



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

April 28, 2011.

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

OR2011-05849

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# 415715 (Fort Worth PIR No. W006604).

The City of Fort Worth (the "city") received a request for eleven categories of information related to the candidates and hiring process for a specified position. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.104, 552.111, 552.117, and 552.122 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.103 of the Government Code 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 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 section 552.103(a) 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 city 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 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 that litigation is reasonably anticipated, the city must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* This office has concluded that litigation was reasonably anticipated when the potential opposing party filed a complaint with the Equal Employment Opportunity Commission ("EEOC"). *See* Open Records Decision No. 336 (1982).

You state the city's fire department posted a job vacancy announcement to which several applicants responded. Subsequently, one of the applicants filed an EEOC discrimination complaint against the city. The complaint was delivered to the city on the same day the city received the request for information. Based on your representations and our review, we agree the city reasonably anticipated litigation on the date it received the request. You also state the submitted information reveals the qualifications and evaluation of each applicant and, thus, relates to the complainant's discrimination claim. We agree the submitted information is related to the anticipated litigation. Accordingly, we conclude section 552.103(a) of the Government Code is generally applicable to the submitted information.<sup>1</sup>

We note, however, the information you seek to withhold under section 552.103 includes a memorandum sent to all the applicants and the complainant's application letter and seven attachments. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information that is related to litigation through discovery procedures. *See* ORD 551 at 4–5. If a potential opposing party has seen or had access to information that is related to anticipated 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). Therefore,

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<sup>1</sup> As our ruling is dispositive for this information, we do not address your arguments under sections 552.111 and 552.122 of the Government Code.

the city may not withhold the memorandum or the complainant's application letter and seven attachments under section 552.103 of the Government Code. Further, the applicability of section 552.103(a) ends once the litigation has concluded or is no longer reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

Section 552.104 of the Government Code excepts from required public disclosure "information which, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). You claim the submitted information relates to a competitive situation because it concerns the evaluation of applicants, including the requestor, in an ongoing hiring process, and releasing this information would give the requestor and other applicants an unfair advantage. However, this office has consistently interpreted section 552.104 to apply in competitive bidding and procurement situations. *See, e.g.,* Open Records Decision Nos. 604 at 1 (1992), 593 at 1 (1991) (statutory predecessor to section 552.104 "designed to protect governmental interests in commercial transactions"), 592 at 5 (1991), 583 at 3 (1990) (statutory predecessor to section 552.104 did not restrict access to information because it might be commercially useful to requestor), 568 at 2 (1990), 541 at 3 (1990), 514 at 1 (1988) (statutory predecessor to section 552.104 protects governmental purchasing interests), 463 at 1-2 (1987) (statutory predecessor to section 552.104 "has been construed to protect the sealed bid process"), 231 (1979) (statutory predecessor not applicable to feasibility study where no actual bidding process was under way). In light of this office's prior interpretations of section 552.104, we are not persuaded that a competition among applicants for a position of public employment is a competitive situation contemplated by section 552.104. *Cf.* ORD 463 at 2 (stating, by analogy, that "competition" between two job applicants seeking one job offered by the state is not a process the statutory predecessor to section 552.104 was intended to protect). We find the city has failed to demonstrate the applicability of section 552.104 of the Government Code in this instance, and no information may be withheld 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, which 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 established. *Id.* at 681-82. This office has concluded that some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required 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 you have marked in the complainant's application letter is highly intimate or embarrassing and

of no legitimate concern to the public. The city must withhold this information under section 552.101 of the Government Code in conjunction with common-law privacy.

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."<sup>2</sup> Gov't Code § 552.102(a). The Texas Supreme Court has held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, No. 08-0172, 2010 WL 4910163 (Tex. Dec. 3, 2010). Having reviewed the information at issue, we conclude the city must withhold the information we have marked under section 552.102(a) of the Government Code.

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. Gov't Code § 552.117(a)(1). 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 information. *See Open Records Decision No. 530 at 5 (1989)*. Thus, information may be withheld under section 552.117(a)(1) only on behalf of a current or former 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 information. You state the employee whose information is at issue elected to keep his personal information confidential prior to the city's receipt of the request. Accordingly, the city must withhold the information we have marked under section 552.117(a)(1) of the Government Code.

In summary, with the exception of the memorandum and the complainant's application letter and seven attachments, the city may withhold the submitted information under section 552.103 of the Government Code. The city must withhold the information you have marked under section 552.101 of the Government Code in conjunction with common-law privacy and the information we have marked under sections 552.102(a) and 552.117(a)(1) 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.

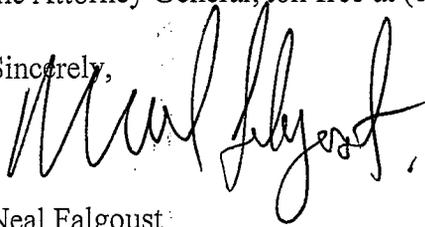
This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), or call the Office of the Attorney General's Open Government Hotline, toll free,

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<sup>2</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions.

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,

A handwritten signature in black ink, appearing to read "Neal Falgoust". The signature is written in a cursive style with a large, sweeping initial "N".

Neal Falgoust  
Assistant Attorney General  
Open Records Division

NF/bs

Ref: ID# 415715

Enc. Submitted documents

c: Requestor  
(w/o enclosures)