



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 18, 2014

Ms. Lauren M. Wood  
Counsel for City of Frisco  
Abernathy, Roeder, Boyd & Joplin, P.C.  
P.O. Box 1210  
McKinney, Texas 75070-1210

OR2014-10560

Dear Ms. Wood:

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# 526338.

The City of Frisco (the "city"), which you represent, received a request for information pertaining to the requestor's client, information pertaining to five named individuals, specified city policies, and information pertaining to discrimination or wrongful termination claims made by city employees for a specified period of time. You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, and 552.103 of the Government Code. Further, you state release of the submitted information may implicate the privacy interests of third parties. Accordingly, you state, and provide documentation showing, you notified the third parties of the request for information and of their right to submit arguments to this office as to why the information at issue should not be released.<sup>1</sup> *See Gov't Code § 552.304* (providing that interested party may submit comments stating why information should or should not be released). We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>2</sup>

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<sup>1</sup>As of the date of this letter, we have not received comments from any of the third parties explaining why the submitted information should not be released.

<sup>2</sup>We 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.

You state you submitted a representative sample of the information pertaining to the five named individuals and information pertaining to discrimination or wrongful termination claims made by city employees. However, you have not submitted any information responsive to the remaining portions of the request. To the extent the city maintained any information responsive to the other portions of the request when it received the request for information, we assume that information has been released. If the city has not released it, the city must do so at this time. *See* Gov't Code §§ 552.221, .301, .302; Open Records Decision No. 664 (2000).

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:

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

...

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

...

(17) information that is also contained in a public court record; and

(18) a settlement agreement to which a governmental body is a party.

Gov't Code § 552.022(a)(1), (3), (17)-(18). The submitted information includes completed evaluations and investigations that are subject to subsection 552.022(a)(1). The city must release the completed evaluations and investigations pursuant to subsection 552.022(a)(1) unless they are excepted from disclosure under section 552.108 of the Government Code or are made confidential under the Act or other law. *See id.* § 552.022(a)(1). The submitted information also includes checks subject to subsection 552.022(a)(3), a court-filed document subject to subsection 552.022(a)(17), and settlement agreements to which the city is a party subject to subsection 552.022(a)(18), which must be released unless they are made confidential under the Act or other law. *See id.* § 552.022(a)(3), (17)-(18). You seek to withhold the information subject to section 552.022 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 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 city may not withhold the information at issue under section 552.103 of the Government Code. Additionally, although the city seeks to withhold the court-filed document under section 552.101 of the Government Code in conjunction with common-law privacy, we note common-law privacy is not applicable to information contained in public court records. *See Star-Telegram v. Walker*, 834 S.W.2d 54 (Tex. 1992) (common-law privacy not applicable to court-filed document). Therefore, the marked court-filed document may not be withheld under section 552.101 of the Government Code in conjunction with common-law privacy. However, we will consider your argument under section 552.101 of the Government Code in conjunction with common-law privacy for the remaining information. We note some of the information at issue may be confidential under section 552.117 of the Government Code.<sup>3</sup> As section 552.117 makes information confidential under the Act, we will consider the applicability of this exception to the submitted information. Further, as your remaining arguments under sections 552.101 and 552.102 make information confidential, we will also consider your arguments against disclosure under these exceptions. We will also address your argument under section 552.103 for the information that is not subject to section 552.022 of the Government Code.

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). The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to

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<sup>3</sup>The 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).

litigation through discovery procedures. *See* Open Records Decision No. 551 at 4-5 (1990). A governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) exception applies 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 requested information is related to that litigation. *See 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.); ORD 551 at 4. The governmental body must meet both parts of this test for information to be excepted under section 552.103(a). *See* ORD 551 at 4.

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, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and 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.<sup>4</sup> 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 that 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. 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).

You inform us the requestor's client is a former city employee. You inform us, and provide documentation showing, prior to the city's receipt of the instant request the city received a letter from the requestor alleging wrongful termination of his client. The requestor states the purpose of the letter was to appeal the city's decision to terminate his client's employment, provide the city with notice of claims, and to give the city an opportunity to resolve the dispute short of legal action, which may include the filing of an Equal Employment Opportunity Commission claim or the instigation of a lawsuit. The letter further states the requestor would be investigating whether his client's termination was discriminatory and in violation of state or federal law if the matter was not resolved. The letter requests a hearing to reconsider the requestor's client's termination or, in the alterative, refer the matter to mediation. The letter states if the matter is not resolved or mediation is not scheduled within

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<sup>4</sup>In addition, this office has concluded litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

a specified period of time, the requestor will take legal action and lays out damages the requestor will seek if a lawsuit results. The letter also requests all evidence pertaining to the requestor's client be preserved. Thus, you state on the date the city received the request for information, the city reasonably anticipated litigation to which the city would be a party. Based on your representations and our review, we find the city reasonably anticipated litigation on the date the request was received. You assert because the submitted information concerns similarly situated employees, the information at issue is related to the anticipated litigation for purposes of section 552.103. Upon review, we agree the submitted information is related to the anticipated litigation. Accordingly, the city may withhold the submitted information that is not subject to section 552.022 under section 552.103 of the Government Code.<sup>5</sup>

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 "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.

We note some of the information subject to section 552.022 of the Government Code consists of sexual harassment investigations. In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied), the court addressed the applicability of common-law privacy to information relating to an investigation of alleged sexual harassment. The investigation files in *Ellen* contained individual witness statements, an affidavit by the individual accused of the misconduct responding to the allegations, and conclusions of the board of inquiry that conducted the investigation. *See* 840 S.W.2d at 525. The court ordered the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating the public's interest was sufficiently served by the disclosure of such

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<sup>5</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

documents. *Id.* The *Ellen* court held “the public did not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released.” *Id.*

Thus, if there is an adequate summary of an investigation of alleged sexual harassment, the investigation summary must be released along with the statement of the accused under *Ellen*, but the identities of the victim and witnesses of the alleged sexual harassment must be redacted, and their detailed statements must be withheld from disclosure. *See* Open Records Decision Nos. 393 (1983), 339 (1982). If no adequate summary of the investigation exists, then all of the information relating to the investigation ordinarily must be released, with the exception of information that would identify the victims and witnesses. We note supervisors are generally not witnesses for purposes of *Ellen*, except where their statements appear in a non-supervisory context.

In this instance, we find one of the investigations contains an adequate summary of the investigation and a statement of the accused. The summary and statement are not confidential under section 552.101 in conjunction with common-law privacy; however, information within the summary and statement identifying victims and witnesses must be withheld under section 552.101 of the Government Code in conjunction with common-law privacy. *See Ellen*, 840 S.W.2d at 525. Thus, pursuant to section 552.101 in conjunction with common-law privacy and the holding in *Ellen*, the city must withhold the identifying information of the victims and witnesses, which we have marked, within the adequate summary and statement of the accused, and must release the remainder of this information. Because there is an adequate summary, the city must also withhold the remainder of the investigation at issue, which we have marked, under section 552.101 in conjunction with common-law privacy and the holding in *Ellen*.<sup>6</sup> The remaining sexual harassment investigations do not include adequate summaries. Therefore, the city must generally release the information pertaining to these investigations. However, this information contains the identity of the alleged sexual harassment victims and a witness. Accordingly, the city must withhold the identifying information of the victims and witness, which we have marked and indicated, pursuant to section 552.101 of the Government Code in conjunction with common-law privacy and the holding in *Ellen*. Upon review, however, we find the city has not demonstrated how any portion of the remaining information at issue consists of a sexual harassment investigation or identifies a victim or witness of sexual harassment. Thus, none of the remaining information may be withheld under section 552.101 in conjunction with common-law privacy and *Ellen*.

Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987). Upon review, we find the information we marked in the remaining information satisfies the standard

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<sup>6</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the city must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find the remaining information is not highly intimate or embarrassing information or is of legitimate public interest. Therefore, none of the remaining information may be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.101 of the Government Code also encompasses information protected by other statutes, such as section 1703.306 of the Occupations Code. Section 1703.306 provides:

(a) A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person other than:

(1) the examinee or any other person specifically designated in writing by the examinee;

(2) the person that requested the examination;

(3) a member, or the member's agent, of a governmental agency that licenses a polygraph examiner or supervises or controls a polygraph examiner's activities;

(4) another polygraph examiner in private consultation; or

(5) any other person required by due process of law.

(b) The [Texas Department of Licensing and Regulation] or any other governmental agency that acquires information from a polygraph examination under this section shall maintain the confidentiality of the information.

(c) A polygraph examiner to whom information acquired from a polygraph examination is disclosed under Subsection (a)(4) may not disclose the information except as provided by this section.

Occ. Code § 1703.306. Upon review, we find the information we marked constitutes information acquired from a polygraph examination that is confidential under section 1703.306. It does not appear the requestor falls into any of the categories of individuals who are authorized to receive the polygraph information under section 1703.306(a). Accordingly, the city must withhold the polygraph information we marked under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code.

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 none of the remaining information is subject to section 552.102(a) of the Government Code, and the city may not withhold any of the remaining information on that basis.

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 individuals whose information is at issue are currently licensed peace officers as defined by article 2.12. If the individuals are currently licensed peace officers as defined by article 2.12, then the city must withhold the information we marked under section 552.117(a)(2) of the Government Code. However, if the individuals whose information is at issue are no longer licensed peace officers as defined by article 2.12, then the city may not withhold the marked information under section 552.117(a)(2) of the Government Code.

If the individuals at issue are not currently licensed peace officers, then their personal information may be subject to section 552.117(a)(1) of the Government Code. Section 552.117(a)(1) excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of current or former employees or officials of a governmental body who request this information be kept confidential under section 552.024 of the Government Code. *See id.* § 552.117(a)(1). 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 be withheld under section 552.117(a)(1) only on behalf of a current or former employee or official who made a request for confidentiality under section 552.024 prior to the date of the governmental body’s receipt of the request for information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee or official who did not timely request under section 552.024 the information be kept confidential. Therefore, to the extent the individuals whose information is at issue timely requested confidentiality under section 552.024 of the Government Code, the city must withhold the information we marked and indicated under section 552.117(a)(1) of the Government Code. Conversely, to the extent the individuals at issue did not timely request confidentiality under section 552.024, the city may not withhold the information we marked and indicated under section 552.117(a)(1) of the Government Code.

In summary, 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 (1) withhold the information we marked and indicated under section 552.101 of the Government Code in conjunction with common-law privacy; (2) withhold the polygraph information we marked under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code; (3) withhold the information we marked under section 552.117(a)(2) of the Government Code if the individuals whose information is at issue are currently licensed peace officers as defined by article 2.12; and (4) withhold the information we marked and indicated under section 552.117(a)(1) of the Government Code if the individuals whose information we marked and indicated timely requested confidentiality under section 552.024 of the Government Code. The city must release the remaining information subject to section 552.022 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](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,



Paige Thompson  
Assistant Attorney General  
Open Records Division

PT/dls

Ref: ID# 526338

Enc. Submitted documents

c: Requestor  
(w/o enclosures)