



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 31, 2013

Mr. Ryan M. Stults
Assistant City Attorney
City of Missouri City
1522 Texas Parkway
Missouri City, Texas 77489

OR2013-09100

Dear Mr. Stults:

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# 488780.

The City of Missouri City (the "city") received a request for e-mail correspondence between the requestor and a named city employee during a specified time period of the requestor's employment with the city. You state the city has released some of the requested information. You claim the remaining requested information is excepted from disclosure under sections 552.103, 552.117, and 552.137 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

Section 552.103 of the Government Code provides 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

¹Although you also raise section 552.1175 of the Government Code, the proper exception in this instance is section 552.117 of the Government Code because the city holds the information at issue in an employment context.

²We assume 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.

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

This office has long held "litigation," for purposes of section 552.103, includes "contested cases" conducted in a quasi-judicial forum. *See* Open Records Decision Nos. 474 (1987), 368 (1983), 336 (1982), 301 (1982). In determining whether an administrative proceeding is conducted in a quasi-judicial forum, some of the factors this office considers are whether the administrative proceeding provides for discovery, evidence to be heard, factual questions to be resolved, the making of a record, and whether the proceeding is an adjudicative forum of first jurisdiction with appellate review of the resulting decision without a re-adjudication of fact questions. *See* Open Records Decision No. 588 (1991). We note a contested case under the Administrative Procedure Act (the "APA"), chapter 2001 of the Government Code, constitutes litigation for purposes of section 552.103. *See* Open Records Decision No. 588 at 7 (1991) (stating contested case under statutory predecessor to APA constituted litigation for purposes of statutory predecessor to section 552.103 of the Government Code).

You state, and have submitted documentation demonstrating, that the city was notified of a hearing with the Texas Workforce Commission (the "TWC") regarding the requestor's unemployment compensation claim prior to the city's receipt of the request for information. The TWC administers the Texas Unemployment Compensation Act (the "TUCA") under title 4 of the Labor Code. The TUCA is found in subtitle A of title 4. The provisions governing the TWC are found in subtitle B of title 4. Section 301.0615 of the Labor Code states, except as otherwise provided by title 4, a hearing conducted under title 4 is not subject to subchapters C through H of the APA. Labor Code § 301.0615(a)(2). Subchapters C through H are applicable to contested cases under the APA. Moreover, section 2001.224 of the APA provides subchapters C through H "do not apply to a hearing by the [TWC] to determine whether or not a claimant is entitled to unemployment compensation[.]" Gov't

Code § 2001.224. Accordingly, we note, and you acknowledge, an unemployment compensation claim hearing is not a contested case under the APA.

However, you assert an unemployment compensation claim hearing is “litigation” for the purposes of section 552.103 because the hearing is an “adversarial, quasi-judicial proceeding before an administrative body.” You explain the TWC’s hearings examiners have the right to compel production of documents or testimony and the decisions made by the TWC are appealable to a court. You also explain that “those courts are subject to a substantial evidence rule, and . . . are bound to review rulings on a factual basis passed on by the [TWC].” However, you do not state, or provide documentation showing, an unemployment compensation claim hearing provides for discovery or evidence to be heard. You also do not state the unemployment claim hearing resolves factual questions. Further, you do not state the court review of the resulting decision is without a re-adjudication of fact questions. Upon review of your arguments, we find you have failed to demonstrate an unemployment compensation claim hearing constitutes litigation for purposes of section 552.103. Accordingly, the city may not withhold any of the submitted information under section 552.103.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, social security number, emergency contact information, and family member information of a current or former official or employee of a governmental body who requests that this information be kept confidential under section 552.024 of the Government Code. *See id.* §§ 552.117, .024. 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). 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)*. Thus, 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. You inform us, and provide documentation showing, that the employee at issue timely elected confidentiality under section 552.024. Therefore, the city must withhold the cellular telephone number we have marked under section 552.117(a)(1) of the Government Code if the associated cellular telephone service was paid for with personal funds. The remaining information you have marked is not subject to section 552.117(a)(1) and may not be withheld on that basis.

Section 552.117(a)(2) of the Government Code excepts from public disclosure a peace officer’s home address and telephone number, social security number, emergency contact information, and family member information regardless of whether the peace officer made an election under section 552.024 of the Government Code. Gov’t Code § 552.117(a)(2). We note section 552.117(a)(2) is also applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See ORD 506 at 5-6*. Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code

of Criminal Procedure. Therefore, the city must withhold the cellular telephone number we have marked under section 552.117(a)(2) of the Government Code if the associated cellular telephone service was paid for with personal funds. The remaining information you have marked is not subject to section 552.117(a)(2) and may not be withheld on that basis.

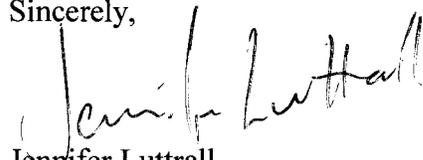
Section 552.137 of the Government Code excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body," unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov't Code § 552.137(a)-(c). The e-mail addresses at issue are not a type specifically excluded by section 552.137(c). Accordingly, 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 affirmatively consent to their disclosure. However, the remaining information you have marked does not consist of e-mail addresses and may not be withheld under section 552.137 of the Government Code.

In summary, the city must withhold the cellular telephone numbers we have marked under sections 552.117(a)(1) and 552.117(a)(2) of the Government Code if the associated cellular telephone services were paid for with personal funds. The city must withhold the information we have marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their disclosure. 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,



Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/tch

Ref: ID# 488780

Enc. Submitted documents

c: Requestor
(w/o enclosures)