



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 17, 2014

Mr. Michael Bostic
Assistant City Attorney
City of Dallas
1500 Marilla Street, Room 7DN
Dallas, Texas 75201

OR2014-16513

Dear Mr. Bostic:

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# 538215.

The City of Dallas (the "city") received a request for information pertaining to the position of Housing Director. The city states it has released some of the requested information, but claims some of the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.117, 552.136, and 552.137 of the Government Code. We have considered the claimed exceptions and reviewed the submitted representative sample of information.¹

Initially, we note some of the information you have submitted to us for review is not responsive to the request for information because it was created after the city received the request. This ruling does not address the public availability of any information that is not responsive to the request, and the city is not required to release this information in response to this request.

You assert the responsive information in Exhibit B is excepted from disclosure under section 552.103 of the Government Code, which provides in relevant part as follows:

¹We 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 those records contain substantially different types of information than that submitted to this office.

(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 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 that (1) litigation is 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, 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). The governmental body must meet both prongs of this test for information to be excepted from disclosure under section 552.103(a).

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 have submitted information to this office showing that, prior to the city's receipt of the request for information, a city employee filed a complaint against the city with the EEOC. Based on your representations and our review of the submitted documents, we find you have demonstrated litigation was reasonably anticipated when the city received the request for information. Our review of Exhibit B also shows it is related to the anticipated litigation for purposes of section 552.103(a). Therefore, we agree section 552.103 is applicable to the responsive information in Exhibit B.

However, once information has been obtained by all parties to the anticipated 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 the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a). We note the employee at issue, who is the opposing party to the anticipated litigation, has seen or had access to pages 9 and 10 of Exhibit B. Therefore, the city may not withhold this information under section 552.103(a). However, we agree the city may withhold the remaining responsive

information in Exhibit B under section 552.103(a).² We note the applicability of section 552.103(a) ends once the litigation has concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 at 2 (1982); 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. 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 some of the submitted information in Exhibit C, which we have marked, satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, we conclude the remaining information in Exhibit C is not confidential under common-law privacy, and the city may not withhold it under section 552.101 on that ground.

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 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). We agree the city must withhold the date of birth you have marked on page 9 of Exhibit B under section 552.102(a) of the Government Code.

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 that this information be kept confidential under section 552.024 of the Government Code. Gov’t Code § 552.117(a)(1). Whether 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). We agree the city must withhold the information you have marked on pages 9 and 10 of Exhibit B under section 552.117(a)(1) if the employee at issue timely requested confidentiality under section 552.024 of the Government Code; nevertheless, the city may not withhold this information under section 552.117(a)(1) if the

²As our ruling is dispositive, we do not address your other arguments to withhold this information.

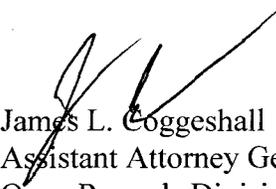
employee at issue did not timely request confidentiality under section 552.024. Exhibit C pertains to applicants of the specified job position. However, we are unable to discern which, if any, of the applicants were hired. Therefore, the city must withhold the information we have marked under section 552.117(a)(1) in Exhibit C if it pertains to applicants who were ultimately hired by the city and who timely requested confidentiality under section 552.024. Conversely, the city may not withhold this information under section 552.117(a)(1) if the applicants were not ultimately hired by the city or if they did not timely request confidentiality under section 552.024. Section 552.117(a)(1) is not applicable to the remaining information, and the city may not withhold it on that ground.

To conclude, with the exception of pages 9 and 10, the city may withhold the responsive information in Exhibit B under section 552.103 of the Government Code. The city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy and the information you have marked under section 552.102 of the Government Code in the remaining documents. The city must withhold the information you have marked on pages 9 and 10 of Exhibit B under section 552.117(a)(1) of the Government Code if the employee at issue timely requested confidentiality under section 552.024 of the Government Code. The city must also withhold the information we have marked in Exhibit C under section 552.117(a)(1) of the Government Code if it pertains to applicants who were ultimately hired by the city and who timely requested confidentiality under section 552.024. The city must release the remaining responsive information.

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,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/cbz

Mr. Michael Bostic - Page 5

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Enc. Submitted documents

c: Requestor
(w/o enclosures)