



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 13, 2013

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

OR2013-14109

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# 496257 (Houston GC No. 20518).

The City of Houston (the "city") received a request for all information regarding the incident and investigation that led to the recommendation for indefinite suspension of the requestor's client, including fourteen specified categories of information. You claim that the submitted information is excepted from disclosure under sections 552.102, 552.103, and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note some of the information you submitted in response to the request was created after the date the city received that request. This information, which we marked, is not responsive to the request. Our ruling does not address the public availability of information that is not responsive to a request, and the city is not required to release non-responsive information.

Next, we note some of the submitted information consists of completed evaluations and a completed investigation, which are subject to section 552.022(a)(1) of the Government Code. Section 552.022(a)(1) provides for the required public disclosure of "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). Pursuant to

section 552.022(a)(1), completed evaluations and investigations are expressly public unless they are either excepted under 552.108 of the Government Code or made confidential under the Act or other law. Although you raise section 552.103 of the Government Code for this information, section 552.103 is a discretionary exception to disclosure and does not make information confidential under the Act. *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 Nos. 665 at 2 n.5 (discretionary exceptions generally), 663 (1999) (governmental body may waive section 552.103). Therefore, the city may not withhold the completed evaluations and completed investigation under section 552.103 of the Government Code. However, we will address your claim under section 553.103 for the information that is not subject to section 552.022(a)(1).

Section 552.103 of the Government Code provides in relevant 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 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 that the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Thomas v. Cornyn*, 71 S.W.3d 473, 487 (Tex. App.—Austin 2002, no pet.); *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).

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To establish that litigation is reasonably anticipated, a governmental body must provide this office with

“concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” *Id.* Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body’s receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be “realistically contemplated”). On the other hand, this office has determined if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983). This office has stated a pending complaint with the Equal Employment Opportunity Commission (the “EEOC”) indicates litigation is reasonably anticipated. Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982).

You argue all of the responsive information not subject to section 552.022 of the Government Code is excepted under section 552.103 of the Government Code because the city anticipates litigation from the requestor’s client. You state, and provide documentation showing, the requestor’s client has filed an internal grievance regarding an employment decision. We note, however, as of the date of the request, the requestor’s client had not filed an EEOC complaint and had not taken any steps toward filing litigation beyond hiring an attorney. Based on our review of your arguments, we find you have failed to demonstrate the requestor’s client had taken any objective step toward filing litigation against the city prior to the date the city received the request for information. Accordingly, we find the city has failed to demonstrate it reasonably anticipated litigation on the date it received the request, and we conclude the city may not withhold the responsive information not subject to section 552.022 under section 552.103 of the Government Code.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. Gov’t Code § 552.107(1). When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the

government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. *See* TEX R. EVID. 503(b)(1). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication, *id.*, meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5). Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, orig. proceeding). Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege, unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state Exhibit 5 and the responsive information in Exhibit 6 consists of communications sent between attorneys for the city and city employees in order to facilitate the rendition of legal services to the city. You state this information was intended to be, and has remained, confidential. Based on your representations and our review, we agree Exhibit 5 consists of a privileged attorney-client communication. Accordingly, the city may withhold Exhibit 5 under section 552.107(1) of the Government Code. However, the responsive information in Exhibit 6 has been shared with non-privileged parties. Therefore, we conclude you have failed to establish how this information constitutes communications between or among privileged parties for the purposes of section 552.107(1). Thus, the city may not withhold the responsive information in Exhibit 6 under section 552.107(1).

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.”¹ Gov’t Code § 552.101. Section 552.101 encompasses information protected by federal law, such as section 1324a of title 8 of the United States Code. Section 1324a governs I-9 forms and their related documents. This section provides an I-9 form and “any information contained in or appended to such form, may not be used for purposes other than for enforcement of this chapter” and for enforcement of other federal statutes governing crime and criminal investigations. *See* 8 U.S.C. § 1324a(b)(5); *see also* 8 C.F.R. § 274a.2(b)(4). Release of the submitted I-9 forms in this instance would be “for purposes other than enforcement” of the referenced federal statutes. Accordingly, we conclude the submitted I-9 forms, which we

¹The 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).

have marked, are confidential pursuant to section 1324a of title 8 of the United States Code and must be withheld under section 552.101 of the Government Code.

Section 552.101 of the Government Code also encompasses section 6103(a) of title 26 of the United States Code. Prior decisions of this office have held section 6103(a) of title 26 of the United States Code renders federal tax return information confidential. *See* Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision No. 600 (1992) (W-4 forms). Section 6103(b) defines the term "return information" as "a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments . . . or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary [of the Treasury] with respect to a return or with respect to the determination of the existence, or possible existence, of liability . . . for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense[.]" *See* 26 U.S.C. § 6103(b)(2)(A). Federal courts have construed the term "return information" expansively to include any information gathered by the Internal Revenue Service regarding a taxpayer's liability under title 26 of the United States Code. *See Mallas v. Kolak*, 721 F. Supp. 748, 754 (M.D.N.C. 1989), *aff'd in part*, 993 F.2d 1111 (4th Cir. 1993). Thus, the W-4 forms we have marked constitute tax return information that is confidential under section 6103(a) of title 26 of the United States Code and must be withheld under section 552.101 of the Government Code.

We next note the submitted information contains fingerprints, including the requestor's client's fingerprints. Access to fingerprint information is governed by sections 560.001, 560.002, and 560.003 of the Government Code. Section 560.001 provides in part "[i]n this chapter . . . '[b]iometric identifier' means a retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry." Gov't Code § 560.001(1). Section 560.003 provides that "[a] biometric identifier in the possession of a governmental body is exempt from disclosure under [the Act]." *Id.* § 560.003. Section 560.002 provides, however, "[a] governmental body that possesses a biometric identifier of an individual . . . may not sell, lease, or otherwise disclose the biometric identifier to another person unless . . . the individual consents to the disclosure[.]" *Id.* § 560.002(1)(A). Thus, section 560.002(1)(A) of the Government Code gives an individual or her authorized representative a right of access to her own fingerprints. In this instance, the requestor is the authorized representative of one of the individuals whose fingerprints are at issue. Thus, the requestor has a right of access to his client's fingerprints. Therefore, the city must release the requestor's client's fingerprints to this requestor under section 560.002 of the Government Code. However, we have marked a fingerprint in the remaining information pertaining to another individual that must be withheld under section 552.101 in conjunction with section 560.003 of the Government Code.

Section 552.101 of the Government Code also encompasses common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which

would be highly objectionable to a reasonable person and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be demonstrated. *See id.* at 681-82. The type of information considered intimate or embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. This office has also found a compilation of an individual's criminal history is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person. *Cf. U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989) (when considering prong regarding individual's privacy interest, court recognized distinction between public records found in courthouse files and local police stations and compiled summary of information and noted that individual has significant privacy interest in compilation of one's criminal history). Furthermore, we find a compilation of a private citizen's criminal history is generally not of legitimate concern to the public. We note, however, active warrant information or other information relating to an individual's current involvement in the criminal justice system does not constitute criminal history information for purposes of section 552.101. *See Gov't Code* § 411.081(b). We also note records relating to routine traffic violations are not considered criminal history information. *Cf. Gov't Code* § 411.082(2)(B) (criminal history record information does not include driving record information). This office has found some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See Open Records Decision Nos.* 455 (1987) (information pertaining to prescription drugs, specific illnesses, operations and procedures, and physical disabilities protected from disclosure), 422 (1984), 343 (1982). This office has also found personal financial information not relating to the financial transaction between an individual and a governmental body is excepted from required public disclosure under common-law privacy. *See Open Records Decision Nos.* 600, 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history). However, information concerning financial transactions between an employee and a public employer is generally of legitimate public interest. ORDs 600, 545. We further note the scope of a public employee's privacy is narrow. *See Open Records Decision No.* 423 at 2 (1984). Upon review, we find the information we have marked is highly intimate or embarrassing and not of legitimate public concern. Therefore, the city must withhold the marked information under section 552.101 of the Government Code in conjunction with common-law privacy.

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." *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, 348 (Tex. 2010). Upon review, we note one of the birth dates at issue belongs to the requestor's client. Because section 552.102(a) protects personal privacy, the requestor has a special right of access to his client's birth date under section 552.023. *See* Gov't Code 552.023(a) (person or person's authorized representative has special right of access, beyond right of general public, to information held by governmental body that relates to person and that is protected from public disclosure by laws intended to protect person's privacy interests); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning himself). Thus, the city may not withhold the birth date of the requestor's client from the requestor on the basis of section 552.102(a). However, the city must withhold the marked employee birth date not pertaining to the requestor's client under section 552.102(a).

Section 552.117(a)(1) of the Government Code excepts from disclosure the 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. *See* Gov't Code §§ 552.117(a)(1), .024. We note section 552.117 is 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) (statutory predecessor to section 552.117 of the Government Code not applicable to cellular telephone numbers provided and paid for by governmental body and intended for official use). Whether a particular piece of information is protected by section 552.117 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 a former or current employee who made a request for confidentiality under section 552.024 prior to the date on which the request for information was made. We note the submitted information contains an election form for the employee whose information is at issue. This election form reflects that, at the time the city received the request, the employee elected to restrict access to his personal information under section 552.024. Accordingly, the city must withhold the employee's personal information, which we have marked, under section 552.117(a)(1) of the Government Code. The marked cellular telephone numbers may only be withheld, however, if the employee concerned paid for the cellular telephone service with personal funds.

Section 552.130 of the Government Code provides information relating to a motor vehicle operator's license, driver's license, motor vehicle title, or registration issued by an agency of this state or another state or country is excepted from public release. *See* Gov't Code § 552.130. Accordingly, the city must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code.

Section 552.136 of the Government Code provides, "[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." *Id.* § 552.136(b);

see id. § 552.136(a) (defining “access device”). Upon review, the city must withhold the information we have marked under section 552.136 of the Government Code.

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 id.* § 552.137(a)-(c). The e-mail address at issue is not excluded by subsection (c). Therefore, the city must withhold the personal e-mail address we have marked under section 552.137 of the Government Code, unless the owner affirmatively consents to its public disclosure.

In summary, the city may withhold Exhibit 5 under section 552.107(1) of the Government Code. The city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 1324a of title 8 of the United States Code, section 6103(a) of title 26 of the United States Code, section 560.003 of the Government Code, and common-law privacy. The city must withhold the marked employee birth date not pertaining to the requestor’s client under section 552.102(a) of the Government Code. The city must withhold the information we have marked, including the cellular telephone numbers if paid for with personal funds, under section 552.117(a)(1) of the Government Code. The city must also withhold the information we have marked under sections 552.130 and 552.136 of the Government Code. The city must withhold the e-mail address we have marked under section 552.137 of the Government Code, unless the owner of the e-mail address consent to its release.² The city must release the remaining information.³

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/>

²We note Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including a Form 1-9 and attachments under section 552.101 of the Government Code in conjunction with section 1324a of title 8 of the United States Code, W-4 forms under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code, a fingerprint under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code, and an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general opinion.

³We note the information being released in this instance includes information that is confidential with respect to the general public. Therefore, if the city receives another request for this information from a different requestor, the city must again seek a ruling from this office.

[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,

A handwritten signature in black ink, appearing to read 'Sarah Casterline', with a long horizontal line extending to the right.

Sarah Casterline
Assistant Attorney General
Open Records Division

SEC/tch

Ref: ID# 496257

Enc. Submitted documents

c: Requestor
(w/o enclosures)