



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 7, 2011

Ms. Judith N. Benton
Assistant City Attorney
City of Waco
P.O. Box 2570
Waco, Texas 76702-2570

OR2011-03168

Dear Ms. Benton:

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# 410511 (Ref# LGL-10-1754).

The City of Waco (the "city") received a request for all personnel records pertaining to five named individuals. You claim the requested information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.117, 552.122, and 552.136 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Initially, the submitted information includes a resolution passed by the city council. Because laws and ordinances are binding on members of the public, they are matters of public record and may not be withheld from disclosure under the Act. *See* Open Records Decision No. 551 at 2-3 (1990) (laws or ordinances are open records). The submitted resolution is analogous to an ordinance. Moreover, the resolution states it was passed at a public meeting of the city council and, thus, is an official record of a governmental body's public proceedings. *See* Open Records Decision No. 221 at 1 (1979) ("official records of the public proceedings of a governmental body are among the most open of records"). Therefore, the resolution, which we have marked, must be released.

Next, we note some of the remaining information is subject to section 552.022 of the Government Code, which provides:

¹We 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.

the following categories of information are public information and not excepted from required disclosure under [the Act] 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;

...

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

Gov't Code § 552.022(a)(1), (3). The submitted personnel records contain completed performance evaluations, which must be released under section 552.022(a)(1), unless the information is excepted from disclosure under section 552.108 or expressly confidential under other law. The personnel records also contain an executed employment contract that must be released under section 552.022(a)(3), unless the information is expressly confidential under other law. Although you claim the evaluations and contract are excepted under section 552.103 of the Government Code, this section is a discretionary exception to public disclosure that protects a governmental body's interests and may be waived. *See id.* § 552.007; *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); Open Records Decision No. 665 at 2 n.5 (discretionary exceptions generally). As such, section 552.103 is not "other law" that makes information confidential for the purposes of section 552.022. Consequently, the city may not withhold the submitted performance evaluations and contract, which we have marked, under section 552.103 of the Government Code. You also assert portions of the evaluations are, and we note a portion of the contract is, excepted under section 552.117 of the Government Code. Because information subject to sections 552.022(a)(1) and 552.022(a)(3) may be withheld under section 552.117, we will consider the applicability of section 552.117 to the submitted evaluations and contract, along with your claims under sections 552.101, 552.102, 552.103, 552.117, 552.122, and 552.136 for the remaining submitted information.

Section 552.117(a)(1) of the Government Code excepts from disclosure the current and former 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 this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). Whether 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) on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made.

You have marked the social security numbers of current and former city employees in the submitted performance evaluations. We have marked other personal information of a city employee in the submitted employment contract. You have provided documentation showing the employee whose information is at issue in the contract and some of the evaluations timely chose to not allow public access to his social security number and other personal information. Therefore, the city must withhold that employee's social security number you have marked, and other personal information we have marked, under section 552.117(a)(1) of the Government Code. You have not informed us whether the other two employees whose social security numbers are at issue timely chose to not allow public access to their personal information. Therefore, if these employees timely elected to withhold their social security numbers, the city must withhold their marked social security numbers pursuant to section 552.117(a)(1) of the Government Code. If these employees did not timely elect to withhold this information, then the city may not withhold their marked social security numbers under section 552.117(a)(1) of the Government Code.² As you have not claimed any other exceptions for the remaining information in the evaluations and contract, the city must release this information.

You claim the remaining information not subject to section 552.022 is excepted under section 552.103 of the Governmental Code, which 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). 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 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*

²Regardless of the applicability of section 552.117(a)(1), section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act. Gov't Code § 552.147(b).

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).

The question of 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 litigation is reasonably anticipated, the governmental body must furnish concrete evidence litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* This office has stated a pending Equal Employment Opportunity Commission (“EEOC”) complaint indicates litigation is reasonably anticipated. Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982).

You indicate, and provide documentation showing, that, prior to the city’s receipt of the request for information, one of the individuals named in the request filed a discrimination claim with the EEOC. Based on your representations and our review, we determine the city reasonably anticipated litigation on the date it received the request. Further, you explain the remaining information relates to the anticipated litigation because it consists of the personnel records of the complainant, the subject of the complaint, and other employees who would be involved in the complaint investigation as witnesses. Based on your arguments and our review, we agree the remaining information relates to the reasonably anticipated litigation.

However, 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. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the litigation is not excepted from disclosure under section 552.103(a), and must be disclosed. In this instance, one of the remaining memoranda reflects it was provided to the opposing party. Therefore, because the opposing party in the anticipated litigation was provided with this information, which we have marked, it may not be withheld under section 552.103 of the Government Code. The remaining information, however, may be withheld under section 552.103 of the Government Code.³

You claim the memorandum provided to the opposing party is confidential under section 552.102 of the Government Code. Section 552.102(a) 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). Although you generally assert the memorandum at issue is confidential under section 552.102(a), you have not provided any arguments explaining, nor does our review reveal, the applicability of this section to the memorandum. Consequently, the city may not withhold the memorandum provided to the opposing party under section 552.102(a) of the Government Code. As you

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

have not claimed any other exceptions to disclosure for this memorandum, it must be released.

In summary, the city must release the marked city council resolution. The city must withhold under section 552.117(a)(1) of the Government Code the marked social security number in the evaluations, and other personal information in the contract, of the employee who timely elected to not allow public access to his personal information. If the other employees whose social security numbers you have marked in the evaluations timely elected to withhold this information, the city must withhold the marked social security numbers pursuant to section 552.117(a)(1) of the Government Code. Otherwise, the marked social security numbers must be released, along with the remaining information in the evaluations and contract. With the exception of the memorandum we have marked for release, the city may withhold the remaining information under section 552.103 of the Government Code.

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,



Leah B. Wingerson
Assistant Attorney General
Open Records Division

LBW/dls

Ref: ID# 410511

Enc. Submitted documents

c: Requestor
(w/o enclosures)