



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 25, 2012

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

OR2012-05899

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# 451486 (GC No. 19323).

The City of Houston (the “city”) received a request for personnel information related to a named city police officer. You claim the requested 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.

We first note some of the submitted information falls within the scope of section 552.022 of the Government Code. Section 552.022(a)(1) provides for required public disclosure of “a completed report, audit, evaluation, or investigation made of, for, or by a governmental body,” unless the information is made confidential under the Act or other law or excepted from disclosure under section 552.108 of the Government Code. Gov’t Code § 552.022(a)(1). We have marked completed evaluations that are subject to section 552.022(a)(1). The city does not claim the evaluations are excepted from disclosure under section 552.108. Section 552.103 of the Government Code, which the city does claim, is a discretionary exception to disclosure 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 section 552.103); Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.103 does not make information confidential for purposes

of section 552.022(a)(1). Therefore, the marked evaluations may not be withheld under section 552.103 of the Government Code and must be released to the requestor pursuant to section 552.022(a)(1) of the Government Code.

Next, we address the city's 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 must provide relevant facts and documentation sufficient to establish the applicability of this exception to the information at issue. To do so, 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).*

You inform us, and have provided documentation demonstrating, the remaining information pertains to a police officer who was temporarily suspended by the city police department. We understand the city is a civil service city under chapter 143 of the Local Government Code. You also state, and have provided documentation demonstrating, the officer filed an appeal of his suspension pursuant to chapter 143 of the Local Government Code prior to the city's receipt of the present request for information. We note municipal civil service appeals such as this one are governed by chapter 143. *See Local Gov't Code* §§ 143.057, .127-.131. This office has determined such appeals constitute litigation for purposes of section 552.103. *Cf. Open Records Decision No. 588 (1991).* Thus, based on your representations and documentation, we find the city was a party to pending litigation on the date of its receipt of the present request. You have provided an affidavit from an assistant city attorney

representing the city in connection with the officer's appeal, who states the remaining information at issue is related to the pending litigation. Based on your representations and documentation and our review, we conclude section 552.103 of the Government Code is generally applicable to the remaining information.

In this instance, however, the suspended officer has already seen or had access to some of the remaining information. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information related to litigation through discovery procedures. *See* ORD 551 at 4-5. Thus, when the opposing party has seen or had access to information related to litigation, through discovery or otherwise, there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Therefore, because the opposing party in the pending litigation has already seen or had access to the information we have marked, the city may not withhold the marked information under section 552.103. Although the officer also appears to have seen or had access to other remaining information, he saw or had access to that information in the usual scope of his employment. For purposes of section 552.103, such information is not considered to have been seen by the opposing party to litigation. Therefore, except for the information we have marked, the city may withhold the information that is not encompassed by section 552.022 of the Government Code under section 552.103 of the Government Code. We note the applicability of this exception ends once the related litigation concludes. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

We note sections 552.117 and 552.130 of the Government Code are applicable to some of the marked information that may not be withheld under section 552.103.¹ Section 552.117(a)(2) excepts from disclosure the home address, home telephone number, emergency contact information, and social security number of a peace officer, as well as information that reveals whether the officer has family members, regardless of whether the officer complies with sections 552.024 or 552.1175 of the Government Code. *See* Gov't Code §§ 552.117, .024. Section 552.117(a)(2) adopts the definition of peace officer found at article 2.12 of the Code of Criminal Procedure. We note section 552.117(a)(2) protects a peace officer's personal cellular telephone number or pager number if the officer pays for the cellular telephone or pager service with his or her personal funds. *See* Open Records Decision No. 670 at 6 (2001). The city must withhold the information we have marked under section 552.117(a)(2) of the Government Code, including the officer's cellular telephone number if he pays for the cellular telephone service with his personal funds.

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

¹This office will raise sections 552.117, 552.130, and 552.140 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).

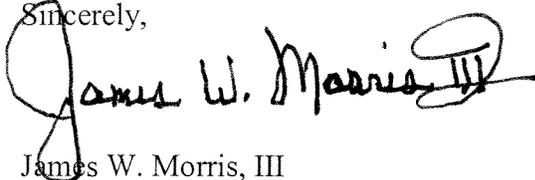
another state or country. *See* Gov't Code § 552.130(a)(1). The city must withhold the driver's license number we have marked under section 552.130 of the Government Code.

In summary, the city (1) must release the marked evaluations pursuant to section 552.022(a)(1) of the Government Code; (2) may withhold the remaining information at issue under section 552.103 of the Government Code, except for the marked information the opposing party in the pending litigation has seen or to which he has had access; (3) must withhold the information we have marked under section 552.117(a)(2) of the Government Code, including the cellular telephone number if the officer pays for the cellular telephone service with his personal funds; (4) must withhold the driver's license number we have marked under section 552.130 of the Government Code; and (5) must release the rest of the marked information that is not protected by section 552.103.

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,

A handwritten signature in black ink that reads "James W. Morris, III". The signature is written in a cursive style with a large initial "J" and "M".

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/em

Ref: ID# 451486

Enc: Submitted documents

c: Requestor
(w/o enclosures)