



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 9, 2009

Mr. Laurence E. Boyd
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OR2009-07904

Dear Mr. Boyd:

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# 345434.

The City of Danbury (the "city"), which you represent, received nine requests from the same requestor for information pertaining to: the destruction of a mailbox by a named individual, city-issued fence permits, criminal complaints pertaining to two named individuals, complaints filed against the city, complaints filed against a named individual, a named police officer's personnel file, and information about the requestor's stolen bicycle. You state you have provided some of the requested information to the requestor. You state you have no information responsive to the requests for complaints against two named individuals or information pertaining to a stolen bicycle.¹ You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.108, 552.117, 552.130, and 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that a portion of the submitted information is not responsive to the instant request because it was created after the date the city received the request. We have marked

¹ The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

this information. The city need not release non-responsive information in response to this request and this ruling will not address that information.

Next, you state the city asked the requestor for clarification regarding her request for complaints against the city and fence permits. *See* Gov't Code § 552.222 (if request for information is unclear, governmental body may ask requestor to clarify request); *see also* Open Records Decision No. 31 (1974) (when presented with broad requests for information rather than for specific records, governmental body may advise requestor of types of information available so that request may be properly narrowed). You inform us the requestor has not clarified her request. Therefore, the city is not required to release any information that might be responsive to the request for complaints against the city and fence permits. But if the requestor clarifies her request, the city must seek a ruling from this office before withholding any responsive information from the requestor. *See* Open Records Decision No. 663 (1999) (ten-business-day deadline tolled while governmental body awaits clarification).

Next, we note you have not submitted any information responsive to request number eight. You state the city is searching for any responsive documents. Therefore, to the extent this information existed when the present request was received, we assume it has been released. If such information has not been released, then it must be released in its entirety at this time. *See* Gov't Code §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

Next, you claim that a portion of the submitted information consists of records of the judiciary. Generally, the Act governs the disclosure of information maintained by or for a "governmental body." *See* Gov't Code §§ 552.002, .021. Although the Act's definition of a "governmental body" is broad, it specifically excludes "the judiciary." *See id.* § 552.003(1)(B); Open Records Decision No. 25 (1974). You state that the information you have marked consists of information maintained only by the city's Municipal Court. Based on your representations, we find the information at issue is not subject to public disclosure under the Act and need not be released to the requestor. *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).

Next, you inform us the request for information concerning a named police officer was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2002-0911 (2002). In Open Records Letter No. 2002-0911, we ruled that with the exception of the information the opposing party has already seen, the city may withhold the requested information under section 552.103 of the Government Code. We note that the purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. *See* Open Records Decision No. 551 at 4-5 (1990). Thus, if the

opposing party has seen or had access to information relating to 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). We further note that the applicability of section 552.103(a) ends when the litigation has concluded or is no longer pending. *See* Attorney General Opinion MW-575 at 2 (1982); Open Records Decision Nos. 350 at 3 (1982). Accordingly, to the extent all parties in the litigation have not obtained the information at issue and the litigation is still pending, the city may continue to rely on Open Records Letter No. 2002-0911 for the information that was at issue in this prior ruling. *See* Open Records Decision No. 673 (2001) (governmental body may rely on prior ruling as a previous determination when (1) the records or information at issue are precisely the same records or information that were previously submitted to this office pursuant to section 552.301(e)(1)(D); (2) the governmental body which received the request for the records or information is the same governmental body that previously requested and received a ruling from the attorney general; (3) the prior ruling concluded that the precise records or information are or are not excepted from disclosure under the Act; and (4) the law, facts, and circumstances on which the prior ruling was based have not changed since the issuance of the ruling). We now address your arguments for the information that is not the same as the information previously ruled upon.

You claim that the remaining information is excepted from disclosure under section 552.108 of the Government Code, which provides in relevant part the following:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:

- (1) release of the information would interfere with the detection, investigation, or prosecution of crime;
- (2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in a conviction or deferred adjudication[.].

Gov't Code § 552.108(a)(1), (a)(2). Please note that the protections offered by subsections 552.108(a)(1) and 552.108(a)(2) of the Government Code are, generally, mutually exclusive. Section 552.108(a)(1) generally applies to information that pertains to criminal investigations or prosecutions that are currently pending, while section 552.108(a)(2) protects law enforcement records that pertain to criminal investigations and prosecutions that have concluded in final results other than criminal convictions or deferred adjudication. 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 that report number 070326-09 pertains to a criminal case that was dismissed. However, you also state that the renewed investigation is still pending. Because you have provided this office with conflicting arguments, we find that you have not demonstrated the applicability of section 552.108 to report number 070326-09. Thus, the city may not withhold report number 070326-09 under section 552.108 of the Government Code.

You state report number 090319-03 pertains to a pending criminal case. Based on these representations, we conclude that the release of report number 090319-03 would interfere with the detection, investigation, or prosecution of crime. *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). We note, however, report number 090319-03 includes a citation. Because the citation has been provided to the individual who was cited, we find that release of this information will not interfere with the detection, investigation, or prosecution of crime. *See Gov't Code* § 552.108(a)(1). Therefore, the city may not withhold the citation, which we have marked, under section 552.108(a)(1). However, we agree that section 552.108(a)(1) applies to the remaining information.

We note that basic information about an arrested person, an arrest, or a crime is not excepted from disclosure under section 552.108. *Gov't Code* § 552.108(c). Such basic information refers to the information held to be public in *Houston Chronicle. Houston Chronicle*, 531 S.W.2d 177; *see also* Open Records Decision No. 127 (1976) (summarizing types of information made public by *Houston Chronicle*). Therefore, with the exception of the citation and basic information, the city may withhold report number 090319-03 pursuant to section 552.108(a)(1).

Section 552.103 of the Government Code provides:

(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). The city 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, 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, no pet.); *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 city must meet both prongs of this test for information to be excepted under section 552.103(a).

To establish litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *Id.* Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983).

In this instance, you state that the remaining information has been referred to the district attorney for investigation and possible prosecution. We note, however, that the city is not a party to this litigation. *See* Gov't Code §552.103(a); Open Records Decision No. 575 at 2 (1990) (stating that predecessor to section 552.103 only applies when governmental body is party to litigation). Furthermore, you have not provided this office with an affirmative representation from a governmental body with a litigation interest that it seeks to withhold the information at issue pursuant to section 552.103.

You also state that the other potential litigation is a civil suit by the requestor against the named individual and the city. You state the requestor asserted that her civil rights have been violated and that she could sue the city. We note a person's threat to sue without any further action is not sufficient to establish reasonably anticipated litigation. *See* ORD 331. In this instance, you have not informed us any individual has taken any concrete steps toward the initiation of litigation. *See id.* Thus, we find you have failed to establish the city reasonably anticipated litigation when it received this request for information. Accordingly, we conclude none of the remaining information may be withheld under section 552.103.

You claim a portion of the information in the citation is confidential under section 552.101 of the Government Code. Section 552.101 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. Common-law privacy protects information if the information (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 demonstrated. *Id.* at 681-82. We note that dates of birth are not highly intimate or embarrassing. *See Tex. Comptroller of Public Accounts v. Attorney Gen. of Tex.*, 244 S.W.3d 629 (Tex. App.—2008, n.p.h.) (“We hold that date-of-birth information is not confidential[.]”); *see also* Attorney General Opinion MW-283 (1980) (public employee’s date of birth not protected under privacy); Open Records Decision No. 455 at 7 (1987) (birth dates, names, and addresses are not protected by privacy). Accordingly, you have failed to demonstrate that any portion of the information at issue is highly intimate or embarrassing and of no legitimate concern to the public. Accordingly, no portion of the submitted information may be withheld under section 552.101 in conjunction with common-law privacy.

Section 552.117(a)(1) of the Government Code excepts from disclosure the current and former home addresses, telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that 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 under section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). We note, however, that section 552.117 only applies to records that the governmental body holds in its capacity as an employer. *See* Gov’t Code § 552.117 (providing that employees of governmental entities may protect certain personal information in the hands of their employer). In this instance, the information you have marked under section 552.117 is not contained in records that the city holds in its capacity as an employer. Thus, the information you have marked under section 552.117 may not be withheld on this basis.

Section 552.130 of the Government Code excepts from disclosure information that “relates to . . . a motor vehicle operator’s or driver’s license or permit issued by an agency of this state[.]” Gov’t Code § 552.130(a)(1). The city must withhold the Texas motor vehicle record information you have marked, as well as the additional information we have marked, under section 552.130 of the Government Code.

Section 552.147 of the Government Code provides that “[t]he social security number of a living person is excepted from” required public disclosure under the Act. *Id.* § 552.147(a). We note that the requestor also has a right to her own social security number. *See generally id.* § 552.023(b) (governmental body may not deny access to person to whom information

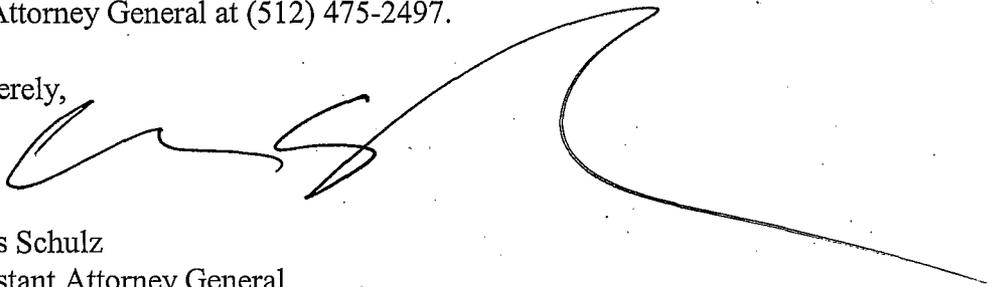
relates, or that person's representative, solely on grounds that information is considered confidential by privacy principles). The city may withhold the social security numbers of persons other than the requestor that you have marked under section 552.147.

In summary, the city need not release the information maintained solely by the city's Municipal Court. To the extent all parties in the litigation have not obtained the information at issue and the litigation is still pending, the city may continue to rely on Open Records Letter No. 2002-0911 for the information that was at issue in this prior ruling. With the exception of the citation and basic information, the city may withhold report number 090319-03 pursuant to section 552.108(a)(1). The city must withhold the Texas motor vehicle record information you have marked, as well as the additional information we have marked, under section 552.130 of the Government Code. The city may withhold the social security numbers of persons other than the requestor that you have marked under section 552.147. The remaining responsive information must be released.

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.oag.state.tx.us/open/index_orl.php, 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 must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Chris Schulz
Assistant Attorney General
Open Records Division

CS/cc

Ref: ID# 345434

Enc. Submitted documents

cc: Requestor
(w/o enclosures)