 at 4. The city must meet both prongs of this test for information to be excepted under section 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” Open Records Decision No. 452 at 4 (1986). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. ORD 452 at 4. This office has stated that a pending Equal Employment Opportunity Commission (“EEOC”) complaint indicates that litigation is reasonably anticipated. *See* Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982).

You state, and provide documentation showing, that on June 8, 2009, the requestor filed an EEOC complaint on behalf of his client alleging discrimination based on race, national origin, and retaliation. Based on your representation and our review of the submitted EEOC complaint, we agree the city reasonably anticipated litigation on the date it received the present request for information. The submitted EEOC complaint alleges discrimination against the city in its administration of employee pay raises. You generally assert that the submitted documents directly relate or otherwise pertain to the EEOC claim or to personnel actions related to the requestor. Based on your representation and our review, we agree the remaining information relates to litigation anticipated by the city.

We note that 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 551 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 instance, the requestor’s client and the city’s opposing party in the filed EEOC complaint is the city’s police chief. As such, this individual has already seen or had access to most of the information to which section 552.103 applies. However, the requestor’s client only had access to this information in the usual scope of his employment as the city’s police chief. Such information is not considered to have been obtained by the opposing party to the litigation and may thus be withheld under section 552.103. Therefore, the city may withhold the information we marked under section 552.103 of the Government Code. We note, however, that 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 submitted ordinances and approved city budget must be released. The submitted public meeting notice and minutes must be released in accordance with the Open

Meetings Act. The city must withhold the information revealing personal financial decisions we marked under section 552.101 of the Government Code in conjunction with common-law privacy, the account and routing numbers we marked under section 552.136 of the Government Code, and the information we marked under section 552.103 of the Government Code. The remaining information must be released.<sup>2</sup>

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), 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, toll free, at (888) 672-6787.

Sincerely,



Bob Davis  
Assistant Attorney General  
Open Records Division

RSD/cc

Ref: ID# 354879

Enc. Submitted documents

cc: Requestor  
(w/o enclosures)

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<sup>2</sup>The reports being released in Exhibit B contain social security numbers. 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 has a right, however, to his client's 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).