



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 22, 2010

Ms. Angela M. DeLuca
Assistant City Attorney
City of Bryan
P.O. Box 1000
Bryan, Texas 77805

OR2010-16063

Dear Ms. DeLuca:

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# 400143.

The City of Bryan (the "city") received a request for the entire text of the messages identified by specific codes in the detailed history for a specified police sequence and for the city dispatch rotation logs of all of the wrecker companies dispatched to police-attended traffic incidents in the city and Brazos County for a specified time period. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Initially, it appears the submitted text messages were the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2009-14435 (2009). In that ruling, we determined the city failed to meet the procedural requirements of section 552.301(e)(1)(D) by not submitting the information to this office and thus, must

¹We assume the "representative sample" of information 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 those submitted to this office.

release the information responsive to that request. *See* Gov't Code § 552.301(e)(1)(D) (agency must submit requested information). You now seek to withhold the submitted information, including the text messages that were previously addressed by this office. Section 552.007 of the Government Code provides that if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law or the information is confidential by law. *See id.* § 552.007; Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). Accordingly, pursuant to section 552.007, the city may not now withhold the previously addressed information unless its release is expressly prohibited by law or the information is confidential by law. You seek to withhold the submitted information, including the text messages that were previously addressed in Open Records Letter No. 2009-14435, under sections 552.103 and 552.108. Sections 552.103 and 552.108 do not prohibit the release of information or make information confidential. *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 Gov't Code § 552.103); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 586 (1991) (governmental body may waive section 552.108). Therefore, the submitted text messages that were ruled on in Open Records Letter No. 2009-14435, which we have marked, may not now be withheld under section 552.103 or 552.108.

We note, however, the information previously addressed in Open Records Letter No. 2009-14435 contains information covered under section 552.101 of the Government Code in conjunction with common-law privacy. Section 552.101 of the Government Code excepts from public 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 it (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. This office has found personal financial information not related to a financial transaction between an individual and a governmental body is highly intimate or embarrassing and of no legitimate public interest. *See* Open Records Decision Nos. 545 (1990) (deferred compensation information, mortgage payments, assets, bills, and credit history protected under common-law privacy), 373 (1983) (sources of income not related to financial transaction between individual and governmental body protected under common-law privacy). Upon review, we find the information previously addressed in Open Records Letter No. 2009-14435 contains financial information that is highly intimate or embarrassing and of no legitimate public interest. Accordingly, the city must withhold the

information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy.

We further note the information previously addressed in Open Records Letter No. 2009-14435 contains Texas motor vehicle record information. Section 552.130 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 [or] a motor vehicle title or registration issued by an agency of this state[.]” Gov’t Code § 552.130(a)(1), (2). Accordingly, the city must withhold the Texas motor vehicle record information we have marked under section 552.130 of the Government Code.²

Next, we will consider your argument against disclosure under section 552.103 of the Government Code for the remaining submitted information not encompassed by the prior ruling. Section 552.103 of the Government Code 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.

...

(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 at issue. To meet this burden, the governmental body must demonstrate (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.).

²We note this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including Texas driver’s license numbers and license plate numbers under section 552.130 of the Government Code, without the necessity of requesting an attorney general decision.

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).

You state, and provide documentation showing, the city is named in a lawsuit styled *Thomas Chavers, Sandra Portzer, Brazos Valley Carriage Company, L.P., All American Roadrunners, L.P., and Brazos Valley Roadrunners, L.P. v. Tyrone Morrow, Michael Ikner, The City of Bryan, The City of College Station, Brazos County, and John Doe 1-20*, Cause No. 08-cv-3286, which is pending in the United States District Court for the Southern District of Texas, Houston Division. You also state this case was pending when the city received the instant request. You inform us the plaintiffs originally brought suit based on the removal of three tow truck companies from the non-consent tow lists of the city. You state the remedy sought included injunctive relief, which was denied. You also state the plaintiffs asked for a reconsideration of the denial of injunctive relief, which was also denied, and thereafter the plaintiffs filed an interlocutory appeal, which was pending on the date the city received the request. Based on your representations and our review, we conclude litigation was pending when the city received the request and the remainder of the submitted information not encompassed by the previous ruling relates to the pending litigation for the purposes of section 552.103. Therefore, the city may withhold the remainder of the submitted information not encompassed by the prior ruling pursuant to section 552.103 of the Government Code.³

However, we note once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated or pending litigation is not excepted from disclosure under section 552.103(a), and must be disclosed. Further, the applicability of section 552.103(a) 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).

In summary, with regard to the text messages that were previously requested and ruled on by this office, we conclude the city must release that information, which we have marked, in accordance with Open Records Letter No. 2009-14435. In releasing that information, the city must withhold the financial information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy and the Texas motor vehicle record information we have marked under section 552.130 of the Government Code. The city may withhold the remainder of the submitted information under section 552.103 of the Government Code.

³As our ruling is dispositive, we need not address your remaining arguments against disclosure of this 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.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,



Sean Nottingham
Assistant Attorney General
Open Records Division

SN/tp

Ref: ID# 400143

Enc. Submitted documents

c: Requestor
(w/o enclosures)