



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

October 18, 2011

Mr. Larry J. Simmons  
Germer Gertz L.L.P.  
P.O. Box 4915  
Beaumont, Texas 77704

OR2011-15182

Dear Mr. Simmons:

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# 433347.

The City of Jasper (the “city”), which you represent, received two requests from the same requestor for the city’s response to a specified complaint, the sign-in sheet from a specified city council meeting, and the applications of twenty-three applicants for the position of chief of police. You state the city released the sign-in sheet to the requestor. You state the city did not retain information for one applicant who withdrew his application.<sup>1</sup> You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.117, 552.119, 552.122, 552.130, 552.137, and 552.142 of the Government Code.<sup>2</sup> We have considered the exceptions you claim and reviewed the submitted information.

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 exception encompasses information protected by other statutes, such

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<sup>1</sup>We note the Act does not require a governmental body to release information that did not exist when it received a request. See *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dism’d); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

<sup>2</sup>Although you raise section 552.101 of the Government Code in conjunction with the recent Texas Supreme Court decision in *Texas Comptroller of Public Accounts v. Attorney General of Texas*, No. 08-0172, 2010 WL 4910163 (Tex. Dec. 3, 2010) for the birth dates in the submitted information, we understand you to raise section 552.102, as that is the proper exception to raise for this information.

as section 560.003 of the Government Code. Section 560.003 provides “[a] biometric identifier in the possession of a governmental body is exempt from disclosure under [the Act].” *Id.* § 560.003; *see also id.* §§ 560.001(1) (defining “biometric identifier” to include fingerprints), .002(1)(A) (governmental body may not sell, lease, or otherwise disclose individual’s biometric identifier to another person unless individual consents to disclosure). Therefore, the city must withhold the fingerprint we have marked under section 552.101 in conjunction with section 560.003 of the Government Code.

Section 552.101 also 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. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both elements of the test must be established. *Id.* at 681-82. We note the submitted information is related to public employees and public employment. As this office has stated on many occasions, the public generally has a legitimate interest in public employment and public employees, particularly those who are involved in law enforcement. *See Open Records Decision No. 444 at 6 (1986)* (public has genuine interest in information concerning law enforcement employee’s qualifications and performance and circumstances of his termination or resignation). The behavior of a public employee in the workplace and the conditions for his or her continued employment are generally matters of legitimate public interest that are not protected by common-law privacy. *See Open Records Decision No. 438 (1986)*. Likewise, information about a public employee’s qualifications, disciplinary action, and background is generally not protected by common-law privacy. *See Open Records Decision Nos. 444 at 5-6, 405 at 2-3 (1983)* (public has interest in manner in which public employee performs his job), 329 at 2 (1982) (information relating to complaints against public employees and discipline resulting therefrom is not protected under former sections 552.101 or 552.102), 208 at 2 (1978) (information relating to complaint against public employee and disposition of the complaint is not protected under either the constitutional or common-law right of privacy). However, this office has found personal financial information not relating to the financial transaction between an individual and a governmental body is excepted from required public disclosure under common-law privacy. *See Open Records Decision Nos. 600 (1992), 545 (1990)* (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history). This office has found financial information relating only to an individual ordinarily satisfies the first requirement of the test for common-law privacy. *See Open Records Decision Nos. 600* (designation of beneficiary of employee’s retirement benefits, direct deposit authorization, and forms allowing employee to allocate pretax compensation to group insurance, health care or dependent care), 523 (1989). Upon review, we find the information we have marked is highly intimate or embarrassing and not of legitimate public concern. Therefore, the city must withhold the marked information under section 552.101 of the Government Code in conjunction with common-law privacy.

However, we find the remaining information either is not highly intimate or embarrassing or is a matter of legitimate public interest. *See Open Records Decision Nos. 455 at 9 (1987)*

(employment applicant's salary information not private), 336 at 2 (1982) (names of employees taking sick leave and dates of sick leave taken not private); *see also* Open Records Decision No. 562 at 10 (1990) (personnel information does not involve most intimate aspects of human affairs, but in fact touches on matters of legitimate public concern), 423 at 2 (1984) (scope of public employee privacy is narrow); *see also* Gov't Code § 552.022(a)(2) (name, salary, and title of public employee are public information). Therefore, the applicants' salary information and the information regarding complaints is not confidential, and the city may not withhold it on the basis of common-law privacy. *See also* Open Records Decision Nos. 562 at 10, 470 at 4 (1987) (job performance does not generally constitute public employee's private affairs), 405 at 2 (manner in which public employee's job was performed cannot be said to be of minimal public interest), 329 (reasons for employee's resignation ordinarily not private).

You claim portions of the submitted information are excepted from disclosure under section 552.102 of the Government Code. 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." 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 agree the dates of birth of the applicants who are employed by the city must be withheld under section 552.102(a) of the Government Code. However, the dates of birth of the applicants who are not employed by the city are not excepted under section 552.102(a), and the city may not withhold them on that basis.

You raise section 552.103 of the Government Code for the city's response to the specified complaint. Section 552.103 provides in relevant 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 city has the burden of providing relevant facts and documents to show the section 552.103 exception is applicable in a particular situation. The

test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date that 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 city must meet both prongs of this test for information to be excepted under section 552.103.

To establish litigation is reasonably anticipated, a governmental body must provide this office “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” Open Records Decision No. 452 at 4 (1986). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See id.* This office has found a pending complaint filed with the Equal Employment Opportunity Commission (the “EEOC”) indicates litigation is reasonably anticipated. Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982).

You state one of the applicants filed a claim of discrimination with the EEOC prior to the date of the city’s receipt of this request for information. Thus, we agree the city reasonably anticipated litigation on the date it received the request for information. You state the city’s response to the complaint is related to the anticipated litigation. Based on your representations and our review, we conclude section 552.103 is applicable to the city’s response to the complaint, and the city may withhold it on that basis.

We note, however, once information has been obtained by all parties to the anticipated litigation, no section 552.103(a) interest exists with respect to that information. *See* Open Records Decision No. 349 at 2 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and must be disclosed. We further note the applicability of section 552.103(a) ends when the litigation has concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 (1982) at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2.

Section 552.117(a)(2) of the Government Code excepts from public disclosure the home addresses, home telephone numbers, emergency contact information, and social security number of a peace officer, as well as information that reveals whether the peace officer has family members, regardless of whether the peace officer complies with section 552.024 or section 552.1175 of the Government Code.<sup>3</sup> 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)). We note section 552.117 is also applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). We further note an

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<sup>3</sup>“Peace officer” is defined by article 2.12 of the Texas Code of Criminal Procedure.

individual's personal post office box number is not a "home address" and therefore may not be withheld under section 552.117. *See* Gov't Code § 552.117; Open Records Decision No. 622 at 4 (1994) (legislative history makes clear that purpose of section 552.117 is to protect public employees from being harassed *at home*) (citing House Committee on State Affairs, Bill Analysis, H.B. 1979, 69th Leg. (1985)) (emphasis added). We also note section 552.117(a)(2) is not applicable to a former spouse or the fact that a governmental employee has been divorced. Section 552.117 is not applicable to information relating to an individual employed by a governmental body other than the one that received the request for information regarding the individual. *See* Open Records Decision No. 674 at 4 (2001) (governmental body is normally obliged under Gov't Code § 552.117 to protect only information pertaining to employees and officials of that governmental body).

Therefore, except for the information we have marked for release, the city must withhold the home addresses, home and cellular telephone numbers, social security numbers, and family information you have marked pertaining to peace officers employed by the city under section 552.117(a)(2) of the Government Code; however, the city may only withhold the marked cellular telephone numbers if an individual whose information is at issue pays for the cellular telephone service with personal funds. We note some of the information the city seeks to withhold pertains to individuals employed by other governmental bodies. Therefore, the city may not withhold the information you have marked relating to individuals who are not employed by the city under section 552.117 of the Government Code.

Nevertheless, the city may be required to withhold information relating to the individuals not employed by the city under section 552.1175 of the Government Code.<sup>4</sup> Section 552.1175(b) provides in part:

(b) 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 an employee of a district attorney], 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.

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<sup>4</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. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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 remaining information includes information that pertains to an employee of a district attorney and peace officers who are not city employees. To the extent an individual is a currently licensed peace officer or an employee of a district attorney who elects with the city to restrict public access to his or her personal information, the city must withhold that individual's home address, home and cellular telephone numbers, social security number, and family information, which you have marked, and the additional information we have marked, under section 552.1175 of the Government Code; however, the city may only withhold the marked cellular telephone numbers if an individual whose information is at issue pays for the cellular telephone service with personal funds. To the extent an individual is not a currently licensed peace officer or an employee of a district attorney who elects with the city to restrict public access to his or her personal information, the city may not withhold the information you have marked, or the information we have marked, pertaining to that individual under section 552.1175. We note you seek to withhold work addresses, work telephone numbers, and information pertaining to individuals who are not employed by the city and are neither currently licensed peace officers nor employees of a district attorney. The city may not withhold this information, which we have marked for release, under section 552.1175.

You assert the photographs in the submitted information are excepted from disclosure under section 552.119 of the Government Code, which provides the following:

(a) A photograph that depicts a peace officer as defined by Article 2.12, Code of Criminal Procedure, the release of which would endanger the life or physical safety of the officer, is excepted from [required public disclosure] unless:

- (1) the officer is under indictment or charged with an offense by information;
- (2) the officer is a party in a civil service hearing or a case in arbitration; or
- (3) the photograph is introduced as evidence in a judicial proceeding.

(b) A photograph excepted from disclosure under Subsection (a) may be made public only if the peace officer gives written consent to the disclosure.

Gov't Code § 552.119. Under section 552.119, a governmental body must demonstrate, if the information does not demonstrate on its face, that release of the photograph would endanger the life or physical safety of a peace officer. You state release of the photographs at issue "could arguably endanger the safety of the officer[s]." Upon review, we find you have failed to demonstrate how the release of the officers' photographs at issue would endanger the lives or physical safety of the officers. Therefore, the city may not withhold any photographs of peace officers under section 552.119 of the Government Code.

You raise section 552.122 of the Government Code for portions of the remaining information. Section 552.122(b) excepts from public disclosure “a test item developed by a . . . governmental body [.]” Gov’t Code § 552.122(b). In Open Records Decision No. 626 (1994), this office determined the term “test item” in section 552.122 includes “any standard means by which an individual’s or group’s knowledge or ability in a particular area is evaluated,” but does not encompass evaluations of an employee’s overall job performance or suitability. ORD 626 at 6. The question of whether specific information falls within the scope of section 552.122(b) must be determined on a case-by-case basis. *Id.* Traditionally, this office has applied section 552.122 where release of “test items” might compromise the effectiveness of future examinations. *Id.* at 4-5; *see also* Open Records Decision No. 118 (1976). Section 552.122 also protects the answers to test questions when the answers might reveal the questions themselves. *See* Attorney General Opinion JM-640 at 3 (1987); ORD 626 at 8.

Although you contend the interview questions and accompanying comments you have marked are excepted under section 552.122, we find this information evaluates the applicants’ individual experience and abilities, professional opinions, and subjective abilities to respond to particular situations and does not test any specific knowledge of an applicant. Thus, you have failed to demonstrate the applicability of section 552.122 of the Government Code to the information at issue, and the city may not withhold it on that basis.

Section 552.130 of the Government Code provides information relating to a motor vehicle operator’s license or driver’s license, motor vehicle title or registration issued by an agency of this state or another state or country is excepted from public release. Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 4 (to be codified as amendments to Gov’t Code § 552.130(a)(1), (2)). Accordingly, the city must withhold the information you have marked under section 552.130 of the Government Code.

Section 552.137 of the Government Code 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). You have marked the e-mail addresses you seek to withhold. We note section 552.137 is not applicable to an institutional e-mail address, an Internet website address, the general e-mail address of a business, an e-mail address of a person who has a contractual relationship with a governmental body, or an e-mail address maintained by a governmental entity for one of its officials or employees. Among the information at issue, you have marked e-mail addresses maintained by a governmental entity for its employees. Therefore, with the exception of this information, which we have marked for release, the city must withhold the e-mail addresses you have marked, and the additional e-mail addresses we have marked, under section 552.137 of the Government Code, unless their owners consent to their release.

You claim the information you have marked is excepted under section 552.142 of the Government Code, which pertains to records of certain deferred adjudications and provides the following:

(a) Information is excepted from [required public disclosure] if an order of nondisclosure with respect to the information has been issued under Section 411.081(d).

(b) A person who is the subject of information that is excepted from [required public disclosure] under this section may deny the occurrence of the arrest and prosecution to which the information relates and the exception of the information under this section, unless the information is being used against the person in a subsequent criminal proceeding.

*Id.* § 552.142. Section 411.081(d) of the Government Code authorizes a person placed on deferred adjudication for certain offenses to petition the court for an order of nondisclosure, which prohibits criminal justice agencies from disclosing to the public criminal history record information related to the offense giving rise to the deferred adjudication. *Id.* § 411.081(d). Under this provision, a criminal justice agency may only disclose criminal history record information that is the subject of the order to other criminal justice agencies, for criminal justice or regulatory purposes; non-criminal justice agencies listed in section 411.081(i); or the person who is the subject of the order. *Id.* Although you generally assert the information you have marked is excepted from public disclosure pursuant to section 552.142, you have not explained, or provided any documentation showing, an order of nondisclosure was issued pursuant to section 411.081(d) of the Government Code prohibiting the release of the information at issue. Thus, we find you have failed to demonstrate the applicability of section 552.142 to the information you have marked, and the city may not withhold it on that basis.

In summary, the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The city must withhold the fingerprint we have marked under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code. The city must withhold the dates of birth of the applicants who are employed by the city under section 552.102(a) of the Government Code. The city may withhold its response to the specified complaint under section 552.103 of the Government Code. Except for the information we have marked for release, the city must withhold the home addresses, home and cellular telephone numbers, social security numbers, and family information pertaining to peace officers employed by the city you have marked under section 552.117(a)(2) of the Government Code. However, the city may only withhold the marked cellular telephone numbers under section 552.117(a)(2) if an individual whose information is at issue pays for the cellular telephone service with personal funds. To the extent individuals not employed by the city are currently licensed peace officers or employees of a district attorney who elect with the city to restrict public access to their personal information, except for the information we have marked for release, the city must withhold the home addresses, home and cellular telephone numbers, social

security numbers, and family information you have marked, and the additional information we have marked, under section 552.1175 of the Government Code. However, the city may only withhold the marked cellular telephone numbers under section 552.1175 if an individual whose information is at issue pays for the cellular telephone service with personal funds. The city must withhold the motor vehicle record information you have marked under section 552.130 of the Government Code. Except for the e-mail addresses maintained by a governmental entity for its employees, which we have marked for release, the city must withhold the e-mail addresses you have marked under section 552.137 of the Government Code, unless their owners consent to their release.<sup>5</sup> 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](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,



Mack T. Harrison  
Assistant Attorney General  
Open Records Division

MTH/em

Ref: ID# 433347

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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<sup>5</sup>We note Open Records Decision No. 684 (2009) is 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 and an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.