



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 6, 2011

Mr. James D. Parker
Assistant City Attorney
Knight & Partners
223 West Anderson Lane, Suite A-105
Austin, Texas 78752

OR2011-14504

Dear Mr. Parker:

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# 432531.

The City of Leander (the "city"), which you represent, received a request for seven categories of specified information, including information about the city mayor.¹ You state the city will release some of the requested information. You claim some of the requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.108, 552.136, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

¹The city sought and received clarification of the information requested. *See* Gov't Code § 552.222 (if request for information is unclear, governmental body may ask requestor to clarify request); *see also City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (if governmental entity, acting in good faith, requests clarification of unclear or over-broad request, ten-day period to request attorney general ruling is measured from date request is clarified).

²We 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.

Initially, we note the information in Exhibit D consists of documents filed with the court and a completed appraisal report. Under section 552.022(a)(1) of the Government Code, a completed report, audit, evaluation, or investigation made of, for, or by a governmental body is expressly public unless it either is excepted from disclosure under section 552.108 of the Government Code or is expressly confidential under other law. In addition, a document that has been filed with a court is expressly public under section 552.022(a)(17) of the Government Code and may not be withheld unless it is confidential under other law. *See Gov't Code § 552.022(a)(17)*. Although you assert this information is excepted from disclosure under section 552.103 of the Government Code, this section is a discretionary exception under the Act and does not constitute "other law" for purposes of section 552.022. *See 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. 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived). Accordingly, the city may not withhold Exhibit D under section 552.103, but instead must release it to the requestor.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses the doctrine of common-law privacy, which protects information that (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). The types of information considered intimate or embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. However, information pertaining to the work conduct and job performance of public employees is subject to a legitimate public interest and, therefore, generally not protected from disclosure under common-law privacy. *See* Open Records Decision Nos. 562 at 10 (1990) (personnel file information does not involve most intimate aspects of human affairs, but in fact touches on matters of legitimate public concern), 470 at 4 (1987) (job performance does not generally constitute public employee's private affairs), 455 (1987) (public employee's job performance or abilities generally not protected by privacy). You assert pages 39-40 and 42 -43 in Exhibit E are confidential under common-law privacy because the release of this information "would constitute a clearly unwarranted invasion of personal privacy relating to a job application submitted by a member of the public." However, upon review, we find this information is not highly intimate or embarrassing and is of legitimate concern to the public. Therefore, this information is not confidential under common-law privacy, and the city may not withhold it under section 552.101 on that ground.

You assert some of the submitted information in Exhibit E is excepted from disclosure under section 552.103 of the Government Code, which provides in part as follows:

(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 from disclosure under section 552.103(a).

You inform us that, prior to the city's receipt of the request for information, the city brought a condemnation action against property owners: *City of Leander v. Gilpin & Gilpin*, No. 11-1208-CC2 (Co. Ct. at Law No. 2, Williamson County, Tex. Jul. 20, 2011). We therefore agree litigation was pending on the date the city received the request. You seek to withhold pages 46-56, 59-62, 64-65, 67-72, 91-135, 137, 146-149, 151-170, 175-176, 183, 188, 195-197 in Exhibit E under section 552.103. Having reviewed your arguments and representations, we find you have established this information is related to the pending proceedings for purposes of section 552.103. Therefore, the city may withhold these pages pursuant to section 552.103.

We note, however, once the information has been obtained by all parties to the anticipated litigation, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). We also note the applicability of section 552.103(a) ends when the litigation has concluded. Attorney General Opinion MW-575 (1982) at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2.

You assert Exhibits G and I and pages 26, 27, 36, 38 and 140 in Exhibit E are excepted from disclosure under section 552.108 of the Government Code. Section 552.108(a) of the Government Code excepts from disclosure "[i]nformation held by a law enforcement agency

or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime[.]” Generally, a governmental body claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See* Gov’t Code §§ 552.108(a)(1), (b)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You assert Exhibits G and I and pages 26, 27, and 38 in Exhibit E relate to a pending criminal investigation, and have submitted a representation from the Williamson County District Attorney objecting to the release of this information under section 552.108. Based on this representation, we conclude the release of the information at issue would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ’g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975) (court delineates law enforcement interests that are present in active cases), *writ ref’d n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Thus, the city may withhold Exhibits G and I and pages 26, 27, and 38 in Exhibit E under section 552.108(a)(1) of the Government Code.

You also seek to withhold pages 36 and 140 in Exhibit E under section 552.108 because they contain “information that pertains to matters involving code enforcement and matters affecting the detection, investigation, or prosecution of crime” However, you do not inform us this information pertains to a pending criminal investigation. Thus, we find you have not established this information is excepted from disclosure under section 552.108(a)(1).

We note the remaining information contains a city employee’s cellular telephone number. Section 552.117(a)(1) 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 of the Government Code.³ 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 also encompasses a personal cellular telephone number, provided a governmental body does not pay for the cellular phone service. *See* Open Records Decision No. 506 at 5-6 (1988) (Government Code section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). 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 the 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 official or employee who made a request for confidentiality under section 552.024 prior to the date of

³The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body. *See* Open Records Decision Nos. 481 at 2 (1987), 480 at 5 (1987); *see, e.g.*, Open Records Decision No. 470 at 2 (1987) (because release of confidential information could impair rights of third parties and because improper release constitutes a misdemeanor, attorney general will raise predecessor statute of section 552.101 on behalf of governmental bodies).

the governmental body's receipt of the request for the information. Therefore, the city must withhold the information we have marked under section 552.117(a)(1) to the extent the employee concerned paid for the cellular telephone service and timely elected under section 552.024 to keep the cellular telephone number confidential.

We note section 552.1175 of the Government Code may be applicable to some of the submitted information. Section 552.1175(b) provides in part the following:

Information that relates to the home address, home telephone number, emergency contact information, or social security number of [a peace officer as defined by article 2.12 of the Code of Criminal Procedure], 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.

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)). The submitted documents contain information pertaining to an individual who may be a licensed peace officer. Thus, the city must withhold the information we have marked under section 552.1175 if the individual whose information is at issue is currently a licensed peace officer who elects to restrict access to this information in accordance with section 552.1175(b). However, the city may not withhold this information under section 552.1175 if the individual either is not a currently licensed peace officer or he does not elect to restrict access to this information in accordance with section 552.1175(b).

You assert some of the remaining information is excepted from disclosure under section 552.136 of the Government Code. Section 552.136(b) 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." The city must withhold the account numbers we have marked under section 552.136.

You also assert some of the remaining information is excepted from disclosure under section 552.137 of the Government Code. Section 552.137 excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov't

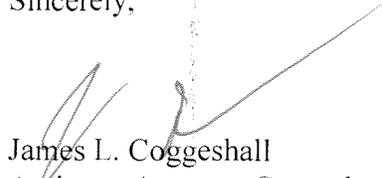
Code § 552.137(a)-(c). Section 552.137 does not apply to a government employee's work e-mail address because such an address is not that of the employee as a "member of the public," but is instead the address of the individual as a government employee. The e-mail addresses at issue do not appear to be of a type specifically excluded by section 552.137(c). You do not inform us a member of the public has affirmatively consented to the release of any e-mail address contained in the submitted materials. Therefore, the city must withhold the e-mail addresses we have marked under section 552.137.

To conclude, the city may withhold pages 46-56, 59-62, 64-65, 67-72, 91-135, 137, 146-149, 151-170, 175-176, 183, 188, 195-197 in Exhibit E under section 552.103 of the Government Code. The city may also withhold Exhibits G and I and pages 26, 27, and 38 in Exhibit E under section 552.108(a)(1) of the Government Code. The city must withhold the information we have marked under section 552.117(a)(1) if the employee concerned paid for the cellular telephone service and timely elected under section 552.024 to keep the cellular telephone number confidential. The city must withhold the information we have marked under section 552.1175 of the Government Code if the individual whose information is at issue is currently a licensed peace officer who elects to restrict access to this information in accordance with section 552.1175(b). The city must also withhold the information we have marked under sections 552.136 and 552.137 of the Government Code. The city must release the remaining information.

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,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/ag

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Enc. Submitted documents

c: Requestor
(w/o enclosures)