



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 12, 2011

Mr. Tyler F. Wallach
Assistant City Attorney
City of Fort Worth
1000 Throckmorton Street, 3rd Floor
Fort Worth, Texas 76102

OR2011-00629

Dear Mr. Wallach:

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# 405763 (City of Fort Worth File No. W004276).

The City of Fort Worth (the "city") received a request for all e-mails between four individuals pertaining to the requestor during a specified time period and for the requestor's personnel file.¹ You state you have released some of the requested information. You state you will redact the e-mail addresses in the submitted information under section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).² You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered comments from

¹You inform us the city received the present request on October 11, 2010. You state that on October 15, 2010, the city provided the requestor with an estimate of charges and required that the requestor pay a deposit. *See* Gov't Code §§ 552.2615, .263(a). You inform us the city received the requestor's deposit on October 29, 2010; thus, that is the date on which the city is deemed to have received the present request. *Id.* § 552.263(e).

²We note this office issued Open Records Decision No. 684, a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

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

Initially, you note, and we agree, that some of the submitted information is not responsive to the instant request for information because it is not contained in an e-mail pertaining to the requestor and is not contained within the requestor's personnel file. Accordingly, this information, which we have marked, is not responsive to the request. This ruling does not address the public availability of nonresponsive information, and the city is not required to release nonresponsive information in response to the request.

Next, we note some of the responsive information is made expressly public under section 552.022 of the Government Code, which provides, in relevant part, as follows:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108; [and]

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Id. § 552.022(a)(1), (3). The responsive information includes completed evaluations subject to section 552.022(a)(1) and information in accounts and vouchers relating to the receipt or expenditure of public funds subject to section 552.022(a)(3). Although the city raises section 552.103 of the Government Code, this exception is discretionary in nature and may be waived. Accordingly, section 552.103 does not constitute other law for purposes of section 552.022. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 473 (1987) (section 552.103 may be waived); *see also 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 section 552.103). Therefore, the city may not withhold the completed evaluations and the information in accounts and vouchers under section 552.103. However, because information subject to section 552.022 may be withheld under sections 552.101 and 552.117 of the Government Code, we will consider these exceptions for the information subject to section 552.022. We will also consider your arguments against disclosure for the information not subject to section 552.022.

We next turn to the information not subject to section 552.022. Section 552.103 of the Government Code provides in 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 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 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). The city must meet both prongs of this test for information to be excepted under 552.103(a).

This office has long held that for the purposes of section 552.103, "litigation" includes "contested cases" conducted in a quasi-judicial forum. *See* Open Records Decision Nos. 474 (1987), 368 (1983), 336 (1982), 301 (1982). Likewise, "contested cases" conducted under the Texas Administrative Procedure Act, chapter 2001 of the Government Code, constitute "litigation" for purposes of section 552.103. *See* Open Records Decision Nos. 588 (1991) (concerning former State Board of Insurance proceeding), 301 (concerning hearing before Public Utilities Commission). In determining whether an administrative proceeding is conducted in a quasi-judicial forum, this office has focused on the following factors: (1) whether the dispute is, for all practical purposes, litigated in an administrative proceeding where (a) discovery takes place, (b) evidence is heard, (c) factual questions are resolved, and (d) a record is made; and (2) whether the proceeding is an adjudicative forum of first jurisdiction, *i.e.*, whether judicial review of the proceeding in district court is an appellate review and not the forum for resolving a controversy on the basis of evidence. *See* ORD 588.

You claim the responsive information is excepted from disclosure under section 552.103 because the requestor has invoked the city's administrative appeals process by filing a grievance/appeal form. You assert that the "[c]ity's administrative appeals proceedings have many of the hallmarks of litigation," but are not governed by the Administrative Procedures Act. You indicate, and provide documentation showing, the city's administrative appeals process includes the right of both sides to present evidence and cross-examine witnesses, and permits the employee to have legal representation. We understand the grievant must complete the grievance process before a lawsuit can be filed against the city for an employment complaint. You inform us that the requestor has filed a "Step One" claim, which you state is a prerequisite for filing an EEOC claim against the city. You state the requestor filed her grievance before the instant request was received. Therefore, we determine the city was involved in pending litigation at the time it received the instant request for information. You state the information at issue directly relates to the pending litigation. Accordingly, we conclude section 552.103 is generally applicable to the information not subject to section 552.022.

We note, however, that the opposing party in the litigation has seen or had access to some of the information at issue. 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* ORD 551 at 4-5. Therefore, 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). Accordingly, the portions of the submitted information that the opposing party in the litigation has seen or had access to, which we have marked, may not be withheld under section 552.103. However, the city may withhold the remaining information not subject to section 552.022 under section 552.103. We note the applicability of this exception ends once the litigation has been concluded. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Section 552.101 of the Government Code also encompasses the common-law right to privacy, which protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *See id.* at 681-82. Determinations under common-law privacy must be made on a case-by-case basis. *See* Open Records Decision No. 373 at 4 (1983); *Indus. Found.*, 540 S.W.2d at 685 (whether matter is of legitimate interest to public can be considered only in context of each particular case). The types 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. *See* 540 S.W.2d at 683.

This office has found 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). Additionally, this office also has found that personal financial information not relating to the financial transaction between an individual and a governmental body is excepted from disclosure under common-law privacy. *See* Open Records Decision No. 600 (1992) (public employee's withholding allowance certificate, designation of beneficiary of employee's retirement benefits, direct deposit authorization, and employee's decisions regarding voluntary benefits programs, among others, protected under common-law privacy).

We note some of the information at issue pertains to the requestor; therefore, pursuant to section 552.023, the requestor has a right of access to her own private information. Gov't Code § 552.023 (governmental body may not deny access to person to whom information relates on ground that information is considered confidential under privacy principles). Accordingly, the information pertaining to this requestor may not be withheld under section 552.101 in conjunction with common-law privacy. Upon review, we find the information we have marked is highly intimate or embarrassing and of no legitimate public interest. Thus, the city must withhold the information we have marked under section 552.101 in conjunction with common-law privacy. However, you have failed to demonstrate how any of the remaining information is highly intimate or embarrassing and of no legitimate public interest. Accordingly, the city may not withhold any of the remaining information under section 552.101 in conjunction with common-law privacy.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former official or employee of a governmental body who requests that this information be kept confidential under section 552.024 of the Government Code. *See id.* §§ 552.117, .024. Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. You indicate the employees at issue timely elected confidentiality under section 552.024. Accordingly, the city must withhold the information you have marked, and the additional information we have marked, under section 552.117(a)(1) of the Government Code.

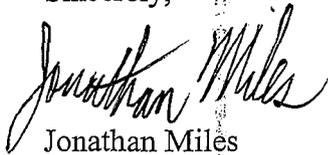
In summary, except for the information subject to section 552.022 of the Government Code and the marked information that the opposing party in the pending litigation has seen or had access to, the city may withhold the responsive information under section 552.103 of the Government Code. In releasing the information subject to section 552.022 and the

information that the opposing party in the litigation has had access to, the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy and the information you have marked, and the additional information we have marked, under section 552.117(a)(1) of the Government Code. The remaining information must be released.³

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,



Jonathan Miles
Assistant Attorney General
Open Records Division

JM/em

Ref: ID# 405763

Enc. Submitted documents

c: Requestor
(w/o enclosures)

³We note the information being released includes information to which the requestor has a right of access under section 552.023 of the Government Code. Because this information would be confidential with respect to the general public, the city must again seek a ruling from this office if it receives another request for this information from another requestor.