



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

September 15, 2011

Ms. Krista Cover  
Assistant City Attorney  
City of San Antonio  
P.O. Box 839966  
San Antonio, Texas 78283

OR2011-13358

Dear Ms. Cover:

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# 430077 (COSA No. W001946).

The City of San Antonio (the "city") received a request for any accident report and any photographs, video, or audio concerning a specified incident, correspondence between the city and a named person, the city's policy regarding liability for damages caused to a private party, and information regarding why a named person has not been compensated for the specified incident. You claim the submitted information is excepted from disclosure under section 552.103 of the Government Code. We have considered the claimed exception and reviewed the submitted information.

We first note you have not submitted information responsive to the part of the request seeking the city's policy regarding liability for damages caused to a private party. To the extent information responsive to this part of the request existed on the date the city received the request, we assume you have released it. *See* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible). If you have not released any such records, you must do so at this time. *See* Gov't Code §§ 552.301(a), .302.

We next note most of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides, in relevant part, for the required public disclosure of:

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

...

(17) information that is also contained in a public court record[.]

*Id.* § 552.022(a)(1), (17). In this instance, the submitted information contains a completed investigation of a claim subject to section 552.022(a)(1) and court-filed documents subject to section 552.022(a)(17). The city may withhold information subject to section 552.022(a)(1) only to the extent it is excepted from disclosure under section 552.108 or confidential under other law. The city may withhold information subject to section 552.022(a)(17) only to the extent it is confidential under other law. Although you raise section 552.103 of the Government Code, this is a discretionary exception to disclosure that protects only 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 Nos. 663 (1999) (governmental body may waive section 552.103), 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.103 is not "other law" that makes information confidential for purposes of section 552.022, and the city may not withhold any of the information subject to section 552.022 under that section. However, we note portions of the information are subject to sections 552.101, 552.102, 552.117, 552.1175, 552.130, and 552.136 of the Government Code.<sup>1</sup> Because these exceptions are all "other law" that makes information confidential for purposes of section 552.022, we will address their applicability to the information subject to release under section 552.022, along with your argument against disclosure for the remaining submitted information.

We first address your argument against disclosure of the information not subject to section 552.022. 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.

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<sup>1</sup>The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Gov't Code § 552.103(a), (c). The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to the litigation to obtain such information through discovery procedures. *See* ORD 551 at 4-5. A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception applies 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 requested information 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). The governmental body must meet both parts of this test for information to be excepted under section 552.103(a). *See* ORD 551 at 4.

You state a lawsuit styled *James E. Price v. Public Works Operation Departments* was filed and is currently pending against the city in Small Claims Court, Precinct 2. We note this lawsuit was filed prior to the city's receipt of the instant request. Therefore, we agree litigation was pending on the date the city received the request for information. You also state the information at issue pertains to the substance of the lawsuit claims. Based on your representations and our review, we find the remaining submitted information, which we have marked, is related to the pending litigation. Therefore, the city may withhold the marked information under section 552.103 of the Government Code.

We note once the information at issue has been obtained by all parties to the anticipated litigation through discovery or otherwise, a section 552.103(a) interest no longer exists as to that information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to all other parties in the litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. The applicability of section 552.103(a) also ends once the litigation has been concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

We next address the remaining information subject to section 552.022 of the Government Code. 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. This section encompasses the common-law right to 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 met. *Id.* at 681-82. This office has found financial information that does not relate to a financial transaction between an individual and a governmental body ordinarily satisfies the first requirement of the test for common-law privacy. For example, information related to an individual's mortgage payments, assets, bills, and credit history is generally protected by the common-law right to privacy. *See* Open Records Decision Nos. 545 (1990), 523 (1989); *see also* 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 are protected under common-law privacy). However, there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. *See* ORDs 600 at 9 (information revealing employee participation in group insurance plan funded partly or wholly by governmental body is not excepted from disclosure), 545 (financial information pertaining to receipt of funds from governmental body or debts owed to governmental body not protected by common-law privacy). Upon review, we find the information we have marked constitutes personal financial details that are not of legitimate public interest. Therefore, the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy.<sup>2</sup>

Section 552.102(a) of the Government Code 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). The Texas Supreme Court recently 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 carefully reviewed the information at issue, we have marked the information that must be withheld under section 552.102(a) of the Government Code.

Section 552.117 of the Government Code excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. 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)(1)). Section 552.117 also encompasses personal cellular telephone numbers if the cellular service is not paid for with government funds. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). The city may withhold information under section 552.117 only 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. We have marked information, including a cellular telephone number, that is subject to section 552.117(a)(1). Thus, if an individual whose personal information is at issue timely requested confidentiality under section 552.024, the city must withhold such individual's information under section 552.117(a)(1). However, the city may withhold the marked cellular telephone number only if the cellular service is not paid for with government funds. Conversely, if an

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<sup>2</sup>We note the information we marked on the basis of common-law privacy in the documents subject to section 552.022(a)(1) is also found in the court document subject to section 552.022(a)(17). However, information that has been filed with a court is not protected by common-law privacy. *See Star-Telegram v. Walker*, 834 S.W.2d 54 (Tex. 1992) (common-law privacy not applicable to court-filed document). Therefore, this information may not be withheld from the court document on the basis of common-law privacy.

individual did not make a timely election under section 552.024, the city may not withhold such information under section 552.117(a)(1).

Section 552.1175 of the Government Code provides, in relevant part:

(a) This section applies only to:

(1) peace officers as defined by Article 2.12, Code of Criminal Procedure;

...

(b) Information that relates to the home address, home telephone number, emergency contact information, or social security number of an individual to whom this section applies, or that reveals whether the individual has family members is confidential and may not be disclosed to the public under this chapter if the individual to whom the information relates:

(1) chooses to restrict public access to the information; and

(2) notifies the governmental body of the individual's choice on a form provided by the governmental body, accompanied by evidence of the individual's status.

Gov't Code § 552.1175(a)(1); Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 3 (to be codified as an amendment to Gov't Code § 552.1175(b)). Section 552.1175 also encompasses a peace officer's personal cellular telephone number if the cellular service is not paid for with government funds. We have marked information of a peace officer, including a cellular telephone number, that is subject to section 552.1175. If the peace officer elects to restrict access to the information pertaining to him in accordance with section 552.1175(b), the city must withhold the marked information under section 552.1175 of the Government Code. However, the city may withhold the marked cellular telephone number only if the cellular service is not paid for with government funds.

Section 552.130 of the Government Code excepts from disclosure "information [that] relates to (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state or another state or country; [or] (2) a motor vehicle title or registration issued by an agency of this state or another state or country[.]" Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 4 (to be codified as an amendment to Gov't Code § 552.130). Therefore, the city must withhold the information we have marked under section 552.130.

Section 552.136 of the Government Code provides that "[n]otwithstanding any other provision of this chapter, 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." Gov't Code § 552.136(b). An access device number is one that may be used to "(1) obtain money,

goods, services, or another thing of value; or (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.” *Id.* § 552.136(a). This office has determined an insurance policy number is an access device number for purposes of section 552.136. Therefore, the city must withhold the insurance policy numbers we have marked under section 552.136. As you have raised no additional exceptions for the remaining information subject to section 552.022, which we have marked, it must be released to the requestor.

In summary, the city may withhold the information we marked under section 552.103. The city must withhold the information we marked under (1) section 552.101 in conjunction with common-law privacy, (2) section 552.102, (3) section 552.117, if the employee at issue timely elected confidentiality under section 552.024 and if the cellular service is not paid for with government funds, (4) section 552.1175, if the peace officer at issue elects confidentiality under section 552.1175(b) and if the cellular service is not paid for with government funds, and (5) sections 552.130 and 552.136. The city must release the remaining information we have marked under subsections 552.022(a)(1) and (a)(17).

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, 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,



Misty Haberer Barham  
Assistant Attorney General  
Open Records Division

MHB/agn

Ref: ID # 430077

Enc. Submitted documents

c: Requestor  
(w/o enclosures)