



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 3, 2012

Ms. Tiffany N. Evans
Assistant City Attorney
City of Houston
P.O. Box 368
Houston, Texas 77001-0368

OR2012-00070

Dear Ms. Evans:

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# 440801 (GC 19030).

The City of Houston (the “city”) received a request for seven categories of information related to five specified PN numbers. You state most of the requested information does not exist.¹ You claim the submitted information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the information you submitted.²

We first note the job postings submitted as Exhibit 3 are subject to disclosure under section 552.022 of the Government Code. Section 552.022(a)(15) provides for required public disclosure of “information regarded as open to the public under an agency’s policies[,]” unless the information is made confidential under the Act or other law. Gov’t Code § 552.022(a)(15). Because the city makes job postings available on its website, we find

¹We note the Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. *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), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

²This letter ruling assumes the submitted representative sample of information is truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the city to withhold any information that is substantially different from the submitted information. *See Gov’t Code* §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

the submitted job postings are regarded as open to the public under the city's policies and are therefore subject to section 552.022(a)(15). Although you claim an exception to disclosure under section 552.103 of the Government Code, that section is a discretionary exception that protects 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 Gov't Code § 552.103); Open Records Decision No. 665 at 2 n.5 (discretionary exceptions generally). As such, section 552.103 does not make information confidential for purposes of section 552.022(a)(15). Therefore, the submitted job postings may not be withheld under section 552.103 of the Government Code and must be released pursuant to section 552.022(a)(15) of the Government Code.

Next, we address your claim under section 552.103 of the Government Code for the remaining information at issue. Section 552.103 provides in 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). A governmental body that claims an exception to disclosure under section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information at issue. To meet this burden, a governmental body must demonstrate that (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) the information at issue is related to the pending or anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Both elements of the 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).

To establish litigation is reasonably anticipated, a governmental body must provide this office with "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.* Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the

governmental body from an attorney for a potential opposing party.³ *See* Open Records Decision No. 555 (1990); *see also* Open Records Decision No. 518 at 5 (1989) (litigation must be “realistically contemplated”). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Further, the fact a potential opposing party has hired an attorney who makes a request for information does not establish litigation is reasonably anticipated. *See* Open Records Decision No. 361 (1983).

You contend, and have provided an affidavit from a senior assistant city attorney asserting, the remaining information is related to reasonably anticipated litigation. You explain the information at issue pertains to a matter involving city employees who were recently laid off and who object to the manner in which the departments that previously employed them were restructured. You inform us one of the former employees appealed his layoff to the city’s civil service commission. You also inform us two of the former employees have retained an attorney whose communications with the city have frequently been contentious. You state the attorney has implied there may be litigation, and his clients have made statements indicating they intend to file a lawsuit. You do not inform us, however, that either any of the employees concerned or their attorney have taken objective steps toward the commencement of litigation. Thus, having considered your representations, the submitted affidavit, and the other documentation you provided, we find you have not demonstrated litigation was reasonably anticipated on the date of the city’s receipt of this request for information. *See* Gov’t Code § 552.103(c); ORD 361 (fact request was made by attorney on behalf of rejected applicant not sufficient to invoke statutory predecessor to Gov’t Code § 552.103), 331 (mere chance of litigation not sufficient to trigger statutory predecessor). We therefore conclude the city may not withhold the remaining information under section 552.103 of the Government Code.

We note sections 552.117, 552.130, and 552.137 of the Government Code are or may be applicable to some of the remaining information.⁴ 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 this information be kept confidential under section 552.024 of the Government Code. *See* Gov’t Code §§ 552.117(a)(1), .024. We note section 552.117(a)(1) encompasses an official’s or employee’s personal cellular telephone or pager number if the official or employee pays for the telephone or pager service with his

³In addition, this office has concluded 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).

⁴This office will raise sections 552.117, 552.130, and 552.137 on behalf of a governmental body, as these sections are mandatory exceptions to disclosure. *See* Gov’t Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

or her personal funds. *See* Open Records Decision No. 506 at 5-6 (1988) (statutory predecessor to Gov't Code § 552.117 not applicable to numbers for cellular mobile phones installed in county officials' and employees' private vehicles and intended for official business). 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). Information may only be withheld under section 552.117(a)(1) 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 the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who did not timely request confidentiality under section 552.024. Thus, the city must withhold the information we have marked under section 552.117(a)(1) of the Government Code to the extent it pertains to a current or former city employee who timely requested confidentiality for the information under section 552.024 of the Government Code, including cellular telephone numbers if the employee pays for the cellular telephone service with his or her personal funds.⁵

Section 552.130 of the Government Code excepts from disclosure information related to a motor vehicle operator's or driver's license or permit issued by an agency of this state or another state or country. *See* Gov't Code § 552.130(a)(1). The city must withhold the driver's license information we have marked under section 552.130 of the Government Code.

Section 552.137 of the Government Code states "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 public disclosure or the e-mail address falls within the scope of section 552.137(c). *Id.* § 552.137(a)-(c). Section 552.137 is not applicable to an institutional e-mail address, an internet website address, or an e-mail address a governmental entity maintains for one of its officials or employees. The city must withhold the e-mail addresses we have marked under section 552.137 of the Government Code unless the owners of the e-mail addresses have affirmatively consented to their public disclosure.⁶

We note some of the submitted information appears to be protected by copyright. A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *See* Open Records Decision No. 180 at 3 (1977); *see also* Open Records Decision No. 109 (1975). A custodian of public records also must comply with

⁵In the event the social security numbers at issue are not excepted from disclosure under section 552.117(a)(1) of the Government Code, we note 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.

⁶We note Open Records Decision No. 684 (2009) is a previous determination issued by this office authorizing all governmental bodies to withhold ten categories of information without the necessity of requesting an attorney general decision, including an e-mail address of a member of the public under section 552.137 of the Government Code.

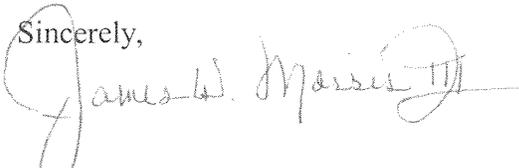
copyright law, however, and is not required to furnish copies of records that are copyrighted. *See* ORD 180 at 3. A member of the public who wishes to make copies of copyrighted materials must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, the city must (1) release the job postings in Exhibit 3 pursuant to section 552.022(a)(15) of the Government Code; (2) withhold the information we have marked under section 552.117(a)(1) of the Government Code to the extent it pertains to a current or former city employee who timely requested confidentiality for the information under section 552.024 of the Government Code, including cellular telephone numbers if the employee pays for the cellular telephone service with his or her personal funds; (3) withhold the marked driver's license information under section 552.130 of the Government Code; and (4) withhold the marked e-mail addresses under section 552.137 of the Government Code unless the owners of the e-mail addresses have affirmatively consented to their public disclosure. The rest of the submitted information must be released, but any copyrighted information may only be released in accordance with copyright law.

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 W. Morris, III
Assistant Attorney General
Open Records Division

JWM/em

Ref: ID# 440801

Enc: Submitted documents

c: Requestor
(w/o enclosures)