



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 6, 2013

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

OR2013-13135A

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# 502218 (GC No. 20487).

This office issued Open Records Letter No. 2013-13135 (2013) on July 30, 2013. We have examined this ruling and determined Open Records Letter No. 2013-13135 is incorrect. Where this office determines that an error was made in the decision process under sections 552.301 and 552.306, and that error resulted in an incorrect decision, we will correct the previously issued ruling. Consequently, this decision serves as the correct ruling and is a substitute for Open Records Letter No. 2013-13135. *See generally* Gov't Code § 552.011 (providing that Office of the Attorney General may issue a decision to maintain uniformity in application, operation, and interpretation of the Act).

The City of Houston (the "city") received a request for six categories of information pertaining to six named city police department employees and all reports regarding the requestor. You inform us a portion of the requested information will be made available to the requestor. 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 submitted information.

Initially, we note some of the submitted information, which we have marked, was the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2013-12564A (2013). In Open Records Letter No. 2013-12564A, we determined the city's police department (1) must release certain information pursuant to section 552.022(a)(1) of the Government Code, but in releasing the documents subject to section 552.022(a)(1), must withhold the dates of birth we marked under section 552.102(a) of the Government Code, and (2) with the exception of basic information, may withhold the remaining information at issue under section 552.108(a)(2) of the Government Code. We have no indication there has been any change in the law, facts, or circumstances on which the prior ruling was based. Accordingly, we conclude the city must rely on Open Records Letter No. 2013-12564A as a previous determination and withhold or release the information we have marked in accordance with that ruling.¹ *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

Next, we note some of the remaining 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:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). The submitted information contains documents pertaining to completed investigations that are subject to subsection 552.022(a)(1). The city must release this information pursuant to subsection 552.022(a)(1) unless it is excepted from disclosure under section 552.108 of the Government Code or is made confidential under the Act or other law. *See id.* § 552.022(a)(1). You seek to withhold this information under section 552.103 of the Government Code, however, section 552.103 is a discretionary exception and does not make information confidential under the Act. *See Dallas Area Rapid*

¹As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

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 discretionary exceptions). Therefore, the information we have marked may not be withheld under section 552.103. However, because section 552.102 of the Government Code makes information confidential for purposes of 552.022, we will address the applicability of this section to the information subject to section 552.022(a)(1).²

Section 552.102 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 has 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 the dates of birth we have marked in the information subject to section 552.022(a)(1) under section 552.102 of the Government Code. The remainder of the documents subject to section 552.022(a)(1) of the Government Code must be released.

Section 552.103 of the Government Code 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, the governmental body must demonstrate that (1) litigation was pending or

²The 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).

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, orig. proceeding); *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 state, and have provided a pleading demonstrating, that a lawsuit styled *LaFleur v. Houston Police Department Chief, McClelland*, Cause No. 2013-02979, was filed in a district court of Harris County prior to the city's receipt of this request for information. Based on our review of the pleading you provided and the submitted information, we find Exhibit 3 is related to this pending litigation. You also state, and have provided a pleading demonstrating, that a lawsuit styled *Alfaro v. Houston*, Cause No. 11-cv-1541, was pending in the United States District Court for the Southern District of Texas, Houston Division, prior to the city's receipt of this request for information. You inform us the officer at issue in Exhibit 4 has been designated as an expert witness in this case. Based on our review, we find Exhibit 4 is related to this pending litigation. Therefore, we find the city may withhold the submitted information in Exhibits 3 and 4 under section 552.103 of the Government Code.

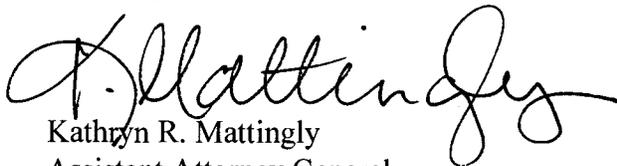
However, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to all parties to the pending litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

In summary, the city must rely on Open Records Letter No. 2013-12564A as a previous determination and withhold or release the information we have marked in accordance with that ruling. The city must release the information we have marked pursuant to section 552.022(a)(1) of the Government Code; however, in releasing this information, the city must withhold the dates of birth we have marked under section 552.102(a) of the Government Code. The city may withhold the information in Exhibits 3 and 4 under section 552.103 of the Government Code.

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Kathryn R. Mattingly
Assistant Attorney General
Open Records Division

KRM/bhf

Ref: ID# 502218

Enc. Submitted documents

c: Requestor
(w/o enclosures)