



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 23, 2007

Mr. Cass Robert Callaway
City Attorney
City of Venus
P.O. Box 380
Venus, Texas 76084

OR2007-10988

Dear Mr. Callaway:

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# 288309.

The City of Venus (the "city") received two requests from the same requestor for (1) a memo from a named individual regarding comp time records; (2) the minutes of the March 12, 2007 city council meeting; (3) minutes of certain other city council meetings; (4) documentation pertaining to the requestor's termination; and (5) documentation sent to the Texas Commission on Law Enforcement Officer Standards and Education ("TCLEOSE"). You claim that some of the requested information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and have reviewed the information you submitted.

We first note that the Act does not require a governmental body to release information that did not exist when it received a request or create responsive information.¹ In this instance, two of the submitted documents were created after the date of the city's receipt of these requests. This decision does not address the public availability of those documents, which we have marked, and they need not be released.

¹See *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), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

We also note that some of the remaining information does not appear to be responsive to these requests. You state that the city will release the minutes of city council meetings that are responsive to parts 1 and 2 of the second request. You have submitted a variety of other information that the city seeks to withhold, including a memo that appears to be responsive to the first request. Thus, the remaining information other than the memo is responsive to these requests only if it is encompassed by parts 3 and 4 of the second request – “all documentation pertaining to [the requestor’s] termination” and “documentation sent to [TCLEOSE] proving [the requestor] violated a policy and falsified a time record and misused the TLETS information system.” We are unable to determine the extent to which the remaining information other than the memo is responsive to parts 3 and 4 of the second request. To the extent, however, that the remaining information other than the memo is not encompassed by parts 3 and 4 of the second request, it is not responsive to these requests. This decision does not address the public availability of any information that is not responsive to these requests, and any such information need not be released. To the extent that the remaining information is responsive to these requests, we will address its public availability, along with that of the memo.

We further note that some of the information has been redacted from the remaining documents or is otherwise illegible. Section 552.301 of the Government Code prescribes procedures that a governmental body must follow in asking this office to determine whether requested information is excepted from public disclosure, unless the information is the subject of a previous determination. *See* Gov’t Code §§ 552.006, .301(a), .302; Open Records Decision No. 673 (2001) (previous determinations). Among other things, a governmental body must submit to this office either the specific information that it seeks to withhold or representative samples if the information is voluminous. *See* Gov’t Code § 552.301(e)(1)(D). Thus, information that a governmental body seeks to withhold must be submitted in a form that enables this office to determine whether the information falls within the scope of an exception to disclosure.

Because we are able to discern the nature of some of the redacted information, we will address its public availability. With regard to the rest of the redacted information, we note that section 552.147(b) of the Government Code authorizes the city to redact a living person’s social security number from public release without the necessity of requesting a decision from this office under the Act. The requestor has a right, however, to his own social security number. *See generally id.* § 552.023(b) (governmental body may not deny access to person to whom information relates, or that person’s representative, solely on grounds that information is considered confidential by privacy principles). Additionally, the previous determination issued in Open Records Decision No. 670 (2001) authorizes the city to withhold the home addresses and telephone numbers, personal cellular phone and pager numbers, social security numbers, and family member information of its peace officers under section 552.117(a)(2) of the Government Code without the necessity of requesting an

attorney general decision.² See Open Records Decision No. 670 at 6. The requestor has a right of access, however, under section 552.023 of the Government Code to any information relating to him that the city would be required to withhold from the public under section 552.117(a)(2). See Gov't Code § 552.023(a); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning himself).³

Therefore, to the extent that the rest of the redacted or illegible information consists of the social security number of a living individual other than the requestor, it may be withheld under section 552.147(b). To the extent that the rest of the redacted or illegible information consists of the home address and telephone number, personal cellular phone and pager number, social security number, or family member information of a peace officer other than the requestor, it must be withheld under section 552.117(a)(2). Unless otherwise specifically marked, the rest of the redacted and illegible information must be released to the requestor.

We next note that some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a)(1) provides for required public disclosure of “a completed report, audit, evaluation, or investigation made of, for, or by a governmental body[,]” unless the information is expressly confidential under other law or excepted from disclosure under section 552.108 of the Government Code. Gov't Code § 552.022(a)(1). Section 552.022(a)(17) provides for required public disclosure of “information that is also contained in a public court record[,]” unless the information is expressly confidential under other law. *Id.* § 552.022(a)(17). In the instance, the submitted information includes completed reports made of, for, or by the city and a document filed with a court. You do not claim an exception to disclosure under section 552.108. Although you seek to withhold the completed reports and the court-filed document under section 552.103 of the Government Code, section 552.103 is a discretionary exception that protects a governmental body's interests and may be waived. See *id.* § 552.007; *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 Gov't Code § 552.103); Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.103 is not other law that makes information expressly confidential for purposes of section 552.022. Therefore, the city may not withhold any of the information that is subject to section 552.022(a)(1) or 552.022(a)(17) under section 552.103.

²We note that section 552.117(a)(2) adopts the definition of peace officer found at article 2.12 of the Code of Criminal Procedure.

³Section 552.023(a) provides that “[a] person or a person's authorized representative has a special right of access, beyond the right of the general public, to information held by a governmental body that relates to the person and that is protected from public disclosure by laws intended to protect that person's privacy interests.” Gov't Code § 552.023(a).

We note, however, that section 552.101 of the Government Code is applicable to some of the information in question.⁴ Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision,” and encompasses information that other statutes make confidential. Gov’t Code § 552.101. The public availability of the submitted F-5 forms (Report of Separation of Licensee) is governed by section 1701.454 of the Occupations Code. Under section 1701.452 of the Occupations Code, a law enforcement agency must submit a report to TCLEOSE regarding a person licensed under chapter 1701 of the Occupations Code who resigns from the employment of the law enforcement agency or whose appointment with the law enforcement agency is terminated. *See* Occ. Code § 1701.452. Section 1701.454 of the Occupations Code provides as follows:

(a) A report or statement submitted to [TCLEOSE] under this subchapter is confidential and is not subject to disclosure under Chapter 552, Government Code, unless the person resigned or was terminated due to substantiated incidents of excessive force or violations of the law other than traffic offenses.

(b) Except as provided by this subchapter, a [TCLEOSE] member or other person may not release the contents of a report or statement submitted under this subchapter.

Id. § 1701.454; *see* 37 T.A.C. § 217.7 (reporting appointment and termination of licensee). In this instance, the submitted F-5 forms do not appear to pertain to a person who resigned or was terminated due to substantiated incidents of excessive force or violations of the law other than traffic offenses. We therefore conclude that the city must withhold the F-5 forms, which we have marked, under section 552.101 in conjunction with section 1701.454 of the Occupations Code. The rest of the submitted information that is subject to section 552.022, which we also have marked, must be released.

With respect to the information that is not subject to section 552.022, we address your claim under section 552.103. That exception provides in 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.

⁴Unlike other exceptions to disclosure, this office will raise section 552.101 on behalf of a governmental body, because the Act prescribes criminal penalties for the release of confidential information. *See* Gov’t Code §§ 552.007, .352; Open Records Decision No. 325 at 2 (1982).

...

(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 of its receipt of 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 (Tex. App. – Austin 1997, no pet.); *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).*

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See Open Records Decision No. 452 at 4 (1986).* To establish that litigation is reasonably anticipated, a governmental body must provide this office with “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.”⁵ *Id.* You inform us that the requestor, a former city employee, has filed multiple complaints with the federal Equal Employment Opportunity Commission (the “EEOC”) and that the EEOC has certified the requestor’s right to sue. You state that in contemplation of a lawsuit in federal court, the requestor’s attorney sent the city a copy of a complaint which has not yet been filed. You have provided a copy of the complaint. Based on your representations and the submitted complaint, we find that you have demonstrated that the city reasonably anticipated litigation when it received these requests for information. We also find that the information that is not subject to section 552.022 is related to the anticipated litigation. We therefore conclude that section 552.103 is generally applicable to that information.

We note, however, that the requestor – the opposing party in the anticipated litigation – already has seen or had access to much of the information in question. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by

⁵Among other examples, this office has concluded that litigation was reasonably anticipated where the opposing party took the following objective steps toward litigation: (1) filed a complaint with the Equal Employment Opportunity Commission (“EEOC”), *see Open Records Decision No. 336 (1982)*; (2) hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see Open Records Decision No. 346 (1982)*; and (3) threatened to sue on several occasions and hired an attorney, *see Open Records Decision No. 288 (1981)*.

forcing parties seeking information relating to that litigation to obtain it through discovery procedures. *See* Open Records Decision No. 551 at 4-5 (1990). If the opposing party has seen or had access to information relating to anticipated 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). Thus, to the extent that the requestor already has seen or had access to the information that is not subject to section 552.022, such information may not be withheld under section 552.103. Otherwise, the city may withhold the information in question at this time under section 552.103. We note that 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).

Although the city may not withhold the information that the requestor already has seen or to which he has already had access under section 552.103, other exceptions are applicable to some of that information. Section 552.101 also encompasses section 6103 of title 26 of the United States Code, which governs the public availability of federal tax return information. *See* 26 U.S.C. § 61.03(a); *Mallas v. Kolak*, 721 F. Supp 748, 754 (M.D.N.C. 1989), *aff'd in part*, 993 F.2d 1111 (4th Cir. 1993); Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision Nos. 600 (1992) (W-4 forms), 226 (1979) (W-2 forms). Section 6103(b) defines the term “return information” as encompassing “a taxpayer’s identity, the nature, source, or amount of income, payments, tax withheld, deficiencies, overassessments or tax payments . . . or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary [of the Treasury] with respect to a return . . . or the determination of the existence, or possible existence, of liability . . . for any tax . . . penalty . . . or offense[.]” 26 U.S.C. § 6103(b)(2)(A). However, section 6103(e) is an exception to confidentiality under section 6103(a). Section 6103(e) provides for disclosure of tax information to the taxpayer. *See* 26 U.S.C. § 6103(e)(7) (information may be disclosed to any person authorized by subsection(e) to obtain such information if Secretary of Treasury determines such disclosure would not seriously impair tax administration); *see also* *Lake v. Rubin*, 162 F.3d 113 (D.C. Cir. 1998) (26 U.S.C. § 6103 represents exclusive statutory route for taxpayer to gain access to own return information and overrides individual’s right of access under federal Freedom of Information Act). Therefore, the city must release the requestor’s income tax information, which we have marked, pursuant to section 6103(e)(7).

Section 552.101 also encompasses common-law privacy, which protects information that is highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and of no legitimate public interest. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Common-law privacy encompasses certain types of personal financial information. This office has determined that financial information that relates only to an individual ordinarily satisfies the first element of the common-law privacy test, but the public has a legitimate interest in the essential facts about a financial transaction between an individual and a governmental body. *See* Open Records

Decision Nos. 600 at 9-12 (1992) (identifying public and private portions of certain state personnel records), 545 at 4 (1990) (attorney general has found kinds of financial information not excepted from public disclosure by common-law privacy to generally be those regarding receipt of governmental funds or debts owed to governmental entities), 523 at 4 (1989) (noting distinction under common-law privacy between confidential background financial information furnished to public body about individual and basic facts regarding particular financial transaction between individual and public body), 373 at 4 (1983) (determination of whether public's interest in obtaining personal financial information is sufficient to justify its disclosure must be made on case-by-case basis). We have marked personal financial information that the city must withhold under section 552.101 in conjunction with common-law privacy.

Section 552.130 of the Government Code excepts from disclosure information that relates to a motor vehicle title or registration issued by an agency of this state.⁶ See Gov't Code § 552.130(a)(2). We have marked Texas motor vehicle information that the city must withhold under section 552.130.

Section 552.136 of the Government Code states in part that “[n]otwithstanding any other provision of [the Act], 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.”⁷ *Id.* § 552.136(b); see *id.* § 552.136(a) (defining “access device”). We have marked a bank account number that the city must withhold under section 552.136.

Section 552.137 of the Government Code provides that “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 public disclosure.”⁸ *Id.* § 552.137(a)-(b). The types of e-mail addresses listed in section 552.137(c) may not be withheld under this exception. See *id.* § 552.137(c). Likewise, section 552.137 is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees. We have marked an e-mail address that the city must withhold under section 552.137, unless the owner of the e-mail address has consented to its disclosure. Because section 552.137 protects personal

⁶Unlike other exceptions to disclosure under the Act, this office will raise section 552.130 on behalf of a governmental body, as this exception is mandatory and may not be waived. See Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

⁷Section 552.136 also is a mandatory exception and may not be waived. Gov't Code §§ 552.007, .352; ORD 674 at 3 n.4.

⁸Section 552.137 also is a mandatory exception and may not be waived. Gov't Code §§ 552.007, .352; ORD 674 at 3 n.4.

privacy, the city may not withhold the requestor's e-mail address under this exception. *See id.* § 552.023(a); ORD 481 at 4.

In summary: (1) the city must withhold the marked F-5 forms under section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code; (2) the city must release the rest of the marked information that is subject to section 552.022 of the Government Code; (3) except for the information that may not be withheld under section 552.103 because the requestor has already seen or had access to it, the remaining information is excepted under section 552.103 of the Government Code; (4) the city must release the marked income tax information under section 6103(e) of title 26 of the United States Code; (5) the city must withhold the marked information that is protected by common-law privacy under section 552.101; (6) the marked Texas motor vehicle information must be withheld under section 552.130 of the Government Code; (7) the marked bank account number must be withheld under section 552.136 of the Government Code; and (8) the marked e-mail address must be withheld under section 552.137 of the Government Code unless the owner has consented to its disclosure.⁹

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the

⁹We note that the city would be required to withhold some of the remaining information from the public to protect the requestor's privacy. In this instance, however, that requestor has a special right of access to his own private information. *See* Gov't Code § 552.023(a); ORD 481 at 4. Should the city receive another request from this same information from a person who would not have a right of access to this requestor's private information, the city should resubmit this same information and request another ruling. *See* Gov't Code §§ 552.023(a), .302.

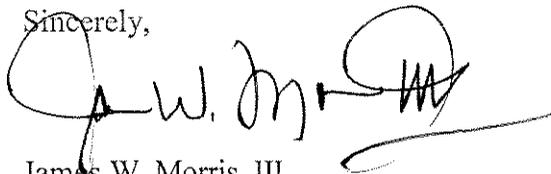
Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Office of the Attorney General at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "J.W. Morris, III", with a large, stylized flourish at the end.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/ma

Ref: ID# 288309

Enc: Submitted documents

c: Mr. Thomas Peyton
310 Ridge Hollow Trail
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(w/o enclosures)