



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

April 7, 2016

Mr. Michael W. Dixon  
Counsel for the City of Riesel  
Haley & Olson, P.C.  
510 North Valley Mills Drive, Suite 600  
Waco, Texas 76710

OR2016-07831

Dear Mr. Dixon:

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# 604915.

The City of Riesel (the "city"), which you represent, received a request for eight categories of information, including 1) records of a specified piece of equipment used by a named peace officer; 2) all records related to traffic stops initiated by the named peace officer in a specified area; 3) all complaints related to and the disciplinary history of the named peace officer; 4) all reports of a specified type of complaint involving the named peace officer; 5) all documents related to any type of quota system employed by the city in relation to citations or arrests; 6) the city's financial statement for three specified time periods; and 7) all reports reflecting the total fine and special expense amounts collected by the city during three specified time periods. You state the city does not have information responsive to a portion of the request.<sup>1</sup> You claim some of the submitted information is not subject to the Act. Additionally, and in the alternative, you claim the submitted information is excepted from disclosure under sections 552.103 and 552.108 of the Government Code. We have received comments from the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released). We

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<sup>1</sup>The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983).

have considered the raised arguments and reviewed the submitted representative sample of information.<sup>2</sup>

Initially, the city states the submitted citations and complaints “become records of the judiciary.” Section 552.003(b) of the Government Code excludes the judiciary from the Act. Therefore, the Act neither authorizes information held by the judiciary to be withheld nor requires that it be disclosed. *See* Open Records Decision No. 25 (1974). Accordingly, to the extent the information at issue is maintained solely by the judiciary, it is not subject to release under the Act and need not be released in response to the present request.<sup>3</sup> *See* Gov’t Code § 552.0035 (access to information maintained by or for judiciary is governed by rules adopted by supreme court); Tex. R. Jud. Admin. 12 (public access to judicial records). However, to the extent the information at issue is maintained by the city, it is subject to the Act and we will consider your claimed exceptions to its disclosure.

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; [and]

...

(5) all working papers, research material, and information used to estimate the need for or expenditure of public funds or taxes by a governmental body, on completion of the estimate[.]

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<sup>2</sup>This letter ruling assumes the submitted representative sample of information is truly representative of the requested information as a whole. This ruling does not reach, and therefore does not authorize the withholding of, any other requested information to the extent that the other information is substantially different than that submitted to this office. *See* Gov’t Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

<sup>3</sup>We note records of the judiciary may be public under other sources of law. *See, e.g.*, Gov’t Code § 29.007(d)(4) (complaints filed with municipal court clerk); *see id.* § 29.007(f) (municipal court clerks shall perform duties prescribed by law for county court clerk); Loc. Gov’t Code § 191.006 (records belonging to office of county clerk shall be open to public unless access restricted by law or court order); *see also* *Star-Telegram, Inc. v. Walker*, 834 S.W.2d 54, 57 (Tex. 1992) (documents filed with courts are generally considered public and must be released); Attorney General Opinions DM-166 (1992) at 2-3 (public has general right to inspect and copy judicial records), H-826 (1976); Open Records Decision No. 25 (1974).

Gov't Code § 552.022(a)(3), (5). The submitted information contains city quarterly reports sent to the Texas Secretary of State that are subject to section 552.022(a)(3), as well as information used to estimate the need for or expenditure of public funds or taxes by a governmental body that is subject to subsection 552.022(a)(5). Such records must be released unless they are made confidential under the Act or other law. *See id.* § 552.022(a)(3), (5). You seek to withhold this information under sections 552.103 and 552.108 of the Government Code. However, sections 552.103 and 552.108 are discretionary exceptions and do 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), 663 at 5 (1999) (waiver of discretionary exceptions); 177 at 3 (1977) (statutory predecessor to Gov't Code § 552.108 subject to waiver). Therefore, the information subject to section 552.022, which we have marked, may not be withheld under section 552.103 or section 552.108 of the Government Code. However, because sections 552.117, 552.130, and 552.137 make information confidential under the Act, we will consider their applicability to the information at issue.<sup>4</sup> Further, we will consider your arguments against disclosure for the remaining information.

You claim the information not subject to section 552.022 of the Government Code is excepted from disclosure under section 552.108(a)(1) of the Government Code. Section 552.108(a)(1) excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]” Gov't Code § 552.108(a)(1). Generally, a governmental body claiming section 552.108(a)(1) must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state the submitted information relates to an active investigation or prosecution. Generally, the release of information pertaining to an open case is presumed to interfere with the criminal investigation. *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases). As previously noted, however, the information at issue includes copies of citations. The citations have previously been provided to the individuals who were cited. Because copies of these documents have previously been released to the individuals who were cited, we find you have not shown release of the documents will interfere with the detection, investigation, or prosecution of crime, and these documents may not be withheld under section 552.108(a)(1). *See* Gov't Code § 552.108(a)(1). We also note the remaining information at issue includes the personnel records of the arresting officer in the incident that forms the basis of the pending investigation and prosecution. Because the remaining

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<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. Open Records Decision Nos. 481 (1987), 480(1987), 470 (1987).

information at issue has not been previously released, we conclude release of this information would interfere with the detection, investigation, or prosecution of crime. Thus, we find section 552.108(a)(1) is applicable to the remaining information at issue. Accordingly, with the exception of the submitted citations, the city may withhold the information not subject to section 552.022 of the Government Code, which we have marked, under section 552.108(a)(1) of the Government Code.

You also claim the citations at issue are excepted under section 552.103 of the Government Code. Section 552.103 provides, in relevant 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 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).

We note the purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information related to litigation through the discovery process. See ORD 551 at 4-5. If the opposing party has seen or had access to information related to pending or anticipated litigation, through discovery or otherwise, then there is no interest in withholding that information from public disclosure under section 552.103. See Open Records Decision Nos. 349 (1982), 320 (1982). In this instance, you state the citations are related to pending investigations or prosecutions. We note the recipients of the citations are defendants in the prosecutions. Thus, as the opposing parties in the litigation have already seen the citations at issue, we conclude the city may not withhold the citations under section 552.103 of the Government Code.

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. Section 552.101 encompasses the doctrine of common-law privacy, which protects information that (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is 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. In considering whether a public citizen’s date of birth is private, the Third Court of Appeals looked to the supreme court’s rationale in *Texas Comptroller of Public Accounts v. Attorney General of Texas*, 354 S.W.3d 336 (Tex. 2010). *Paxton v. City of Dallas*, No. 03-13-00546-CV, 2015 WL 3394061, at \*3 (Tex. App.—Austin May 22, 2015, pet. denied) (mem. op.). The supreme court concluded public employees’ dates of birth are private under section 552.102 of the Government Code because the employees’ privacy interest substantially outweighed the negligible public interest in disclosure.<sup>5</sup> *Texas Comptroller*, 354 S.W.3d at 347-48. Based on *Texas Comptroller*, the court of appeals concluded the privacy rights of public employees apply equally to public citizens, and thus, public citizens’ dates of birth are also protected by common-law privacy pursuant to section 552.101. *City of Dallas*, 2015 WL 3394061, at \*3. We note the submitted citations include public citizens’ dates of birth. Upon review, the city must withhold the dates of birth we have marked in the citations under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.117(a)(2) of the Government Code excepts from disclosure the home address, home telephone number, 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 made an election under section 552.024 of the Government Code. Gov’t Code § 552.117(a)(2); Open Records Decision No. 622 (1994). We note section 552.117(a)(2) 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). We understand the individual whose information is at issue is a licensed peace officer as defined by article 2.12. Accordingly, the city must withhold the information we have marked in the information subject to section 552.022 of the Government Code under section 552.117(a)(2) of the Government Code; however, the cellular telephone number may not be withheld if a governmental body pays for the cellular telephone service.

Section 552.130 of the Government Code provides that information relating to a motor vehicle operator’s or driver’s license or permit or motor vehicle title or registration issued

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<sup>5</sup>Section 552.102(a) 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).

by an agency of this state or another state or country is excepted from public release. Gov't Code § 552.130. The city must withhold the information we have marked in the citations and the information subject to section 552.022(a)(5) of the Government Code under section 552.130 of the Government Code.

Section 552.137 of the Government Code provides, "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act]," unless the owner of the e-mail address has affirmatively consented to its release or the e-mail address is specifically excluded by subsection (c). *Id.* § 552.137(a)–(c). The city must withhold the e-mail address we have marked in the information subject to section 552.022(a)(5) of the Government Code under section 552.137 of the Government Code, unless the owner of the e-mail address has affirmatively consented to its release.

We note some of the information subject to section 552.022(a)(5) of the Government Code may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see* Open Records Decision No. 109(1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, the city must release the information subject to section 552.022 of the Government Code. However, in releasing such information, the city must withhold the information we have marked under section 552.117 of the Government Code, so long as a governmental body does not pay for the cellular telephone service; section 552.130 of the Government Code; and section 552.137 of the Government Code, unless the owner of the e-mail address has affirmatively consented to its release. Furthermore, in releasing the information subject to section 552.022 of the Government Code, any information subject to copyright may be released only in accordance with copyright law. With the exception of the submitted citations, the city may withhold the information not subject to section 552.022 of the Government Code we have marked under section 552.108(a)(1) of the Government Code. To the extent the submitted citations are maintained solely by the judiciary, such information is not subject to the Act. To the extent copies of the submitted citations are also maintained by the city, the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy, as well as the information we have marked under section 552.130 of the Government Code and 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,

A handwritten signature in black ink, appearing to read 'J. Behnke', with a long horizontal line extending to the right.

Joseph Behnke  
Assistant Attorney General  
Open Records Division

JB/som

Ref: ID# 604915

Enc. Submitted documents

c: Requestor  
(w/o enclosures)