



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 2, 2009

Mr. Julian Taylor, III
Assistant City Attorney for the City of Freeport
The Law Office of Wallace Shaw, P.C.
P.O. Box 3073
Freeport, Texas 77542-1273

OR2009-15572

Dear Mr. Taylor:

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# 360019.

The City of Freeport (the "city"), which you represent, received a request for actual or proposed salary requests from the City Manager for the 2009-2010 fiscal year; documents reflecting payroll and the number of employees for the city's Parks Department for 2007, 2008, and 2009; the complete personnel files of four named city employees; all documents addressing the residency requirements and residence information of all city judges; information regarding EEOC complaints against the city within the last five years; documents reflecting the race, gender, disability, and age information for city employees; documents pertaining to the relationship between two named city employees prior to their employment with the city; minutes for meetings in which the qualifications of City Manager candidates were discussed during 2008 and 2009; and minutes from any meeting in which the City Manager was chosen or his selection was discussed.¹ You state that you have released some of the responsive information and that you have redacted social security

¹We note the requestor modified his request twice. See Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).

numbers.² You also state that you have redacted the home telephone numbers, addresses, and family information of city peace officers pursuant to Open Records Decision No. 670 (2001). You claim that portions of the submitted information are excepted from disclosure under sections 552.103, 552.108, 552.115, 552.117, 552.130, and 552.137 of the Government Code.³ We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that you have redacted Texas motor vehicle information in the submitted information. 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, labeled to indicate which exceptions apply to which parts of the copy, unless the governmental body has received a previous determination for the information at issue. Gov't Code §§ 552.301(a), .301(e)(1)(D). You do not assert, nor does our review of our records indicate, that you have been authorized to withhold the information you redacted without seeking a ruling from this office. See Gov't Code § 552.301(a); Open Records Decision No. 673 (2000). 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 any information that it submits to this office in seeking an open records ruling. Failure to do so may result in the presumption that the redacted information is public. See Gov't Code § 552.302.

Next, we note that some of the submitted information constitutes information subject to section 552.022 of the Government Code. Section 552.022(a) enumerates categories of information that are not excepted from required disclosure under the Act unless expressly confidential under other law. See Gov't Code §§ 552.022(a)(1) (stating that a completed report or evaluation is public information unless excepted from disclosure under section 552.108 of the Government Code or made confidential under other law). We have marked performance evaluations and completed reports that fall under section 552.022(a)(1). This marked information is subject to required disclosure under the Act unless other law expressly makes it confidential. You claim that this information is excepted from disclosure under section 552.103 of the Government Code. Section 552.103 is a discretionary exception to disclosure that protects a governmental body's interests and does not make information confidential. See *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103). Therefore, you may not withhold any of the information that is subject to

²Section 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.

³Although you also raise section 552.101 in the city's initial brief to this office, you make no arguments explaining the applicability of these exceptions to the submitted information. Therefore, we assume you have withdrawn this exception.

section 552.022 under section 552.103. As you raise no other exception to disclosure of this information, it must be released to the requestor.

You state that a portion of the remaining submitted information is excepted from disclosure under section 552.103 of the Government Code. 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). 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, 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). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See id.*

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. *See id.* This office has found that a pending EEOC complaint and a pending complaint filed with the Texas Workforce Commission's Civil Rights Division indicate litigation is reasonably anticipated. Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982).

You state, and provide documentation showing, that prior to the city's receipt of the instant request, the discrimination claims at issue were filed with the EEOC against the city. Based on your arguments and our review of the submitted information, we find the city reasonably anticipated litigation on the date this request was received. You also state that the information found in Exhibits 6-A, 6-F, 6-R, and the remainder of Exhibit 6-C is information that pertains to the substance of the discrimination claims at issue. Based on your

representations and our review, we find the information at issue is related to the anticipated litigation. Therefore, section 552.103 is generally applicable to Exhibits 6-A, 6-F, 6-R, and the remaining information in Exhibit 6-C.

We note, however, that once an opposing party in pending litigation has seen or had access to information that is related to litigation, there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, the information the opposing party in the anticipated litigation has seen or had access to is not excepted from disclosure under section 552.103(a) and must be disclosed. In this instance, the opposing party in one of the EEOC complaints against the city has already seen or had access to some of the submitted information. Therefore, this information, which we have marked, may not be withheld under section 552.103. However, the city may withhold the remaining information at issue under section 552.103 of the Government Code.

You claim that portions of information you have marked in Exhibits 3P and 7-d are excepted from disclosure under section 552.108 of the Government Code. Section 552.108(b)(1) excepts from disclosure the internal records and notations of law enforcement agencies and prosecutors when their release would interfere with law enforcement and crime prevention. Gov't Code § 552.108(b)(1); *see also* Open Records Decision No. 531 at 2 (1989) (quoting *Ex parte Pruitt*, 551 S.W.2d 706, 710 (Tex. 1977)). Section 552.108(b)(1) is intended to protect "information which, if released, would permit private citizens to anticipate weaknesses in a police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate the laws of this State." *See City of Ft. Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App.—Austin 2002, no writ). This office has concluded that section 552.108(b) excepts from public disclosure information relating to the security or operation of a law enforcement agency. *See, e.g.*, Open Records Decision Nos. 531 (1989) (release of detailed use of force guidelines would unduly interfere with law enforcement), 252 (1980) (Gov't Code § 552.108 is designed to protect investigative techniques and procedures used in law enforcement), 143 (1976) (disclosure of specific operations or specialized equipment directly related to investigation or detection of crime may be excepted).

To claim section 552.108(b)(1), a governmental body must explain how and why release of the requested information would interfere with law enforcement and crime prevention. Gov't Code §§ 552.108(b)(1), .301; Open Records Decision No. 562 at 10 (1990). Generally known policies and techniques may not be withheld under section 552.108. *See, e.g.*, ORD 531 at 2-3 (Penal Code provisions, common law rules, and constitutional limitations on use of force are not protected under predecessor to section 552.108), 252 at 3 (governmental body did not meet burden because it did not indicate why investigative procedures and techniques requested were any different from those commonly known). Although you generally assert that release of the dates of birth you have marked in Exhibits 3P and 7-d would potentially interfere with the investigation of crime, you do not demonstrate any specific harm that would result from the release of this information. Thus,

we find that you have not adequately explained how release of the information at issue would interfere with law enforcement or crime prevention. Accordingly, the city may not withhold any portion of the information you have marked under section 552.108(b)(1) of the Government Code.

Next, you raise section 552.115 of the Government Code for the portion of the remaining information you have marked as Exhibit 3A. Section 552.115 excepts from disclosure “[a] birth or death record maintained by the bureau of vital statistics of the Texas Department of Health or a local registration official[.]” Gov’t Code § 552.115(a). Section 552.115 is applicable only to information maintained by the bureau of vital statistics or local registration officials. *See* Open Records Decision No. 338 (1982) (finding that statutory predecessor to section 552.115 excepted only those birth and death records which are maintained by the bureau of vital statistics and local registration officials). Because section 552.115 does not apply to information held by the city, the submitted birth certificate may not be withheld on this basis.

We note that section 552.117(a)(1) of the Government Code excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former official or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Gov’t Code § 552.117(a)(1). Additionally, section 552.117(a)(2) excepts from disclosure the home address, home telephone number, social security number, and the family member information of a peace officer as defined by article 2.12 of the Code of Criminal Procedure, regardless of whether the officer elected confidentiality under section 552.024 or section 552.1175 of the Government Code. *Id.* § 552.117(a)(2). 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 a former or current official or employee who has made a request for confidentiality under section 552.024 prior to the date on which the request for information was made.

Exhibits 3A, 3P, and 3S contain personal information pertaining to city employees. The information in Exhibits 3A and 3S pertains to city employees who are not peace officers. Therefore, if the officials whose information we have marked in Exhibits 3A and 3S timely elected to keep their information confidential under section 552.024, the city must withhold this information pursuant to section 552.117(a)(1). If the officials did not make a timely election for confidentiality, their information may not be withheld under section 552.117(a)(1). The information at issue in Exhibit 3P pertains to a peace officer. Accordingly, the city must withhold the information we have marked in Exhibit 3P under section 552.117(a)(2) of the Government Code.

You claim section 552.130 of the Government Code for portions of the remaining information in Exhibits 3M, 3P, and 3S. 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(a). Therefore, the city must withhold the Texas motor vehicle record information we have marked in Exhibits 3M, 3P, and 3S under section 552.130 of the Government Code.

We note that a portion of Exhibit 3P is protected from disclosure under section 552.136 of the Government Code.⁴ 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.” Gov’t Code § 552.136(b); *see id.* § 552.136(a) (defining “access device”). This office has determined that insurance policy numbers are access device numbers for purposes of section 552.136. Accordingly, the city must withhold the insurance policy number we have marked in Exhibit 3P under section 552.136 of the Government Code.

Finally, you assert that section 552.137 applies to the portion of the submitted information. 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 id.* § 552.137(a)–(c). The e-mail addresses at issue are not a type specifically excluded by section 552.137(c). Accordingly, the city must withhold the information we have marked in Exhibit 3P as well as the additional e-mail address we have marked in Exhibit 3S under section 552.137 of the Government Code unless the owners of the e-mail addresses have affirmatively consented to their disclosure.

In summary, the city must release the information we have marked under section 552.022 of the Government Code. Additionally, the city may withhold the information we have marked under section 552.103 of the Government Code. If the officials in Exhibits 3A and 3S timely elected to keep their personal information confidential under section 552.024 of the Government Code, the city must withhold that information, which we have marked, pursuant to section 552.117(a)(1) of the Government Code. The city must withhold the information we have marked under sections 552.117(a)(2), 552.130, 552.136, and 552.137 of the Government Code. 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.

⁴The 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 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, toll free, at (888) 672-6787.

Sincerely,



James McGuire
Assistant Attorney General
Open Records Division

JM/eb

Ref: ID# 360019

Enc. Submitted documents

c: Requestor
(w/o enclosures)