



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 12, 2012

Ms. Danielle Folsom
Assistant City Attorney
City of Houston
P.O. Box 368
Houston, Texas 77001-0368

OR2012-14479

Dear Ms. Folsom:

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# 464703 (GC No. 19819).

The City of Houston (the "city") received a request for information related to disciplinary action against city employees working for a specified department, including information related to GPS tracking.¹ You state the city will make some of the requested information available to the requestor. You claim that 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 submitted information.

Initially, we understand that the city has redacted personal information subject to section 552.117 of the Government Code a permitted by section 552.024 of the Government Code.² We understand the city has redacted driver's license numbers pursuant to

¹You note that the city received clarification of the information requested. *See* Gov't Code § 552.222 (providing that 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) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

²Section 552.024(c)(2) of the Government Code authorizes a governmental body to redact information protected by section 552.117(a)(1) of the Government Code without the necessity of requesting a decision under the Act if the current or former employee or official to whom the information pertains timely chooses to not allow public access to the information. *See* Gov't Code § 552.024(c)(2).

section 552.130(c) of the Government Code.³ In addition, we understand the city has redacted portions of the requested information under section 552.102(a) of the Government Code pursuant to the court's ruling in *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). We note, however, pursuant to section 552.301, a governmental body that seeks to withhold requested information must submit to this office a copy of the information, labeled to indicate which exceptions apply to which parts of the copy, unless the governmental body has received a previous determination for the information at issue. *See* Gov't Code § 552.301(a), (e)(1)(D). The court ruling at issue does not authorize the city or any other governmental body to withhold dates of birth under section 552.102(a) without seeking a ruling from this office. *See id.* § 552.301(a); Open Records Decision No. 673 (2000). Thus, this information must be submitted in a manner that enables this office to determine whether the information comes within the scope of an exception to disclosure. In this instance, we can discern the nature of the redacted information at issue; thus, being deprived of that information does not inhibit our ability to make a ruling. However, in the future, failure to comply with section 552.301 may result in the information being presumed public under section 552.302 of the Government Code. *See* Gov't Code § 552.302.

Next, we note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Id. § 552.022(a)(3). The submitted information contains invoices that are subject to subsection 552.022(a)(3). You seek to withhold the submitted information under section 552.103 of the Government Code. However, sections 552.103 is a discretionary exception and does not make information confidential under the Act. *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 Gov't Code § 552.103); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of

³Section 552.130(c) allows a governmental body to redact the information described in section 552.130(a)(1) without the necessity of seeking a decision from the attorney general. 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). *Id.* § 552.130(d), (e).

discretionary exceptions) Therefore, the submitted invoices, which we have marked, may not be withheld under section 552.103 of the Government Code. We will consider your arguments under section 552.103 for the information not subject to section 552.022.

Section 552.103 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 has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is showing that (1) litigation is pending or reasonably anticipated on the date the governmental body received the request, 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). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103.

You inform us, and have provided documentation showing, that a lawsuit styled *Deborah L. Neal v. City of Houston*, Cause No. 2012-36373, was filed in the 215th District Court of Harris County prior to the receipt of the clarification of the request for information. You state the information at issue is related to the pending lawsuit. Based on your representations and our review, we agree that litigation was pending on the date the city received the request. We further find that the information at issue relates to the pending litigation. Therefore, we find section 552.103 is generally applicable to the information not subject to section 552.022.

We note, however, that the purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to that litigation to obtain it through discovery procedures. *See* ORD 551 at 4-5. Therefore, if the opposing party has seen or had access to information relating to anticipated 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). In this instance, the opposing party in the anticipated litigation has already seen or had access to some of the information at issue outside of her scope of employment with the city. As such, the city may not withhold this information, which we have marked, from the requestor under section 552.103. However, as sections 552.102 and 552.117 of the Government Code make information confidential under the Act, we will consider the applicability of these exceptions to the information the opposing party has already seen or had access to outside of the her scope of employment with the city.⁴ The city may withhold the remaining information not subject to section 552.022 of the Government Code under section 552.103. We note the applicability of section 552.103 ends once the related litigation concludes. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Section 552.102(a) of the Government Code 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 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.*, 354 S.W.3d 336 (Tex. 2010). Upon review, we find the city must withhold birth dates we have marked under section 552.102(a) of the Government Code.

Section 552.117(a)(1) of the Government Code excepts from disclosure the current and former 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. Gov’t Code § 552.117(a). We further note section 552.117 also applies to the personal cellular telephone number of a current or former official or employee of a governmental body, 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). Whether information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). The city may only withhold information under section 552.117(a)(1) on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Therefore, if the individual whose information is at issue timely requested confidentiality under section 552.024 and if the cellular service at issue is not paid for by a governmental body, the city must withhold the information we have marked under section 552.117(a)(1). Conversely, if the individual at issue did not timely request confidentiality under section 552.024 or a governmental body pays for the marked cellular telephone service, the

⁴The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

city may not withhold the marked information under section 552.117(a)(1) of the Government Code.

In summary, except for the information that was previously seen or accessed by the opposing party in the scope of her employment, which we have marked, the city may withhold the information not subject to section 552.022 of the Government Code under section 552.103 of the Government Code. The city must withhold the information we have marked under section 552.102 of the Government Code. If the individual whose information is at issue timely requested confidentiality and if the cellular service at issue is not paid for by a governmental body, the city must withhold the information we have marked under section 552.117(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, 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# 464703

Enc. Submitted documents

c: Requestor
(w/o enclosures)