



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 9, 2011

Mr. Joe Gorfida, Jr.
Nicols, Jackson, Dillard, Hager & Smith, L.L.P.
1800 Lincoln Plaza
500 North Akard Street
Dallas, Texas 75201

OR2011-06424

Dear Mr. Gorfida:

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# 416877.

The City of Allen (the "city"), which you represent, received a request for ten categories of information pertaining to the requestor's client and a specified business. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.108, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we must address the requestor's assertion that the city did not comply with section 552.301 of the Government Code. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request for information. *See id.* § 552.301(b). The requestor states that he initially requested the information at issue in a facsimile sent on February 2, 2011, to the city secretary. The city states it did not receive the facsimile on February 2, 2011. The city represents that it did not receive the request for information until February 25, 2011. The determination of the date the city received the request for information is a question of fact. This office is unable to resolve disputes of fact in the open records ruling process. Accordingly, we must rely upon the facts alleged to us by the governmental body requesting our opinion, or upon those facts that are discernable from the documents submitted for our inspection. *See* Open Records Decision No. 522 at 4 (1990).

Upon review of the submitted information, we are unable to discern the date the city received the request. Thus, we must accept the city's representation that it received the request for information on February 25, 2011. Accordingly, the tenth business day after the receipt of the request was March 11, 2011. The city's request for a ruling from this office is dated, and was received by facsimile, on March 4, 2011. Therefore, we conclude that the city complied with the procedural requirements of section 552.301(b).

Next, we note portions of Exhibit A consist of completed investigations and reports subject to section 552.022(a)(1) of the Government Code. Section 552.022(a)(1) provides for the required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]" Gov't Code § 552.022(a)(1). Pursuant to section 552.022(a)(1), completed investigations, reports, and evaluations are expressly public unless they are either excepted under section 552.108 of the Government Code or expressly confidential under other law. Sections 552.103 and 552.111 of the Government Code are discretionary exceptions that protect a governmental body's interest 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 Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 470 at 7 (1987) (governmental body may waive statutory predecessor to section 552.111 deliberative process). As such, sections 552.103 and 552.111 are not other laws that make information confidential for the purposes of sections 552.022(a)(1). Therefore, the city may not withhold any of the information subject to 552.022 under section 552.103 or section 552.111 of the Government Code. You claim some of the information subject to section 552.022 is protected from disclosure under section 552.101 of the Government Code and under the common-law informer's privilege. The common-law informer's privilege is other law for the purpose of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001); *Tex. Comm'n on Env'tl. Quality v. Abbott*, No. GV-300417 (126th Dist. Ct., Travis County, Tex.). Section 552.101 is other law for purposes of section 552.022(a)(1). We will, therefore, consider whether the information in Exhibit A that is subject to section 552.022 is excepted under section 552.101 of the Government Code and under the common-law informer's privilege. In addition, because information subject to section 552.022(a)(1) may be excepted under section 552.108 of the Government Code, we will address your argument under this exception for the information subject to section 552.022(a)(1). We will also address all of your arguments for the information not subject to section 552.022.

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 information protected by other statutes, such as section 58.007 of the Family Code, which reads, in part, as follows:

(c) Except as provided by Subsection (d), law enforcement records and files concerning a child and information stored, by electronic means or otherwise, concerning the child from which a record or file could be generated may not be disclosed to the public and shall be:

- (1) if maintained on paper or microfilm, kept separate from adult files and records;
- (2) if maintained electronically in the same computer system as records or files relating to adults, be accessible under controls that are separate and distinct from controls to access electronic data concerning adults; and
- (3) maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subchapters B, D, and E.

Fam. Code § 58.007(c). Under section 58.007(c), juvenile law enforcement records relating to conduct that occurred on or after September 1, 1997, are confidential. *See id.* § 51.03(a), (b) (defining “delinquent conduct” and “conduct indicating a need for supervision”). For purposes of section 58.007(c), a “child” is a person who is ten years of age or older and under seventeen years of age. *See id.* § 51.02(2). The submitted information includes reports of juvenile delinquent conduct that occurred after September 1, 1997. None of the exceptions in section 58.007 appear to apply in this instance. Accordingly, this information, which we have marked, must be withheld under section 552.101 of the Government Code in conjunction with section 58.007(c) of the Family Code. However, the remaining information at issue does not identify any offenders between the ages of ten and sixteen. Further, you provide no arguments explaining how section 58.007 is applicable to this information. Therefore, we conclude none of the remaining information at issue is confidential under section 58.007, and no information may be withheld under section 552.101 on that basis.

Next, you claim the remaining information you have marked in Exhibit A is excepted from disclosure under section 552.108(a)(2) of the Government Code. Section 552.108(a)(2) excepts from disclosure information concerning an investigation that concluded in a result other than conviction or deferred adjudication. Gov’t Code § 552.108(a)(2). A governmental body claiming section 552.108(a)(2) must demonstrate that the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. *See id.* § 552.301(e) (governmental body must provide comments explaining why exceptions raised should apply to information requested). In this instance, you state the information you have marked relates to concluded criminal investigations that did not result in convictions or deferred adjudication. Based on your representations and our review of the information at issue, we conclude section 552.108(a)(2) of the Government Code is generally applicable to the information you have marked.

We note that basic information about an arrested person, an arrest, or a crime is not excepted from disclosure under section 552.108. *Id.* § 552.108(c). Such basic information refers to the information held to be public in *Houston Chronicle Publishing Co. v. City of Houston*, 531 S.W.2d 177 (Tex. App.—Houston [14th Dist.] 1975), *writ ref’d n.r.e.*, 536 S.W.2d 559 (Tex. 1976). We note that basic information includes, among other things, the identity and description of the complainant. *See* Open Records Decision No. 127 (1976) (summarizing types of information deemed public by *Houston Chronicle*). Thus, with the exception of

basic information, the city may withhold the information you have marked under section 552.108(a)(2). We understand you to claim portions of the basic information, as well as portions of the remaining information subject to section 552.022, are excepted from disclosure under section 552.101 of the Government Code in conjunction with the common-law informer's privilege.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. The informer's privilege, incorporated into the Act by section 552.101, has long been recognized by Texas courts. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928). It protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided that the subject of the information does not already know the informer's identity. Open Records Decision Nos. 515 at 3 (1988), 208 at 1-2 (1978). The informer's privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." Open Records Decision No. 279 at 2 (1981) (citing 8 John H. Wigmore, *Evidence in Trials at Common Law*, § 2374, at 767 (J. McNaughton rev. ed. 1961)). The report must be of a violation of a criminal or civil statute. *See* Open Records Decision Nos. 582 at 2 (1990), 515 at 4-5 (1988).

You inform us the information at issue contains identifying information of complainants and other individuals who reported possible violations of section 161.252 of the Texas Health and Safety Code, as well as other state law to the city's police department. We note the violations carry criminal penalties. Having examined these provisions, your arguments, and the documents at issue, we conclude the city may withhold the information we have marked under section 552.101 in conjunction with the informer's privilege. However, you have failed to demonstrate that any of the remaining information subject to section 552.022 identifies or tends to identify an individual who reported a violation of law to the city. Thus, the city may not withhold any portion of the remaining information subject to section 552.022 under section 552.101 in conjunction with the informer's privilege.

You claim the information not subject to section 552.022 in Exhibit A is excepted from disclosure under section 552.103 of the Government Code. Section 552.103 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 governmental body 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. *See 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). Both elements of this 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 demonstrating, that prior to the city's receipt of the present request, the requestor's client filed a complaint against the city in the United States District Court for the Eastern District of Texas. You further state the information at issue is related to the pending litigation because it pertains to the claims in the lawsuit. Accordingly, based on your representations and our review, we find litigation was pending when the city received this request for information and the information at issue relates to the pending litigation. Therefore, section 552.103 is generally applicable to the information not subject to section 552.022 in Exhibit A.¹

We note once the information at issue has been obtained by all parties to the pending litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to the information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Accordingly, the city may only withhold the information at issue under section 552.103 of the Government Code to the extent that the opposing parties to the litigation have not seen or had access to the information. We note that the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

We note the information in Exhibit E contains fingerprints. Section 552.101 of the Government Code also encompasses section 560.003 of the Government Code, which provides that “[a] biometric identifier in the possession of a governmental body is exempt from disclosure under [the Act].” Gov't Code § 560.003; *see id.* § 560.001(1) (“biometric identifier” means retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry). The city must withhold the fingerprints we have marked in Exhibit E under

¹As our ruling is dispositive, we need not address your remaining arguments for the information at issue.

section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code.

The remaining information contains Texas motor vehicle information subject to section 552.130 of the Government Code.² This section excepts from disclosure information that relates to a Texas driver's license or motor vehicle title or registration. *Id.* § 552.130. Therefore, the city must withhold the Texas motor vehicle record information we have marked in Exhibits A and E under section 552.130 of the Government Code.

Finally, we note a bank account number in the remaining information is confidential under section 552.136 of the Government Code, which states, "[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." *Id.* § 552.136(b). Section 552.136(a) defines "access device" as "a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to . . . obtain money, goods, services, or another thing of value [or] initiate a transfer of funds other than a transfer originated solely by paper instrument." *Id.* § 552.136(a). Accordingly, the city must withhold the bank account number we have marked in Exhibit E under section 552.136 of the Government Code.

In summary, the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 58.007(c) of the Family Code. With the exception of basic information, the city may withhold the information you have marked under section 552.108(a)(2) of the Government Code. The city may withhold the information we have marked in the basic information and in the remaining information subject to 552.022 under section 552.101 of the Government Code in conjunction with the informer's privilege. The city may withhold the information not subject to section 552.022 in Exhibit A under section 552.103 of the Government Code. The city must withhold the fingerprints we have marked in Exhibit E under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code. The city must withhold the Texas motor vehicle record information we have marked in Exhibits A and E under section 552.130 of the Government Code. The city must withhold the bank account number

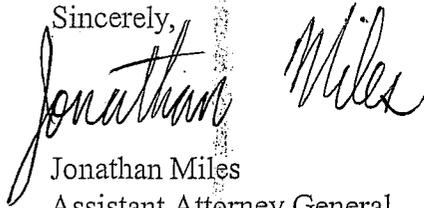
²The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

we have marked in Exhibit E under section 552.136 of the Government Code.³ The remaining information must be released.⁴

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# 416877

Enc. Submitted documents

c: Requestor
(w/o enclosures)

³We 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 a fingerprint under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code, Texas driver's license and license plate numbers under section 552.130 of the Government Code, and bank account numbers under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.

⁴We note the information being released contains social security numbers of individuals other than the requestor. 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. We also note the requestor has a special right of access to some of the information being released in this instance. Because such information is confidential with respect to the general public, if the city receives another request for this information from a different requestor, the city must again seek a ruling from this office.