



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 28, 2011

Ms. Michelle Weiser
Schneider, Krugler, Kleinschmidt & Weiser, P.C.
P.O. Box 507
Giddings, Texas 78942

OR2011-09229

Dear Ms. Weiser:

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#422130.

The City of Lexington (the "city"), which you represent, received a request for information relating to an investigation of the city's police department.¹ You claim the requested information is excepted from disclosure under sections 552.101, 552.103, 552.108, 552.117, and 552.137 of the Government Code.² We have considered the exceptions you claim and reviewed the information you submitted.

We first note the submitted information includes copies of Texas statutes. Because laws and ordinances are binding on members of the public, they are matters of public record and may

¹We note the requestor specifically seeks access to the Police Misconduct Review Committee's final report and recommendations. You do not indicate such information existed when the city received this request for information. The Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

²We note you do not specifically raise sections 552.101, 552.117, and 552.137 of the Government Code but have described the types of information these exceptions encompass. *See Gov't Code* §§ 552.301(a), .302. Therefore, as sections 552.101, 552.117, and 552.137 are mandatory exceptions to disclosure, we will consider whether they are applicable in this instance. *See id.* §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

not be withheld from disclosure under the Act. Therefore, the city must release the submitted statutes, which we have marked. *See* Open Records Decision No. 551 at 2-3 (1990).

We also note some of the submitted information falls within the scope of section 552.022 of the Government Code. Section 552.022(a)(17) provides for required public disclosure of "information that is also contained in a public court record[.]" Gov't Code § 552.022(a)(17). Thus, the court documents we have marked fall within the scope of section 552.022(a)(17). You claim sections 552.103 and 552.108 of the Government Code, which are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived. *See id.* § 552.007; *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 Gov't Code § 552.103); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 177 at 3 (1977) (statutory predecessor to Gov't Code § 552.108 subject to waiver). As such, sections 552.103 and 552.108 are not other law that makes information confidential for the purposes of section 552.022(a)(17). Therefore, the city may not withhold the information in the court documents under sections 552.103 or 552.108. Although you also claim sections 552.101, 552.117, and 552.137 of the Government Code, which are confidentiality provisions for purposes of section 552.022(a)(17), none of the information in the court documents falls within the scope of any of those sections. Therefore, the city must release the marked court documents pursuant to section 552.022(a)(17) of the Government Code.

Next, we address your claim for the rest of the submitted information under section 552.103. This exception 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 that claims section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information at issue. To meet this burden, the governmental body must demonstrate that (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) the information at issue is related to the pending or anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479

(Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See* Open Records Decision No. 551 at 4 (1990).

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

You inform us the former city police chief has filed a charge of discrimination against the city. You have provided a copy of the charge, which reflects it was filed with the Civil Rights Division of the Texas Workforce Commission prior to the city’s receipt of the instant request for information. You indicate the rest of the submitted information is related to the former police chief’s claims of discrimination. Based on your representations and documentation and our review of the remaining information, we find the information at issue is related to litigation the city reasonably anticipated when it received this request for information. We therefore conclude the city may generally withhold the remaining information under section 552.103 of the Government Code.

In this instance, however, the former police chief has already seen some of the remaining information. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. *See* ORD 551 at 4-5. Thus, if the opposing party has seen or had access to information relating to anticipated litigation, through discovery or otherwise, 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, the information the opposing party in the anticipated litigation has seen may not be withheld under section 552.103. Except for that information, which we have marked, the city may withhold the remaining information under section 552.103. We note the applicability of this exception ends once the related litigation concludes or is no longer reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Lastly, we note sections 552.117 and 552.130 of the Government Code are applicable to some of the information the city may not withhold under section 552.103.³ Section 552.117(a)(2) excepts from disclosure the home address, home telephone number, emergency contact information, and social security number of a peace officer, as well as

³This office will raise section 552.130 on behalf of a governmental body, as this section is a mandatory exception to disclosure. *See* Gov’t Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

information that reveals whether the officer has family members, regardless of whether the officer complies with sections 552.024 or 552.1175 of the Government Code. *See* Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 2 (to be codified as an amendment to Gov't Code § 552.117(a)). Section 552.117(a)(2) adopts the definition of peace officer found at article 2.12 of the Code of Criminal Procedure. The city must withhold the information we have marked under section 552.117(a)(2) of the Government Code.

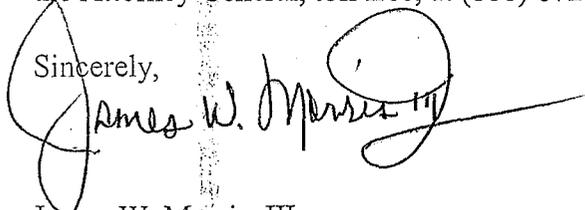
Section 552.130 of the Government Code excepts from disclosure information relating to a motor vehicle title or registration issued by an agency of this state or another state or country. *See* Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 4 (to be codified as an amendment to Gov't Code § 552.130). The city must withhold the driver's license information we have marked under section 552.130 of the Government Code.

In summary, the city (1) must release the marked statutes; (2) must release the marked court documents pursuant to section 552.022(a)(17) of the Government Code; (3) may withhold the rest of the submitted information under section 552.103 of the Government Code, except for the marked information the opposing party in the anticipated litigation has seen; (4) must withhold the information we have marked under section 552.117(a)(2) of the Government Code; (5) must withhold the driver's license information we have marked under section 552.130 of the Government Code; and (6) must release the rest of the submitted information. As we are able to make these determinations, we need not address the other exceptions you claim.

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

Sincerely,

A handwritten signature in black ink, appearing to read "James W. Morris, III". The signature is written in a cursive style and is positioned to the right of the word "Sincerely,".

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/em

Ref: ID# 422130

Enc: Submitted documents

c: Requestor
(w/o enclosures)