



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 27, 2014

Ms. Judi S. Rawls
Police Legal Counsel
City of Beaumont Police Department
P.O. Box 3827
Beaumont, Texas 77704-3827

OR2014-11083

Dear Ms. Rawls:

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# 527391 (OR 04-19).

The City of Beaumont (the "city") received a request for six categories of information related to a specified internal affairs investigation, including e-mails, memoranda, notes, or letters from thirteen named individuals regarding the investigation; the current organizational chart for the city's police department; and the hourly rate of pay, including overtime pay, for each city employee mentioned in the request. You claim the requested 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.

Initially, we note you have not submitted information responsive to the portions of the request regarding the police department's organizational chart and e-mails, memoranda, notes, or letters from several of the named individuals regarding the investigation. We assume, to the extent any information responsive to these portions of the request existed on the date the city received the request, the city has released it. If the city has not released any such information, it must do so at this time. *See* Gov't Code §§ 552.006, .301, .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes no exceptions apply to requested information, it must release information as soon as possible).

Next, we note some of the responsive information is subject to section 552.022 of the Government Code, which provides in pertinent 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:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108; [and]

(2) the name, sex, ethnicity, salary, title, and dates of employment of each employee and officer of a governmental body[.]

Gov't Code § 552.022(a)(1)-(2). The responsive information includes a completed investigation subject to subsection 552.022(a)(1) and employee salary information not part of the completed investigation subject to subsection 552.022(a)(2).

The city may only withhold the completed investigation if it is excepted from disclosure under section 552.108 of the Government Code or is expressly made confidential under other law. The city may only withhold the responsive salary information if it is confidential under other law. Although you seek to withhold the information subject to section 552.022 under section 552.103 of the Government Code, this section is a discretionary exception that protects a governmental body's interest 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); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 542 at 4 (1990) (statutory predecessor to section 552.103 subject to waiver). Therefore, the city may not withhold the completed investigation or the responsive salary information under section 552.103 of the Government Code. As you raise no further exceptions to disclosure for the salary information, it must be released. However, because sections 552.102, 552.117, and 552.130 of the Government Code make information confidential under the Act, we will consider the applicability of these exceptions to the completed investigation.¹ We also will address the city's claim under section 552.103 of the Government Code for the information not subject to section 552.022 of the Government Code.

Section 552.102 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." *Id.* § 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

¹The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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 employee dates of birth in the completed investigation under section 552.102(a) of the Government Code.

Section 552.117 of the Government Code 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 this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). 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)*. Therefore, the city may only withhold information under section 552.117 on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made.

Accordingly, to the extent the employee whose information is at issue timely elected to keep such information confidential under section 552.024, the city must withhold the information we have marked under subsection 552.117(a)(1) of the Government Code. If the employee did not make a timely election under section 552.024, the city may not withhold this information under section 552.117(a)(1) of the Government Code.

Section 552.130 of the Government Code excepts from disclosure information relating to a motor vehicle operator's license or driver's license issued by an agency of this state or another state or country. Gov't Code § 552.130(a)(1). Upon review, we find some of the information subject to section 552.022 consists of motor vehicle record information. Accordingly, the city must withhold the motor vehicle record information we have marked in the completed investigation under section 552.130 of the Government Code.

You claim the remaining submitted information is excepted from disclosure under section 552.103 of the Government Code, which provides in relevant 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). A governmental body claiming section 552.103 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, orig. proceeding); *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). The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

This office has held that for the purposes of section 552.103, “litigation” includes “contested cases” conducted in a quasi-judicial forum. *See* Open Records Decision Nos. 474 (1987), 368 (1983), 336 (1982), 301 (1982). Likewise, “contested cases” conducted under the Texas Administrative Procedure Act, chapter 2001 of the Government Code, constitute “litigation” for purposes of section 552.103. *See* Open Records Decision Nos. 588 (1991) (concerning former State Board of Insurance proceeding), 301 (1982) (concerning hearing before Public Utilities Commission). Some of the factors this office considers in determining whether an administrative proceeding is conducted in a quasi-judicial forum are whether the administrative proceeding provides for discovery, evidence to be heard, factual questions to be resolved, the making of a record, and whether the proceeding is an adjudicative forum of first jurisdiction with appellate review of the resulting decision without a re-adjudication of fact questions. *See* Open Records Decision No. 588 (1991).

You inform us, prior to the city's receipt of the instant request, one of the police officers whose information is at issue filed an appeal challenging the city's actions regarding his suspension. You state the appeal is to be considered by a third-party hearing examiner, in binding arbitration, as authorized by chapter 143 of the Local Government Code. *See* Local Gov't Code §§ 143.057, .127-.131. You also indicate the arbitration is governed by the Labor Rules of the American Arbitration Association (the “AAA”). We note that under the AAA's Labor Rules, the parties may be represented by counsel, witnesses may be required to testify under oath, an arbitrator authorized by law to subpoena witnesses and documents may do so, and the arbitrator is the judge of the relevance and materiality of the evidence. Thus, we understand you to assert the arbitration constitutes litigation of a judicial or quasi-judicial nature for purposes of section 552.103. *See generally* ORD 301 (discussing meaning of “litigation” under predecessor to section 552.103).

Based on your representations and our review of the submitted documents, we find the city was a party to pending litigation on the date it received the request for information. You assert the remaining information relates to the issue in the pending appeal. Upon review, we

find the information at issue is related to the pending litigation. Accordingly, we conclude the city may withhold the remaining information not subject to section 552.022 under section 552.103 of the Government Code.

However, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103 interest exists with respect to that information. 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, and it must be disclosed. We also note the applicability of section 552.103 ends once the litigation has been concluded.

In summary, the city must release the responsive salary information pursuant to subsection 552.022(a)(2) of the Government Code. In the completed investigation, the city must withhold (1) employee dates of birth under section 552.102 of the Government Code; (2) the information we have marked under subsection 552.117(a)(1) of the Government Code, provided the employee whose information is at issue timely elected to keep such information confidential under section 552.024; and (3) the motor vehicle record information we have marked under section 552.130 of the Government Code. The city must release the remainder of the completed investigation pursuant to subsection 552.022(a)(1) of the Government Code. The city may withhold the remaining responsive information under section 552.103 of the Government Code.

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, 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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/dls

Ref: ID# 527391

Enc. Submitted documents

c: Requestor
(w/o enclosures)