



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 6, 2011

Mr. Richard L. Bilbie
Assistant City Attorney
City of Harlingen
P.O. Box 2207
Harlingen, Texas 78551

OR2011-09571

Dear Mr. Bilbie:

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# 422942.

The City of Harlingen (the "city") received a request for the following information: the complete personnel file of the requestor's client, all performance reviews or annual evaluations related to the requestor's client, all documents relating to disciplinary actions against the requestor's client, all e-mails between the requestor's client and certain named individuals concerning a specified topic, all e-mails between certain named individuals concerning the same topic and the requestor's client, all applications submitted for a certain job opening, and all ordinances that relate to the Convention and Visitors Bureau (the "bureau"). You state the city does not maintain information responsive to the request for performance reviews and evaluations.¹ You state the city has provided the requestor with his client's personnel file, disciplinary actions, and two ordinances related to the bureau. You claim the submitted information is excepted from disclosure in whole or in part under sections 552.101, 552.103, 552.104, 552.106, 552.107, 552.108, 552.109, 552.111, 552.117,

¹The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983).

and 552.137 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that some of the information you have submitted is not responsive to the request as it was created after the date the city received the request. This ruling does not address the public availability of any information that is not responsive to the request, and the city is not required to release information that is not responsive. *See Bustamante*, 562 S.W.2d 266; ORD 452 at 3.

Next, we note you have redacted information from the responsive applications. Pursuant to section 552.301 of the Government Code, a governmental body that seeks to withhold requested information must submit to this office a copy of the information, labeled to indicate which exceptions apply to which parts of the copy, unless the governmental body has received a previous determination for the information at issue. Gov't Code §§ 552.301(a), (e)(1)(D). Section 552.147 of the Government Code permits a governmental body to redact the social security number of a living person without requesting a decision from this office. *See* Gov't Code § 552.147(b). Further, Open Records Decision No. 684 (2009) serves as a previous determination to all governmental bodies allowing them to withhold a Texas driver's license number from disclosure under section 552.130 of the Government Code and the e-mail address of a member of the public under section 552.137 of the Government Code without requesting a decision from this office. *See* Open Records Decision No. 684. In addition, the city has redacted the home addresses and home telephone number of each individual from the submitted employment applications. Section 552.024 of the Government Code authorizes a governmental body to redact from public release a current or former employee's home address or telephone number subject to section 552.117(a)(1) of the Government Code without the necessity of requesting a decision from this office under the Act, if the employee or official timely elected to withhold such information. *See id.* §§ 552.024(c); Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 2 (to be codified as an amendment to Gov't Code § 552.117(a)). Section 552.117(a)(1) applies only to employees or former employees of the governmental body. We note that some of the applicants for whom you have redacted information are not current or former employees of the city; therefore section 552.117(a)(1) is not applicable to their home address and home telephone number, and the city may not withhold this information on that basis. Nonetheless, we are able to discern the nature of the information you have redacted, and it does not prohibit us from making a ruling. Accordingly, we will consider your arguments against the disclosure of this information.

Next, we must address the city's procedural obligations under the Act. Pursuant to section 552.301(e), a governmental body that receives a request for information it wishes to withhold under an exception to disclosure is required to submit to this office within fifteen

²Although you raise section 552.102 of the Government Code, you have not submitted arguments in support of that exception; therefore, we assume you have withdrawn it. *See* Gov't Code §§ 552.301, .302.

business days of receiving the request a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. Gov't Code § 552.301(e). The city received the request for information on April 15, 2010. You inform this office that the city observed a holiday on April 22, 2011. Thus, the city was required to submit a copy of the specific information requested or a representative sample by May 9, 2011. Although the city timely submitted some information, the city submitted additional e-mails, marked as Exhibit 2, to this office for a ruling on May 13, 2011. *See id.* § 552.308 (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). As to this additional material, we find the city failed to comply with the requirements of section 552.301(e) of the Government Code.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the information is public and must be released, unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See* Gov't Code § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 630 (1994). A compelling reason exists when third-party interests are at stake or when information is confidential under other law. Open Records Decision No. 150 (1977). Although you assert the additional information is excepted from disclosure under sections 552.103, 552.104, 552.106, 552.107, 552.108, and 552.111 of the Government Code, these are all discretionary exceptions to disclosure and may be waived. *See* Gov't Code § 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. 676 at 10–11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions, governmental body may waive section 552.111), 177 (1977) (statutory predecessor to section 552.108 subject to waiver). Therefore, in failing to comply with the requirements of section 552.301 for this additional information, you have waived your claims under these discretionary exceptions. Thus, the city may not withhold any of the additional e-mails, marked as Exhibit 2, under sections 552.103, 552.104, 552.106, 552.107, 552.108, or 552.111 of the Government Code. However, you also claim sections 552.101, 552.109, and 552.137 of the Government Code for this information. As these exceptions can provide a compelling reason to overcome the presumption of openness under section 552.302, we will consider their applicability to these additional e-mails.

With respect to the timely submitted information in Exhibits 3 and 4, section 552.103 of the Government Code 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). The 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 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 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 that litigation is reasonably anticipated, the governmental body 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 took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

You state, and provide documentation showing, the requestor's client is a former employee whose employment was terminated by the city. You also provide documentation showing the former employee hired the requestor to represent her in the administrative proceedings that followed her termination, and that the city denied the former employee an appeal of her termination. You assert this documentation shows the requestor is contemplating litigation against the city based on his client's termination and the city's subsequent denial of her appeal, and that these documents were received prior to the date of the request. Upon review

of your arguments and the submitted information, we agree the city reasonably anticipated litigation on the date it received the request for information. We further find the information at issue relates to the anticipated litigation. Accordingly, the city may withhold the timely submitted responsive information under section 552.103 of the Government Code.³

We note, however, once the information at issue has been obtained by all parties to the anticipated 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). Thus, any information obtained from or provided to all other parties in the anticipated 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 litigation has concluded or is no longer reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

We turn next to the additional e-mails marked as Exhibit 2. You generally assert this information is excepted from disclosure under section 552.101 of the Government Code. 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. You analogize the information at issue to the audit working papers which this office determined were confidential in Open Records Decision No. 640 (1996). In that decision, this office determined the audit working papers must be withheld pursuant to a specific confidentiality statute in the Insurance Code. *See* Open Records Decision No. 640 at 4. In the present instance, you have not cited any law which would make the submitted communications confidential, nor are we aware of any such law. Therefore, we have no basis to conclude the additional e-mails marked as Exhibit 2 are confidential under section 552.101 of the Government Code and the city may not withhold them on that basis.

Section 552.109 of the Government Code excepts from disclosure “[p]rivate correspondence or communications of an elected office holder relating to matters the disclosure of which would constitute an invasion of privacy[.]” Gov’t Code § 552.109. This office has held the test to be applied to information under section 552.109 is the same as the common-law privacy standard under section 552.101, 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). Upon review, we find you have failed to demonstrate how any of the information in the additional e-mails constitutes highly intimate or embarrassing information that is of no legitimate concern to the public. Therefore, the city may not withhold any of the additional e-mails in Exhibit 2 under section 552.109 of the Government Code.

³As our ruling is dispositive, we do not address your remaining arguments against disclosure for the timely submitted information.

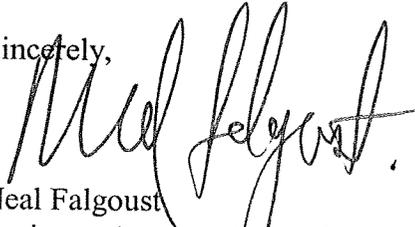
Section 552.137 provides, “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act],” unless the owner of the e-mail address has affirmatively consented to its release or the e-mail address is specifically excluded by subsection (c). Gov’t Code § 552.137(a)–(c). Upon review, we find the e-mail addresses we have marked are not the kind excluded by subsection (c). Accordingly, the city must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless their owners have consented to their release.

In summary, the city need not release any information that is not responsive to the request. The city may withhold the timely submitted responsive information under section 552.103 of the Government Code. The city must withhold the e-mail addresses we have marked in Exhibit 2 under section 552.137 of the Government Code, unless their owners have consented to their release. 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, 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,



Neal Falgoust
Assistant Attorney General
Open Records Division

NF/dls

Ref: ID# 422942

Enc. Submitted documents

c: Requestor
(w/o enclosures)