



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 16, 2010

Mr. Gregory A. Alicie
Open Records Specialist
Baytown Police Department
3200 North Main Street
Baytown, Texas 77521

OR2010-08821

Dear Mr. Alicie:

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# 383006 (Public Information Request #'s 1746, 2010-11432).

The Baytown Police Department and the City of Baytown (collectively the "city") received two requests from two different requestors for information pertaining to the city's Animal Services Department ("animal services"). The request dated March 26, 2010 seeks: 1) certifications for four named animal services employees; 2) the animal service euthanasia log book from March 2010; 3) a copy of all e-mails sent between five named individuals and the city's Human Resources Department during a specified time period that concern the city's animal services; 4) the summary page of all police reports pertaining to a named animal services employee; 5) a specified file sent to the District Attorney's office about possible charges against a named individual; and 6) any formal or informal complaints about a named individual from animal services officers during a specified time period.¹ The request dated April 07, 2010 seeks: 1) information pertaining to two complaints issued by a named former animal services employee, and 2) an electronic copy of a named individual's exit interview. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.108, 552.117, 552.137, and 552.147 of the Government Code.² We have considered the exceptions you claim and reviewed the

¹We note this requestor later clarified his request on March 30, 2010. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).

²Although you raise section 552.105 of the Government Code, you have not submitted any arguments under this exception. Consequently, we do not address it. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must submit written comments explaining why stated exceptions apply no later than 15 days after receipt of written request).

submitted representative samples of information.³ We have also received and considered comments from one of the requestors. *See* Gov't Code § 552.304 (interested party may submit written comments regarding availability of requested information).

Section 552.108(a) of the Government Code excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) 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 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 portions of the submitted information, which you have marked, are related to a pending criminal investigation in which no charges have been filed. However, one of the requestors argues that the charges have been dismissed and thus there is no ongoing investigation by the city. Whether or not the requested information relates to a pending criminal investigation is a question of fact. This office cannot resolve factual disputes in the opinion process. *See* Open Records Decision Nos. 592 at 2 (1991), 552 at 4 (1990), 435 at 4 (1986). Where fact issues are not resolvable as a matter of law, we must rely on the facts alleged to us by the governmental body requesting our decision, or upon those facts that are discernible from the documents submitted for our inspection. *See* Open Records Decision No. 552 at 4 (1990). Thus, based on the city's representation, we accept the city's assertion that the submitted information relates to a pending criminal case. Accordingly, we conclude that the release of the information at issue 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. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e.*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases). Thus, the city may withhold the information it has marked under section 552.108(a)(1) of the Government Code.⁴

Next, you claim portions of the remaining information are subject to section 552.103 of the Government Code. Section 552.103 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

³We assume the representative samples of records submitted to this office are truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and, therefore, does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

⁴As our ruling under section 552.108 is dispositive, we need not address your remaining argument against disclosure of this information, except to note that basic information may generally not be withheld from public disclosure under section 552.103. Open Records Decision No. 597 (1991).

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 to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing (1) litigation is pending or reasonably anticipated on the date the governmental body receives the request for information, and (2) the information at issue is related to that litigation. *See Thomas v. Cornyn*, 71 S.W.3d 473, 487 (Tex. App.—Austin 2002, no pet.); *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 governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). *See* ORD 551 at 4.

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 that 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.* 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. *See* Open Records Decision No. 555 (1990); *see also* 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).

You contend the submitted information is excepted under section 552.103 because a former animal services employee alleges he was wrongfully terminated from animal services due to a grievance he filed against another animal services employee. Further, you inform us the city anticipates litigation from the former employee at issue, and you state that the city believes one of the requestors is seeking the requested information in order to assist the individual at issue in the anticipated litigation. Upon review, we find the submitted information does not reflect that the individual at issue has filed or intends to file litigation.

Moreover, you have not otherwise demonstrated the individual at issue had taken concrete steps towards litigation on the date the request was received. *See* Open Records Decision No. 331 (1982). Thus, we find you have failed to establish the city reasonably anticipated litigation when it received the instant request for information. *See* Gov't Code § 552.103(c). Accordingly, the city may not withhold any of the remaining information you have marked under section 552.103 of the Government Code on that basis.

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. Section 552.102(a) of the Government Code 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). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled the test to be applied to information claimed to be protected under section 552.102(a) is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101. Accordingly, we address the city's section 552.102(a) claim in conjunction with its common-law privacy claim under section 552.101 of the Government Code for the portions of the remaining information it has marked under those sections.

In *Industrial Foundation*, the Texas Supreme Court stated information is excepted from disclosure if it (1) contains highly intimate or embarrassing facts, the release of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. 540 S.W.2d at 685. The type of information considered intimate or embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. This office has found that some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). However, there is a legitimate public interest in the qualifications of a public employee and how that employee performs as a public servant and satisfies employment conditions. *See generally* Open Records Decision Nos. 470 at 4 (1987) (public has legitimate interest in job performance of public employees), 444 at 5-6 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees), 423 at 2 (1984) (scope of public employee privacy is narrow). Upon review, we find none of the remaining information you have marked is highly intimate or embarrassing and of no legitimate public interest. Accordingly, the city may not withhold any of this information under common-law privacy.

Section 552.101 of the Government Code also encompasses the common-law informer's privilege, which has long been recognized by Texas courts. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928). It protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority. Open Records Decision Nos. 515 at 3 (1988). 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 2 (1981) (citing Wigmore, Evidence, § 2374, at 767 (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 4-5 (1988). However, 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* Open Records Decision No. 208 at 1-2 (1978).

In this instance, you claim that portions of the remaining information are excepted from disclosure by the common-law informer's privilege. However, you fail to inform this office of any specific criminal or civil statute that the city believes to have been violated. Thus, as you have not demonstrated that the information at issue pertains to an alleged violation of any specific criminal or civil law, none of the remaining information may be withheld on the basis of the informer's privilege.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home addresses and 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. Gov't Code § 552.117. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is received. *See* Open Records Decision No. 530 at 5 (1989). You state the remaining information contains the personal information of animal services employees who timely requested confidentiality under section 552.024, some of whom you have identified. We have marked the personal information of two animal services employees whom you have not identified, which nevertheless may be subject to section 552.117(a)(1). Accordingly, to the extent the employees to whom this information pertains timely requested confidentiality under section 552.024, the city must withhold this information under section 552.117(a)(1) of the Government Code. However, to the extent these employees did not timely elect confidentiality, the city may not withhold the information at issue under section 552.117(a)(1). Additionally, we note you have marked portions of the remaining information under section 552.117 that do not pertain to a city employee. Therefore, the city may not withhold this information on the basis of section 552.117, and as you raise no further exceptions to its disclosure, it must be released.

Finally, you assert that section 552.137 applies to portions of the submitted information. Section 552.137 of the Government Code excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body," unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See id.* § 552.137(a)-(c). The e-mail addresses at issue are not a type specifically excluded by section 552.137(c). Accordingly, the city must withhold the e-mail addresses you have marked, as well as the additional e-mail address we have marked, under section 552.137 of the Government Code unless the owners of the e-mail addresses have affirmatively consented to their disclosure.⁵

In summary, the city may withhold the information you have marked under section 552.108(a)(1) of the Government Code. To the extent it pertains to employees who timely elected confidentiality under section 552.024 of the Government Code, the city must withhold the information we have marked under section 552.117(a)(1) of the Government Code. The city must withhold the marked e-mail addresses under section 552.137 of the Government Code. The remaining 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, toll free, at (888) 672-6787.

Sincerely,



James McGuire
Assistant Attorney General
Open Records Division

JM/dls

⁵We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

Ref: ID# 383006

Enc. Submitted documents

c: Requestors
(w/o enclosures)