



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 29, 2012

Mr. Gerald E. Castillo
City Attorney
City of Edinburg
P.O. Box 1079
Edinburg, Texas 78540

OR2012-03171

Dear Mr. Castillo:

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# 446732.

The City of Edinburg (the "city") received a request for information pertaining to a former employee. You claim the requested information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note some of the submitted information is subject to section 552.022 of the Government Code, which provides:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under [the Act] or 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;

...

(15) information regarded as open to the public under an agency's policies [and]

...

(17) information that is also contained in a public court record[.]

Gov't Code § 552.022(a)(1), (3), (15), (17). The submitted employee performance evaluation, which we have marked, is subject to section 552.022(a)(1) of the Government Code and must be released unless it is expressly confidential under the Act or other law or is excepted from disclosure by section 552.108. The checks and receipts we have marked are subject to section 552.022(a)(3) and must be released unless they are expressly confidential under the Act or other law. The job description we have marked must be released pursuant to section 552.022(a)(15), if the city considers job descriptions to be open to the public under its policies, unless it is expressly confidential under the Act or other law. The court filed documents we have marked are subject to section 552.022(a)(17) and must be released unless they are expressly confidential under the Act or other law. Although you assert this information is excepted from disclosure under section 552.103 of the Government Code, this section is a discretionary exception under the Act and does not make information confidential under the Act. *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); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 (1999) (governmental body may waive section 552.103). Accordingly, the city may not withhold the marked employee evaluation, checks and receipts, or court filed documents under section 552.103. Likewise, the job description may not be withheld under section 552.103 if it is considered to be open to the public under the city's policies for purposes of section 552.022(a)(15). As you do not claim any other exceptions for the job description, if it is considered to be open to the public under the city's policies then it must be released pursuant to section 552.022(a)(15). However, we will consider your assertion of section 552.103 for the marked job description if it is not considered to be open to the public under the city's policies, and for the information not subject to section 552.022 of the Government Code. Furthermore, we note the employee evaluation, checks and receipts, and court filed documents contain information that may be subject to sections 552.101, 552.117, and 552.136 of the Government Code, all of which make information confidential under the

Act.¹ Accordingly, we will address the applicability of sections 552.101, 552.117, and 552.136 to the employee evaluation, checks and receipts, and court filed documents.

Next, we address your argument under section 552.103 of the Government Code for the information not subject to section 552.022 and the job description if the city does not consider it to be open to the public under the city's policies. Section 552.103 of the Government Code provides 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). A governmental body 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 was 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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You state, and provide documentation showing, a lawsuit was filed against the former employee, the city mayor, and the city chief of police, in their individual and official capacities, prior to the city's receipt of the present request for information. You further state the submitted information is related to the pending litigation because it pertains directly to the subject matter of the litigation. Accordingly, upon review of your arguments and the information at issue, we find litigation was pending when the city received this request for information and the information at issue relates to the pending litigation. Therefore, the city

¹The 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).

may withhold the information that is not subject to section 552.022 of the Government Code and the job description if the city does not consider it to be open to the public under the city's policies pursuant to section 552.103 of the Government Code.²

We note once information has been obtained by all parties to the pending litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the pending litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

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. Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The type of information considered intimate or embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. This office has also found that personal financial information not relating to the financial transaction between an individual and a governmental body is excepted from disclosure under common-law privacy. *See* Open Records Decision No. 600 (1992) (public employee's withholding allowance certificate, designation of beneficiary of employee's retirement benefits, direct deposit authorization, and employee's decisions regarding voluntary benefits programs, among others, protected under common-law privacy). We note, however, the public generally has a legitimate interest in information that relates to public employment and public employees. *See* Open Records Decision Nos. 542 (1990); 470 at 4 (1987) (public has legitimate interest in job qualifications and performance of public employees); 444 at 5-6 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation or public employees); 432 at 2 (1984) (scope of public employee privacy is narrow).

Upon review, we find the personal financial information we have marked is highly intimate or embarrassing and not of legitimate public concern. Therefore, the city must withhold the information we have marked pursuant to section 552.101 of the Government Code in conjunction with common-law privacy.

²As our ruling on this information is dispositive, we need not address your argument against its disclosure under section 552.101 of the Government Code.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home addresses and telephone numbers, social security numbers, emergency contact information, and family member information of current or former officials or employees of a governmental body who request this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code § 552.117(a); Open Records Decision No. 622 (1994). Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. We have marked the personal information of the former employee. If the former employee made a timely election under section 552.024, the city must withhold the information we have marked under section 552.117(a)(1). If the former employee did not make a timely election under section 552.024, this information may not be withheld under section 552.117(a)(1).³

Section 552.136 of the Government Code states “[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. Accordingly, we find the city must withhold the bank account and routing numbers we have marked under section 552.136 of the Government Code.

In summary, if the city considers the marked job description to be open to the public under the city's policies, the city must release it pursuant to section 552.022(a)(15) of the Government Code. The city may withhold the information that is not subject to section 552.022 of the Government Code and the job description if it is not considered to be open to the public under the city's policies pursuant to section 552.103 of the Government Code. The city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. If the former employee made a timely election under section 552.024 of the Government Code, the city must withhold the information we have marked under section 552.117(a)(1) of the Government Code. The city must withhold the bank account and routing numbers we have marked under section 552.136 of the Government Code. The remaining information must be released.

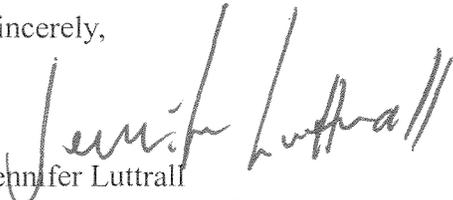
This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

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

³If the employee did not make a timely confidentiality election under section 552.024, we note section 552.147(b) of the Government Code permits a governmental body to withhold a living person's social security number without the necessity of requesting a decision from this office. *See* Gov't Code § 552.147(b).

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,



Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/dls

Ref: ID# 446732

Enc. Submitted documents

c: Requestor
(w/o enclosures)