



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

January 17, 2014

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Austin, Texas 78730

OR2014-01171

Dear Mr. Evans:

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# 511388.

The City of Balch Springs (the "city"), which you represent, received a request for (1) information pertaining to a named city council member's application filing for candidacy, and (2) information pertaining to a named former employee, including the employee's hire date, termination information, Equal Employment Opportunity Commission ("EEOC") claim information, and information pertaining to the named former employee's lawsuit against the city. You state you have released information pertaining to item one of the request. We understand you have redacted social security numbers pursuant to section 552.147(b) of the Government Code.<sup>1</sup> You claim the submitted information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>2</sup>

Initially, we note some of the requested information may have been the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2011-16205 (2011). In Open Records Letter No. 2011-16205, we

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<sup>1</sup>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. *See* Gov't Code § 552.147(b).

<sup>2</sup>We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

ruled the city (1) must release the information we marked pursuant to section 552.022(a)(3) of the Government Code; (2) must release the submitted settlement agreement pursuant to section 552.022(a)(18) of the Government Code; and (3) with the exception of the information we marked for release, may withhold the remaining information under section 552.103 of the Government Code. You now raise sections 552.103 and 552.107 of the Government Code for the submitted information, portions of which may have been at issue in the previous ruling.

Section 552.007 of the Government Code provides if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law or the information is confidential under law. *See* Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under Act, but it may not disclose information made confidential by law). Accordingly, pursuant to section 552.007, the city may not now withhold any previously released information unless its release is expressly prohibited by law or the information is confidential under law. Although you raise sections 552.103 and 552.107 for the submitted information, these sections do not prohibit the release of information or make information confidential. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 439, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Thus, to the extent any portion of the submitted information was previously released in accordance with Open Records Letter No. 2011-16205, the city may not now withhold such information under section 552.103 or section 552.107. As we have no indication the law, facts, and circumstances on which Open Records Letter No. 2011-16205 was based have changed, the city must continue to rely on that ruling as a previous determination and withhold or release any identical information in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes information is or is not excepted from disclosure). To the extent the submitted information is not identical to information at issue in Open Records Letter No. 2011-16205, we will consider your arguments under sections 552.103 and 552.107 of the Government Code.

Next, we note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

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

...

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

(18) a settlement agreement to which a governmental body is a party.

Gov't Code § 552.022(a)(3), (17), (18). The submitted information contains a cash receipt relating to the receipt of funds by the city that is subject to section 552.022(a)(3), court-filed documents that are subject to section 552.022(a)(17), and a settlement agreement between the city and an individual that is subject to section 552.022(a)(18). Although you raise section 552.103 of the Government Code for this information, this section is a discretionary exception to disclosure that protects a governmental body's interest and does not make information confidential. *See Dallas Area Rapid Transit*, 4 S.W.3d at 475-76; ORDs 665 at 2 n.5, 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation and does not itself make information confidential). Consequently, the city may not withhold the information subject to section 552.022, which we have marked, under section 552.103 of the Government Code. As you raise no other exception to disclosure of this information, this information must be released. However, we will address your claims under sections 552.103 and 552.107 of the Government Code for the remaining information, which is not subject to section 552.022.

Next, we will address your arguments under section 552.103 of the Government Code for the information not subject to section 552.022. Section 552.103 of the Government Code provides, in relevant 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 governmental body claiming section 552.103 has the burden of providing relevant facts and documents sufficient to establish the applicability of

section 552.103 to the information it seeks to withhold. To meet this burden, the governmental body must demonstrate: (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 that litigation. See *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, orig. proceeding); *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 ORD 551 at 4.

You state, and provide documentation showing, prior to the city's receipt of the instant request, a lawsuit styled *Harris v. City of Balch Springs*, Cause No. 3:11-CV-2307-L, was filed and is currently pending against the city in the United States District Court for the Northern District of Texas, Dallas Division. Therefore, we agree litigation was pending on the date the city received the present request for information. You also state the information at issue pertains to the substance of the lawsuit claims. You further explain the plaintiff in the lawsuit has requested the same information in discovery requests. Based on your representations and our review, we find the information at issue is related to the pending litigation. Therefore, we conclude section 552.103 of the Government Code is generally applicable to the information at issue.

However, we note the opposing party in the pending litigation has seen or had access to some of the information at issue. 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 litigation, through discovery or otherwise, then 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 city may not withhold the information the opposing party has seen or accessed, which we have marked, under section 552.103. Accordingly, with the exception of the information we have marked for release, the city may withhold the remaining information under section 552.103.<sup>3</sup> We also note the applicability of section 552.103 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).

We note some of the information the opposing party has seen or accessed contains confidential information.<sup>4</sup> Section 552.101 of the Government Code excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses the doctrine of common-law privacy,

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<sup>3</sup>As our ruling for this information is dispositive, we need not address your remaining argument against its disclosure.

<sup>4</sup>The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. Additionally, this office has found personal financial information not relating to the financial transaction between an individual and a governmental body is excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 600 (1992), 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history). Upon review, we find the information we have marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.102(a) of the Government Code excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” Gov’t Code § 552.102(a). The Texas Supreme Court held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). Upon review, we find the city must withhold the birth date we have marked under section 552.102(a) of the Government Code.

Some of the remaining information may be subject to section 552.117(a)(2) of the Government Code. Section 552.117(a)(2) excepts from public disclosure the home addresses, home telephone numbers, emergency contact information, social security number, and family member information of a peace officer, as defined by article 2.12 of the Code of Criminal Procedure, regardless of whether the peace officer complies with section 552.024 of the Government Code or section 552.1175 of the Government Code. Gov’t Code § 552.117(a)(2). We note section 552.117 is also applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). In this instance, it is unclear whether the employee whose information is at issue is currently a licensed peace officer as defined by article 2.12. Accordingly, if the employee whose information is at issue is currently a licensed peace officer as defined by article 2.12, then the city must withhold the cellular telephone number we have marked under section 552.117(a)(2) of the Government Code, if the cellular telephone service is not paid for by a governmental body.

In the event the employee at issue is not a licensed peace officer, then the information we have marked may be subject to section 552.117(a)(1) of the Government Code. Further, the remaining information contains employee information pertaining to other city employees. Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers,

emergency contact information, social security numbers, and family member information of current or former officials 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). As previously noted, section 552.117 is also applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See* ORD 506 at 5-6. Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may be withheld under section 552.117(a)(1) only on behalf of a current or former employee or official 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. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee or official who did not timely request under section 552.024 the information be kept confidential. Therefore, if the individuals whose information is at issue timely requested confidentiality 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; however, the marked cellular telephone number may only be withheld if the cellular telephone service is not paid for by a governmental body. If the individuals at issue did not timely request confidentiality under section 552.024, or the cellular telephone service is paid for by a governmental body, the city may not withhold the marked information under section 552.117(a)(1) of the Government Code.

Section 552.137 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* Gov't Code § 552.137(a)-(c). The e-mail addresses at issue are not excluded by subsection (c). Therefore, the city must withhold the personal e-mail addresses we have marked in the remaining information under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure.

In summary, the city must continue to rely on Open Records Letter No. 2011-16205 as a previous determination and withhold or release any identical responsive information in accordance with that ruling. The city must release the information we have marked pursuant to section 552.022 of the Government Code. With the exception of the information we have marked for release, the city may withhold the remaining information under 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 and the birth date we have marked under section 552.102(a) of the Government Code. If the employee whose information is at issue is currently a licensed peace officer, the city must withhold the cellular telephone number we have marked in the remaining information under section 552.117(a)(2) of the Government Code, if the cellular telephone service is not paid for by a governmental body. The city must withhold the information we have marked under section 552.117(a)(1) of the Government Code, if the individuals whose information is at issue timely requested confidentiality under section 552.024 of the Government Code and

the cellular telephone service is not paid for by a governmental body. The city must withhold the e-mail addresses we have marked in the remaining information under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure. The city must release the remaining information.<sup>5</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.texasattorneygeneral.gov/open\\_orl\\_ruling\\_info.shtml](http://www.texasattorneygeneral.gov/open_orl_ruling_info.shtml), 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Cynthia G. Tynan  
Assistant Attorney General  
Open Records Division

CGT/akg

Ref: ID# 511388

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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<sup>5</sup>We note the information being released contains social security numbers. As previously noted, 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. *See* Gov't Code § 552.147(b).