



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

September 16, 2015

Ms. Lauren F. Crawford
First Assistant City Attorney
City of Bryan
P.O. Box 1000
Bryan, Texas 77805

OR2015-19354

Dear Ms. Crawford:

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# 579640.

The City of Bryan (the "city") received a request for a list of all requests for information submitted to city staff by current city council members during a specified period of time.¹ We understand the city is withholding e-mail addresses of members of the public under section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).² You claim some of the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.104, 552.117, and 552.133 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

¹You inform us the requestor was required to make a deposit for payment of anticipated costs for the request under section 552.263 of the Government Code, which the city received on June 24, 2015. *See* Gov't Code § 552.263(e) (if governmental body requires deposit or bond for anticipated costs pursuant to section 552.263, request for information is considered to have been received on date that governmental body receives deposit or bond).

²We note Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

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. You raise section 552.101 in conjunction with the common-law informer’s privilege, which Texas courts have long recognized. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969). The informer’s privilege protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided the subject of the information does not already know the informer’s identity. *See* Open Records Decision No. 208 at 1-2 (1978). The informer’s privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to “administrative officials having a duty of inspection or of law enforcement within their particular spheres.” Open Records Decision No. 279 at 1-2 (1981) (citing 8 John H. Wigmore, *Evidence in Trials at Common Law*, § 2374, at 767 (J. McNaughton Rev. Ed. 1961)). The report must be of a violation of a criminal or civil statute. *See* Open Records Decision Nos. 582 at 2 (1990), 515 at 4 (1988). However, individuals who provide information in the course of an investigation are not informants for the purposes of claiming the informer’s privilege. The privilege excepts the informer’s statement only to the extent necessary to protect that informer’s identity. Open Records Decision No. 549 at 5 (1990). We note the informer’s privilege does not apply where the informant’s identity is known to the individual who is the subject of the complaint. *See* ORD 208 at 1-2.

You state portions of the information submitted as Exhibit C identify complainants who reported violations of law. You explain the complainants reported the violations to city council members who directed the reports to the appropriate staff members responsible for the enforcement of the applicable ordinances and state laws. You state the subjects of the complaints do not already know the identities of the informers. Based upon your representations and our review, we conclude the city has demonstrated the applicability of the common-law informer’s privilege to some of the information at issue. However, you have failed to demonstrate the remaining information you have highlighted consists of the identifying information of an individual who made a report of a criminal or civil violation to the city for purposes of the informer’s privilege, and the city may not withhold this information under section 552.101 on that basis. Accordingly, with the exception of the information we have marked for release, the city may withhold the information you have highlighted in Exhibit C under section 552.101 of the Government Code in conjunction with the common-law informer’s privilege.

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). A governmental body 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 Open Records Decision No. 551 at 4 (1990).*

Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See Open Records Decision No. 452 at 4 (1986).* To demonstrate litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* This office has found a pending complaint with the Equal Opportunity Employment Commission ("EEOC") indicates litigation is reasonably anticipated. *See Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982), 281 at 1 (1981).*

You state, and provide documentation showing, prior to the city's receipt of the instant request, a city employee filed discrimination claims against the city with the EEOC. Based on your arguments and our review of the information at issue, we find the city reasonably anticipated litigation on the date this request was received. You also state the information in Exhibit B pertains to the substance of the discrimination claims. Based on your representations and our review, we find the information at issue is related to the anticipated litigation. Therefore, the city may generally withhold Exhibit B under section 552.103 of the Government Code.

However, once information has been obtained by all parties to the 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).* Thus, information that has either been obtained from or provided to the opposing

party in the anticipated litigation is not excepted from disclosure under section 552.103(a). We note the opposing party to the anticipated litigation has seen or had access to most of the information at issue. Therefore, the city may not withhold this information, which we have marked, under section 552.103(a). However, we agree the city may withhold the remaining information in Exhibit B under section 552.103(a). We note the applicability of section 552.103 ends once the related litigation concludes. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Section 552.104(a) of the Government Code excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104(a). The “test under section 552.104 is whether knowing another bidder’s [or competitor’s information] would be an advantage, not whether it would be a decisive advantage.” *Boeing Co. v. Paxton*, No. 12-1007, 2015 WL 3854264, at *9 (Tex. June 19, 2015). We understand you to claim the city has a specific marketplace interest in the information at issue. You state the city owns an electric generation and distribution system under the name Bryan Texas Utilities (“BTU”). You also state BTU is engaging in competition and the release of its customer lists and other customer billing information would allow competitors to solicit away customers. After review of the information at issue and consideration of the arguments, we find the city has established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the city may withhold the information you have highlighted in Exhibit D under section 552.104(a).³

Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former employee or official of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code. *See* Gov’t Code § 552.117(a)(1). 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. Upon review, we find you have failed to demonstrate section 552.117(a)(1) is applicable to any of the remaining information. Accordingly, the city may not withhold any of the remaining information under section 552.117(a)(1) of the Government Code.

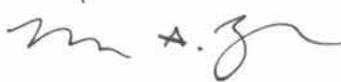
³As our ruling is dispositive, we need not consider your remaining argument against disclosure of this information.

In summary, with the exception of the information we have marked for release, the city may withhold the information you have highlighted in Exhibit C under section 552.101 of the Government Code in conjunction with the common-law informer's privilege and the information in Exhibit B under section 552.103(a) of the Government Code. The city may withhold the information you have highlighted in Exhibit D under section 552.104 of the Government Code. The city must release the remaining information.

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,

A handwritten signature in black ink, appearing to read "Nicholas A. Ybarra". The signature is fluid and cursive, with a small star symbol above the letter 'A'.

Nicholas A. Ybarra
Assistant Attorney General
Open Records Division

NAY/cbz

Ref: ID# 579640

Enc. Submitted documents

c: Requestor
(w/o enclosures)