



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

January 20, 2012

Ms. Elizabeth L. White  
For City of League City  
Ross, Banks, May, Cron & Cavin, P.C.  
2 Riverway, Suite 700  
Houston, Texas 77056

OR2012-00972

Dear Ms. White:

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# 442770 (Ref #s 11-353, 11-354, 11-355).

The City of League City (the "city"), which you represent, received three requests from the same requestor for all e-mails sent to or from two named city employees during a specified time period and all memoranda and reports sent by a named employee to another named employee for a specified time period. You state you have released some of the requested information. You state you will redact driver's license and license plate numbers under section 552.130 of the Government Code pursuant to Open Records Decision No. 684 (2009).<sup>1</sup> You further state you will redact direct deposit authorization forms and personal

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<sup>1</sup>Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including Texas driver's license numbers and license plate numbers under section 552.130, without the necessity of requesting an attorney general decision. We note, however, that effective September 1, 2011, the Texas legislature amended section 552.130 to allow a governmental body to redact the information described in subsections 552.130(a)(1) and (a)(3) without the necessity of seeking a decision from the attorney general. *See* Gov't Code § 552.130(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.130(e). *See id.* § 552.130(d), (e). Thus, the statutory amendments to section 552.130 of the Government Code superceded Open Records Decision No. 684 on September 1, 2011. Therefore, a governmental body may only redact information subject to subsections 552.130(a)(1) and (a)(3) in accordance with section 552.130, not Open Records Decision No. 684.

e-mail addresses pursuant to Open Records Decision No. 684.<sup>2</sup> You claim portions of the submitted information are not subject to the Act. Additionally, you claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.108, and 552.117 of the Government Code.<sup>3</sup> We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>4</sup>

Initially, we address your contention that the portions of the submitted information you have marked are not subject to the Act. In Open Records Decision No. 581 (1990), this office determined certain computer information, such as source codes, documentation information and other computer programming, that has no significance other than its use as a tool for the maintenance, manipulation, or protection of public property is not the kind of information made public under section 552.021 of the Government Code. *See* ORD 581 at 6 (construing predecessor statute). Upon review, we agree the information at issue functions solely as tools to maintain, manipulate, or protect public property and have no other significance. *Id.* As such, the marked computer information is not public information, as defined by section 552.002 of the Government Code, and is not subject to the Act. Therefore, the city need not release this information in response to this request.

Next, we note the city did not fully comply with section 552.301 of the Government Code. Subsection (b) of section 552.301 requires a governmental body requesting an open records ruling from this office to state the exceptions that apply not later than the tenth business day after the date of receiving the written request. Gov't Code § 552.301(b). While the city raised sections 552.101, 552.103, 552.108, and 552.117 of the Government Code within the ten-business-day time period as required by subsection 552.301(b), the city did not raise section 552.107 of the Government Code until after the ten-business-day deadline had passed.

Generally, if a governmental body fails to timely raise a discretionary exception, that exception is waived. *See generally id.* § 552.302; Open Records Decision No. 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions).

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<sup>2</sup>We note Open Records Decision No. 684 also authorizes all governmental bodies to withhold direct deposit authorization forms under section 552.101 of the Government Code in conjunction with common-law privacy and personal e-mail addresses under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

<sup>3</sup>We note that although you raise section 552.1175 of the Government Code as an exception to disclosure, the proper exception for your arguments in this instance is section 552.117 of the Government Code because the city holds the information at issue in an employment context.

<sup>4</sup>We assume that 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 that those records contain substantially different types of information than that submitted to this office.

Section 552.107 is a discretionary exception to disclosure which protects a governmental body's interests and may be waived. *See* Open Records Decision Nos. 676 at 11-12 (2002) (attorney-client privilege under section 552.107 and Texas Rule of Evidence 503 subject to waiver), 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the city may not withhold any of the submitted information under section 552.107 of the Government Code. We will, however, consider the applicability of your timely-raised exceptions.

Section 552.103 of the Government Code 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). 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 that it seeks to withhold. To meet this burden, the 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).

In this instance, you state that, prior to the date of the receipt of the present request for information, a lawsuit, styled *Jornaleros de las Palmas v. City of League City*, Civil Action No. 4:11-cv-02703, was filed by the requestor against the city, and is currently pending in the United States District Court for the Southern District of Texas. Based on your representations and our review, we agree litigation to which the city is a party was pending on the date the city received the present request. Furthermore, we find Exhibits B1, B3,

and B5 are related to the pending litigation. We, therefore, conclude that the city may withhold Exhibits B1, B3, and B5 under section 552.103 of the Government Code.<sup>5</sup>

We note, however, that once information has been obtained by all parties to the pending litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the pending litigation is not excepted from disclosure under section 552.103(a). Further, the applicability of section 552.103(a) ends when the litigation has concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2.

Section 552.108(a)(1) 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 . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]” Gov’t Code § 552.108(a)(1). A governmental body claiming section 552.108 must reasonably explain how and why this exception is applicable to the information at issue. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state Exhibits C1, C2, C3, C5, C6, D1, D2, D3, and D4 relate to ongoing criminal investigations. Based on your representations and our review, we find that 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). Accordingly, the city may withhold Exhibits C1, C2, C3, C5, C6, D1, D2, D3, and D4 under section 552.108(a)(1) of the Government Code.<sup>6</sup>

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 made confidential by other statutes. Section 552.101 encompasses chapter 772 of the Health and Safety Code, which authorizes the development of local emergency communication districts. Sections 772.118, 772.218, and 772.318 of the Health and Safety Code are applicable to emergency 9-1-1 districts established in accordance with chapter 772. *See* Open Records Decision No. 649 (1996). These sections make the originating telephone numbers and addresses of 9-1-1 callers furnished by a service supplier confidential. *Id.* at 2. Section 772.318 of the Health and Safety Code applies to an emergency communication

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<sup>5</sup>As our ruling dispositive, we need not address your remaining argument against disclosure of this information.

<sup>6</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

district for a county with a population of more than 20,000. Section 772.218 applies to an emergency communication district for a county with a population of more than 860,000, and section 772.118 is applicable to a county with a population of more than two million.

We understand the city is part of an emergency communication district established under chapter 772. However, we note none of the remaining information consists of the originating telephone numbers or addresses furnished by a 9-1-1 service provider; therefore, none of the remaining information may be withheld under section 772.318 of the Government Code.

Section 552.101 also encompasses information protected by the common-law informer's privilege, which has long been recognized by Texas courts. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969). The informer's privilege protects the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided the subject of the information does not already know the informer's identity. *See Open Records Decision Nos. 515 at 3 (1988), 208 at 1-2 (1978)*. The privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." *See Open Records Decision No. 279 at 2 (1981) (citing 8 John H. Wigmore, Evidence in Trials at Common Law, § 2374, at 767 (J. McNaughton rev. ed. 1961))*. The report must be of a violation of a criminal or civil statute. *See Open Records Decision Nos. 582 at 2 (1990), 515 at 4-5*. The privilege excepts the informer's statement only to the extent necessary to protect the informer's identity. *See Open Records Decision No. 549 at 5 (1990)*.

You seek to withhold portions of Exhibit C4 under the common-law informer's privilege. However, you do not inform us what criminal or civil statute was reported to be violated, nor do you explain how the city is responsible for enforcing any such statute. Furthermore, we find none of the information at issue identifies an informer for purposes of the common-law informer's privilege. We therefore conclude the city has failed to demonstrate the applicability of the common-law informer's privilege in this instance. Thus, the city may not withhold any of Exhibit C4 under section 552.101 of the Government Code in conjunction with the informer's privilege.

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."<sup>7</sup> 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*

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<sup>7</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)*.

*Tex.*, No. 08-0172, 2010 WL 4910163 (Tex. Dec. 3, 2010). Having carefully reviewed the information at issue, we find the information we have marked in Exhibit A must be withheld under section 552.102(a) of the Government Code.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former official or employee of a governmental body who timely requests this information be kept confidential under section 552.024. Gov't Code § 552.117(a)(1). Upon review, we find no portion of the remaining information constitutes the home address and telephone number, emergency contact information, social security number, or family member information of a current or former official or employee of the city. Accordingly, none of the remaining information may be withheld under section 552.117(a)(1) of the Government Code.

In summary, the city need not release the computer information it has marked as not subject to the Act. The city must withhold the date of birth information we have marked in Exhibit A under section 552.102 of the Government Code. The city may withhold Exhibits B1, B3, and B5 under section 552.103 of the Government Code. The city may withhold Exhibits C1, C2, C3, C5, C6, D1, D2, D3, and D4 under section 552.108(a)(1) of the Government Code. 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](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,



Vanessa Burgess  
Assistant Attorney General  
Open Records Division

VB/dls

Ref: ID# 442770

Enc. Submitted documents

c: Requestor  
(w/o enclosures)