



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 6, 2010

Ms. Carla A. Robinson
First Assistant City Attorney
City of College Station
P.O. Box 9960
College Station, Texas 77842

OR2010-09900

Dear Ms. Robinson:

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# 385552.

The City of College Station (the "city") received a request for e-mails to and from a named city employee for May, June, and July of 2009 and January, February, March, and April of 2010, excluding any attachments to those e-mail communications.¹ You claim the requested information is excepted from disclosure under sections 552.103 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.² We have also considered comments

¹You inform us the city sought and received clarification of this request for information. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

²We assume the representative sample of records submitted to this office is 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.

submitted by the requestor. *See* Gov't Code § 552.304 (providing interested party may submit comments stating why information should or should not be released).

Section 552.108(a)(1) 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 . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]” *Id.* § 552.108(a)(1). Generally, a governmental body claiming section 552.108 must reasonably explain how and why 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). We note if the custodian of records does not have a law enforcement or prosecutorial interest in the information, it must provide a representation from the governmental body with the law enforcement interest that release of the information will interfere with that agency’s law enforcement interest. *See* Open Records Decision No. 474 at 4-5 (1987) (where incident involving allegedly criminal conduct is still under active investigation or prosecution, section 552.108 may be invoked by any proper custodian of information relating to incident).

You state the information consists of e-mails to and from the key witness in a pending prosecution of possession of child pornography. The Brazos County District Attorney’s Office (the “district attorney”) objects to release of the submitted information, stating the information pertains to the key prosecution witness in its pending prosecution of the possession of child pornography case. Upon review of the information, we have marked an e-mail that relates to the possession of child pornography matter. Because you have demonstrated release of this information would interfere with the district attorney’s prosecutorial interests, you have demonstrated the applicability of section 552.108(a)(1) to this information. *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.*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases). Although the requestor argues prosecution is not pending because the defendant in this matter has now pleaded guilty to the charge of possession of child pornography, access to information must be construed as of the time the request for information is made. Open Records Decision No. 530 (1989). Because the prosecution was pending on the date the city received the request, we find the city may withhold the e-mail we marked under section 552.108(a)(1). However, we find you have not adequately shown the remaining e-mails relate to the possession of child pornography case or otherwise explained how release of these e-mails would interfere with the pending prosecution. Consequently, the city may not withhold the remaining information under section 552.108(a)(1).

You also seek to withhold the information under section 552.103 of the Government Code. Section 552.103 provides in relevant part as follows:

- (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 purpose of section 552.103 is to protect the litigation interests of governmental bodies that are parties to the litigation at issue. *See id.* § 552.103(a); Open Records Decision No. 638 at 2 (1996) (section 552.103 only protects the litigation interests of the governmental body claiming the exception). A governmental body has the burden of providing relevant facts and documents to show section 552.103(a) is applicable in a particular situation. The test for meeting this burden is a showing 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 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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

We note the city is not a party to the pending criminal litigation. *See* Gov't Code § 552.103(a); Open Records Decision No. 575 at 2 (1990). Under such circumstances, we require an affirmative representation from the prosecuting attorney representing the governmental body that is a party to the litigation that he or she wants the submitted information withheld from disclosure under section 552.103. The district attorney objects to release of the e-mails because they are records of the state's witness in its pending prosecution of the possession of child pornography case. Thus, we find the city has established litigation was pending when it received this request for information.

However, as previously noted, the remaining e-mails do not relate to the possession of child pornography matter. *See* Open Records Decision Nos. 551 at 5 (1990) (attorney general will determine whether governmental body has reasonably established information at issue is related to litigation), 511 at 2 (1988) (information "relates" to litigation under section 552.103 if its release would impair governmental body's litigation interests). Consequently, as the information does not relate to the pending litigation, the city may not withhold it under section 552.103.

We note the e-mails contain information that is subject to sections 552.101, 552.117, and 552.137 of the Government Code.³ 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 established. *Id.* at 681-82. This office has found that personal financial information not relating to a financial transaction between an individual and a governmental body is generally protected by common-law privacy. See Open Records Decision Nos. 600 (1992) (employee's designation of retirement beneficiary, choice of insurance carrier, election of optional coverages, direct deposit authorization, forms allowing employee to allocate pretax compensation to group insurance, health care or dependent care), 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history). In addition, this office has found certain 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). Upon review, we find the information we marked is highly intimate or embarrassing and not of legitimate public concern. Thus, the city must withhold this information under section 552.101 in conjunction with common-law privacy.

Section 552.117(a)(2) of the Government Code excepts from disclosure the home address, home telephone number, social security number, and family member information of a peace officer, as defined by article 2.12 of the Code of Criminal Procedure. See Gov't Code § 552.117(a)(2); Open Records Decision No. 622 (1994). We marked the home address and other information of an individual; however, it is unclear whether this individual is currently a licensed peace officer as defined by article 2.12 of the Code of Criminal Procedure. Therefore, to the extent the individual at issue is a licensed peace officer as defined by article 2.12, the city must withhold the personal information we marked under section 552.117(a)(2).

If the individual whose personal information we marked under section 552.117(a)(2) is not a licensed peace officer, then her personal information may be excepted under section 552.117(a)(1) of the Government Code. Additionally, we note the remaining information contains the personal information of other city employees.

³The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Section 552.117(a)(1) 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 of the Government Code. Gov't Code § 552.117(a)(1). We note section 552.117 encompasses a personal cellular telephone number, provided a governmental body does not pay for the cellular telephone service. *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). Whether a particular piece of information is protected by 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). The city may only withhold information under section 552.117(a)(1) if the individuals at issue elected confidentiality under section 552.024 prior to the date on which the request for this information was made. Therefore, if the individuals at issue elected to keep their personal information confidential, the city must withhold the information we marked under section 552.117(a)(1). However, the city may only withhold the marked cellular telephone numbers if they are personal cellular telephone numbers and the cellular services were paid for with personal funds.

Lastly, we note the remaining information contains e-mail addresses subject to section 552.137 of the Government Code. Section 552.137 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), such as one provided by a person who has a contractual relationship with a governmental body. Gov't Code § 552.137(a)-(c). We also note section 552.137 is not applicable to the general e-mail address of a business or organization. We marked personal e-mail addresses that are not of types specifically excluded by section 552.137(c). Therefore, the city must withhold the personal e-mail addresses we marked under section 552.137, unless the city has received consent for their release.⁴

In summary, the city may withhold the e-mail we marked under section 552.108(a)(1) of the Government Code. The city must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy. The city must withhold the information we marked under section 552.117(a)(2) if the individual whose information is at issue is currently a licensed peace officer. If the individual whose information we marked is not currently a licensed peace officer, the city must withhold the information we marked pertaining to her under section 552.117(a)(1) of the Government Code, if she timely elected to keep such information confidential. The city must withhold the information we marked under section 552.117(a)(1) if the city employees timely elected

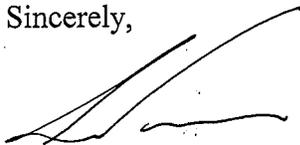
⁴We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including personal e-mail addresses under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

to keep their information confidential; however, the city may only withhold the marked cellular telephone numbers if they are personal cellular telephone numbers and the cellular telephone services are paid for with personal funds. 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,



Ana Carolina Vieira
Assistant Attorney General
Open Records Division

ACV/eeg

Ref: ID# 385552

Enc. Submitted documents

c: Requestor
(w/o enclosures)