



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

October 9, 2015

Mr. Jeffrey Giles  
Assistant City Attorney  
City of Houston  
P.O. Box 368  
Houston, Texas 77001-0368

OR2015-21339

Dear Mr. Giles:

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# 582510 (Houston GC No. 22560).

The City of Houston (the "city") received a request for all personnel records, including disciplinary history, for nine named city police officers and a specified police K-9, who are listed in a specified offense report. You state a portion of the responsive information will be released to the requestor. You claim the submitted information is excepted from disclosure under sections 552.103 and 552.136 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We note portions of the submitted information are subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part, the following:

(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]

...

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

Gov't Code § 552.022(a)(1), (3). Portions of the information in Exhibit 2 consist of completed evaluations that are subject to section 552.022(a)(1) and must be released unless they are either excepted under section 552.108 of the Government Code or are confidential under the Act or other law. Additionally, the salary authorization documents we have marked in Exhibit 2 are subject to section 552.022(a)(3) and may not be withheld unless they are 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 discretionary 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 No. 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the city may not withhold any of the information subject to section 552.022, which we have marked, under section 552.103. However, because section 552.136 of the Government Code makes information confidential for purposes of section 552.022, we will address its applicability to the information subject to section 552.022. We will also address the city's arguments against disclosure of the remaining information.

Section 552.103 of the Government Code provides, in part, the following:

(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 an exception to disclosure under section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information that it seeks to

withhold. To meet this burden, the governmental body must demonstrate 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 the pending or anticipated litigation. See *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 from disclosure under section 552.103(a).

You state, and provide supporting documentation demonstrating, prior to the city's receipt of the instant request for information, an individual filed a lawsuit against the city styled *Allen v. City of Houston*, Cause 4:13-cv-01416, in the United States District Court for the Southern District of Texas, Houston Division. Based on your representations and our review, we find the city was a party to litigation that was pending on the date it received the request. You also contend, and we agree, the information at issue is related to the pending lawsuit because the officer whose personnel information is at issue is also named as a defendant in the lawsuit. Accordingly, the city may withhold the information in Exhibit 2 that is not subject to section 552.022 of the Government Code under section 552.103 of the Government Code.

We note that once the information has been obtained by all parties to the litigation, through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). We also note the applicability of section 552.103(a) ends when the litigation is concluded. Attorney General Opinion MW-575 at 2 (1982); Open Records Decision Nos. 350 at 3 (1982), 349 at 2.

You state portions of the information that is subject to section 552.022 of the Government Code are subject to section 552.136 of the Government Code. Section 552.136 of the Government Code states, "Notwithstanding 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(b); see also *id.* §552.136(a) (defining "access device"). You explain the city uses employee identification numbers as part of an employee's credit union checking account number. However, you also state the city has no way of distinguishing which employees have credit union checking accounts. Accordingly, if any of the employees whose employee identification numbers we have marked do not have a credit union checking account, then the city may not withhold this information under section 552.136. If any of the employees at issue have a credit union checking account, the city must withhold the employee identification numbers we have marked under section 552.136.

In summary, the city may withhold the information that is not subject to section 552.022 of the Government Code in Exhibit 2 under section 552.103(a) of the Government Code. The city must withhold the information we have marked under section 552.136 of the

Government Code to the extent the employees whose employee identification numbers we have marked have a credit union checking account. 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](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,



Nicole Thomas  
Assistant Attorney General  
Open Records Division

NT/eb

Ref: ID# 582510

Enc. Submitted documents

c: Requestor  
(w/o enclosures)