



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 20, 2013

Ms. Alexis G. Allen
Counsel for the City of Red Oak
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500 North Akard Street
Dallas, Texas 75201

OR2013-16318

Dear Ms. Allen:

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# 501413 (Reference# 61613).

The City of Red Oak (the "city"), which you represent, received a request for the payroll records and time sheets of a named individual for a specified time period and the resignation letters of two named individuals. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the information you have submitted.

Initially, we note the requestor seeks information created after the date the request was received. It is implicit in several provisions of the Act that the Act applies only to information already in existence. *See* Gov't Code §§ 552.002, .021, .227, .351. The Act does not require a governmental body to prepare new information in response to a request. *See* Attorney General Opinion H-90 (1973); *see also* Open Records Decision Nos. 572 at 1 (1990), 555 at 1-2 (1990), 452 at 2-3 (1986), 87 (1975). Consequently, a governmental body is not required to comply with a standing request to supply information prepared in the future. *See* Attorney General Opinion JM-48 at 2 (1983); *see also* Open Records Decision Nos. 476 at 1 (1987), 465 at 1 (1987). Thus, the only information encompassed by the present request consists of information the city maintained or had a right of access to as of the date it received the request.

Next, we note portions of the submitted information are subject to section 552.022 of the Government Code, which provides in pertinent part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the 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[.]

Gov't Code § 552.022(a)(3). Portions of the submitted information consist of information in an account relating the expenditure of public funds. We find this information, which we have marked, is subject to section 552.022(a)(3). Although you seek to withhold this information under sections 552.103 and 552.108 of the Government Code, these sections are discretionary and do 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 section 552.103); Open Records Decision No. 177 at 3 (1977) (statutory predecessor to Gov't Code § 552.108 subject to waiver); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Accordingly, the information we have marked may not be withheld under section 552.103 or section 552.108. You also claim section 552.101 for portions of the information subject to section 552.022(a)(3). Further, portions of the information subject to section 552.022(a)(3) may be subject to section 552.117.¹ Because sections 552.101 and 552.117 make information confidential under the Act, we will address their applicability to the information at issue. We will also consider all of your arguments for the information not subject to section 552.022.

Next, we will address your argument under section 552.103 of the Government Code for the information not subject to section 552.022. Section 552.103 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.

¹The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

...

(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 the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing (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. *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, orig. proceeding); *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 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 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 a potential opposing party has hired an attorney who makes a request for information does not establish litigation is reasonably anticipated. Open Records Decision No. 361 (1983).

You state the city is currently conducting an internal investigation of a personnel matter involving city employees. You also state one or more of the employees involved in the investigation have hired an attorney. You explain the attorney at issue has indicated several times during the course of the investigation, and prior to receipt of the instant request for information, a lawsuit will be filed regarding the investigation. You have provided a newspaper article wherein the attorney at issue stated he planned to file a lawsuit against the city within a week. Upon review, we find the city reasonably anticipated litigation on the date it received the request for information. You also state the remaining information is related to the ongoing investigation. Thus, we find the information not subject to

section 552.022 is related to the anticipated litigation. Accordingly, the city may withhold the information not subject to section 552.022 under section 552.103.²

Generally, 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 anticipated 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 or is no longer anticipated. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 552.101 encompasses the doctrine of 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 satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. This office has 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 No. 600 (1992) (public employee’s withholding allowance certificate, designation of beneficiary of employee’s retirement benefits, direct deposit authorization, and employee’s decisions regarding voluntary benefits programs, among others, protected under common-law privacy). This office has also determined a public employee’s net pay is protected by common-law privacy even though it involves a financial transaction between the employee and the governmental body. *See* Attorney General Opinion GA-0572 at 3-5 (2007) (stating that net salary necessarily involves disclosure of information about personal financial decisions and is background financial information about a given individual that is not of legitimate concern to the public). However, there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. *See* Open Records Decision Nos. 600 at 9 (information revealing that employee participates in group insurance plan funded partly or wholly by governmental body is not excepted from disclosure), 545 (1990) (financial information pertaining to receipt of funds from governmental body or debts owed to governmental body not protected by common-law privacy). Upon review, we find the information we have marked meets the standard articulated by the Texas Supreme Court in

²As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

Industrial Foundation. Accordingly, the city must withhold the information we have marked under section 552.101 in conjunction with common-law privacy.

Section 552.117(a)(2) of the Government Code excepts from public 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 peace officer has family members, regardless of whether the peace officer complies with sections 552.024 and 552.1175 of the Government Code. *See* Gov't Code § 552.117(a)(2). Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. In this instance, however, it is unclear whether the individual whose information is at issue is currently a licensed peace officer as defined by article 2.12. If the individual is currently a licensed peace officer as defined by article 2.12, then the city must withhold the information we have marked under section 552.117(a)(2) of the Government Code. However, if the individual is no longer a licensed police officer as defined by article 2.12, the information we have marked may not be withheld under section 552.117(a)(2) of the Government Code.

If the individual at issue is not currently a licensed peace officer, then his personal information may be subject to section 552.117(a)(1) of the Government Code, which excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security number, and family member information of a current or former employee of a governmental body who requests this information be kept confidential under section 552.024. *Id.* § 552.117(a)(1). Whether a particular piece of 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 the information at issue under section 552.117(a)(1) if the individual at issue elected confidentiality under section 552.024 prior to the date on which the request for this information was made. If the individual made a timely election under section 552.024, the city must withhold the information we have marked under section 552.117(a)(1) of the Government Code. If the individual at issue did not make a timely election under section 552.024, his information may not be withheld under section 552.117(a)(1) of the Government Code.

In summary, the city may withhold the information not subject to section 552.022 under section 552.103. The city must withhold the information we have marked under section 552.101 in conjunction with common-law privacy. If the individual whose information is at issue is a licensed peace officer, then the city must withhold the information we have marked under section 552.117(a)(2) of the Government Code. If the individual at issue is not a licensed peace officer, but timely elected confidentiality pursuant to section 552.024, then the city must withhold the information we have marked under section 552.117(a)(1). 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.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,



Melanie J. Villars
Assistant Attorney General
Open Records Division

MJV/som

Ref: ID# 501413

Enc. Submitted documents

c: Requestor
(w/o enclosures)