



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 19, 2014

Mr. James W. Wright
City Attorney
City of Livingston
200 West Church Street
Livingston, Texas 77351-3281

OR2014-23185

Dear Mr. Wright:

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# 547501.

The City of Livingston (the "city") received a request for information pertaining to a named officer, including (1) documents during a specified time period in the officer's personnel file; (2) any documents during a specified time period showing disciplinary actions taken; (3) any citizen complaints filed during a specified time period and documents showing how the complaints were resolved; (4) any complaints filed by a city employee during a specified time period and documents showing how the complaints were resolved; and (5) any documents related to a specified complaint. You indicate you do not have some information.¹ You state some information was released to the requestor. You claim portions of the submitted information are excepted from disclosure under sections 552.101, 552.102, 552.103, 552.117, 552.1175, 552.130, 552.137, and 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

¹The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

Initially, you state some of the submitted information is not responsive to the present request for information. We note a governmental body must make a good faith effort to relate a request to information held by a governmental body. *See* Open Records Decision No. 561 at 8 (1990). The present request asks for information pertaining to a named officer. Upon review, we find the information at issue pertains to the named officer. Accordingly, the information at issue is responsive to the present request and we will address your arguments against its disclosure.

Section 552.103 of the Government Code provides, in relevant part, as follows:

(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).

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 demonstrate 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, an attorney for a potential opposing party making a demand for payment and asserting an intent to sue if such payments are not made. Open Records Decision Nos. 555 at 3 (1990), 346 (1982). In addition, this office has concluded litigation

was reasonably anticipated when the potential opposing party threatened to sue on several occasions and hired an attorney. *See* Open Records Decision No. 288 at 2 (1981). However, an individual publicly threatening to bring suit against a governmental body, but who does not actually take objective steps toward filing suit, is not concrete evidence that litigation is reasonably anticipated. *See* Open Records Decision No. 331 at 1-2 (1982).

You inform us the information at issue pertains to an investigation into the requestor's complaint filed against the named officer. You argue because the requestor made "veiled threats" of pursuing the matter against the city, litigation involving the city was reasonably anticipated on the date of the request. Upon review, however, we find the city has not demonstrated any party had taken concrete steps toward filing litigation when the city received the request for information. Thus, we conclude the city has failed to demonstrate it reasonably anticipated litigation when it received the request for information. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must provide comments explaining why exceptions raised should apply to information requested). Therefore, the city may not withhold any portion of the submitted information under section 552.103(a) of the Government Code.

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 demonstrated. *See id.* at 681-82. This office has found personal financial information not relating to a financial transaction between an individual and a governmental body is generally highly intimate or embarrassing. *See* Open Records Decision No. 600 (1992) (employee's designation of retirement beneficiary, choice of insurance carrier, election of optional coverages, direct deposit authorization, forms allowing employee to allocate pretax compensation to group insurance, health care or dependent care). Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987). We note phone numbers of members of the public are generally not highly intimate or embarrassing. *See id.* at 7 (telephone numbers not protected under privacy).

In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied), the court addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment. The investigation files in the *Ellen* decision 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. *Ellen*, 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 documents. *Id.* In concluding, 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 under *Ellen*, along with the statement of the accused. However, the identities of the victims 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). However, when no adequate summary exists, detailed statements regarding the allegations must be released, but the identities of victims and witnesses must still be redacted from the statements. In either case, the identity of the individual accused of sexual harassment is not protected from public disclosure. We also note supervisors are generally not witnesses for purposes of *Ellen*, except where their statements appear in a non-supervisory context.

Portions of the submitted information relate to an investigation into alleged sexual harassment. Upon review, we determine this information does not contain an adequate summary of the alleged sexual harassment. Because there is no adequate summary of the investigation, the city must generally release any information pertaining to the sexual harassment investigation. However, the information at issue contains the identities of the victim and witnesses to the alleged sexual harassment. We note the requestor is the alleged sexual harassment victim. Section 552.023 of the Government Code states an individual has a special right of access to private information concerning herself. *See* Gov’t Code § 552.023(a), (b) (individual has special right of access to information that relates to himself and is protected by laws intended to protect his privacy interests, and governmental body may not deny access on ground that information is considered confidential by privacy principles); Open Records Decision No. 481 at 4 (privacy theories not implicated when individual requests information concerning herself). Thus, the requestor has a right of access to information pertaining to herself that would otherwise be confidential. Accordingly, the city must withhold the identifying information of the witnesses, which we have marked, under section 552.101 of the Government Code in conjunction with common-law privacy and the holding in *Ellen*. *See Ellen*, 840 S.W.2d at 525. Furthermore, we find the additional information 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 find the city has not demonstrated how any portion of the remaining information at issue is highly intimate or embarrassing and not of legitimate public concern. Thus, the city may not withhold any of the remaining information at issue under section 552.101 in conjunction with common-law privacy.

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 the city must withhold the date of birth we marked under section 552.102(a).

Section 552.117(a)(2) excepts from public disclosure the home addresses, home telephone numbers, 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 section 552.024 or section 552.1175 of the Government Code. Gov't Code § 552.117(a)(2). Section 552.117 also encompasses cellular telephone numbers, provided a governmental body does not pay for the cellular telephone service. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). Upon review, we find the city must withhold the information we marked under section 552.117(a)(2) of the Government Code; however, the city may only withhold the cellular telephone number at issue under section 552.117(a)(2) if a governmental body did not pay for the cellular telephone service.² None of the remaining information consists of a peace officer's home address and telephone numbers, emergency contact information, social security number, or family member information. Accordingly, the city may not withhold any of the remaining information under section 552.117(a)(2) of the Government Code.

Section 552.1175 protects the home address, home telephone number, emergency contact information, date of birth, social security number, and family member information of certain individuals, when that information is held by a governmental body in a non-employment capacity and the individual elects to keep the information confidential. *See* Gov't Code § 552.1175(b). Section 552.1175 applies, in part, to "peace officers as defined by Article 2.12, Code of Criminal Procedure[.]" *Id.* § 552.1175(a)(1). Some of the remaining information relates to individuals who may be licensed peace officers of different law enforcement agencies; however, we are unable to determine from the information provided if the individuals at issue are currently licensed peace officers. Thus, we must rule conditionally. Accordingly, to the extent the information we have marked relates to individuals who are currently licensed peace officers and who elect to restrict access to the information in accordance with section 552.1175(b), the city must withhold the marked information under section 552.1175 of the Government Code. Conversely, if the individuals whose information is at issue are not currently licensed peace officers and did not elect to restrict access to their information in accordance with section 552.1175(b), the marked information may not be withheld under section 552.1175.

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

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, or personal identification document issued by an agency of this state or another state or country is excepted from public release. *See id.* § 552.130. Accordingly, the city must withhold the motor vehicle record information we marked under section 552.130 of the Government Code. However, the remaining information is not subject to section 552.130 and the city may not withhold it on that basis.

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 owner of the e-mail address consents to its release or the e-mail address falls within the scope of section 552.137(c). *See id.* § 552.137(a)-(c). We note the e-mail addresses at issue are not of types excluded by subsection (c). Accordingly, the city must withhold the e-mail addresses you have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure.

In summary, the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy and in conjunction with the holding in *Ellen*. The city must withhold the additional information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The city must withhold the date of birth we marked under section 552.102(a). The city must withhold the information we marked under section 552.117(a)(2) of the Government Code; however, the city may only withhold the cellular telephone number at issue under section 552.117(a)(2) if a governmental body did not pay for the cellular telephone service. To the extent the information we have marked relates to individuals who are currently licensed peace officers and who elect to restrict access to the information in accordance with section 552.1175(b), the city must withhold the marked information under section 552.1175 of the Government Code. The city must withhold the motor vehicle record information we marked under section 552.130 of the Government Code. The city must withhold the e-mail addresses you have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure. 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.

³In this instance, the requestor has a right of access to the information being released. Thus, if the city receives another request for this information from a different requestor, the city must seek another ruling from this office.

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,



Lauren Dahlstein
Assistant Attorney General
Open Records Division

LMD/som

Ref: ID# 547501

Enc. Submitted documents

c: Requestor
(w/o enclosures)