



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

February 19, 2016

Ms. Janet M. Spugnardi  
Senior Assistant City Attorney  
City of Irving  
P.O. Box 152288  
Irving, Texas 75015

OR2016-04035

Dear Ms. Spugnardi:

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# 598840 (Irving ORR ID# PI-16-203).

The City of Irving (the "city") received a request for twenty-three categories of information pertaining to a specified incident. You claim the requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.108, 552.111, 552.117, and 552.152 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>1</sup>

Initially, we note the submitted information contains a peace officer's Texas Commission on Law Enforcement ("TCOLE") identification number. Section 552.002(a) of the Government Code defines "public information" as information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

- (1) by a governmental body;
- (2) for a governmental body and the governmental body:

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<sup>1</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.

(A) owns the information;

(B) has a right of access to the information; or

(C) spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information; or

(3) by an individual officer or employee of a governmental body in the officer's or employee's official capacity and the information pertains to official business of the governmental body.

Gov't Code § 552.002(a). In Open Records Decision No. 581 (1990), this office determined certain computer information, such as source codes, documentation information, and other computer programming, that has no significance other than its use as a tool for the maintenance, manipulation, or protection of public property is not the kind of information made public under section 552.021 of the Government Code. We understand an officer's TCOLE identification number is a unique computer-generated number assigned to peace officers for identification in the commissioner's electronic database, and may be used as an access device number on the TCOLE website. Accordingly, we find the officer's TCOLE identification number in the submitted information does not constitute public information under section 552.002 of the Government Code. Therefore, the TCOLE identification number is not subject to the Act and need not be released to the requestor.<sup>2</sup>

Next, we note some of the submitted information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2015-25698 (2015). In Open Records Letter No. 2015-25698, we determined, the city (1) must withhold certain information under section 552.101 of the Government Code in conjunction with section 58.007(c) of the Family Code, section 6103(a) of title 26 of the United States Code, section 1324a of title 8 of the United States Code, and common-law privacy; (2) must withhold certain information under sections 552.102(a), 552.130, and 552.137 of the Government Code; (3) may withhold certain information under section 552.108(b)(1) of the Government Code; (4) must withhold certain information under section 552.117(a)(2) of the Government Code, however the cellular telephone number may be withheld only if the cellular telephone service was not provided to the employee at issue at public expense; and (5) must release the remaining information. However, we note the circumstances upon which Open Records Letter No. 2015-25698 have changed with respect to the information previously withheld under section 552.101 of the Government Code in conjunction with section 58.007(c) of the Family Code. Accordingly, the city may not rely upon Open Records Letter No. 2015-25698 with respect to that information. However, with respect to the remaining information, we have no indication the law, facts, or circumstances on which

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<sup>2</sup>As our ruling is dispositive, we do not address your arguments to withhold this information.

the prior ruling was based have changed. Accordingly, except for the information previously withheld under section 552.101 of the Government Code in conjunction with section 58.007(c) of the Family Code, to the extent the submitted information is identical to the information previously submitted and ruled on by this office, we conclude the city must continue to rely on Open Records Letter No. 2015-25698 as a previous determination and withhold or release the information in accordance with that ruling. *See* Open Records Decision No. 673 at 6-7 (2001) (discussing criteria for first type of previous determination).

We note the city seeks to withhold the information ordered released in Open Records Letter No. 2015-25698 under sections 552.103, 552.107, 552.111 and 552.152 of the Government Code. Section 552.007 of the Government Code provides if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law or the information is confidential by law. *See* Gov't Code § 552.007; Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). Accordingly, pursuant to section 552.007, the city may not now withhold the previously released information unless its release is expressly prohibited by law or the information is confidential by law. Sections 552.103, 552.107, and 552.111 do not prohibit the release of information or make information confidential. *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 Nos. 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 470 at 7 (1987) (deliberative process privilege under statutory predecessor to section 552.111 subject to waiver). Therefore, the city may not now withhold any of the information ordered released in Open Records Letter No. 2015-25698 under section 552.103, section 552.107, or section 552.111. However, the city also claims section 552.152 of the Government Code is applicable to the information at issue. Because this section can make information confidential under the Act, we will consider the applicability of this exception to the information previously ordered released. To the extent the information at issue is not subject to Open Records Letter No. 2015-25698, we will address your arguments against release of the submitted information.

Next, we note some of the submitted information consists of a completed report and a completed investigation made by or for the city, which are subject to section 552.022(a)(1) of the Government Code. Pursuant to section 552.022(a)(1), completed investigations, reports, and evaluations are expressly public unless they are either excepted under section 552.108 of the Government Code or confidential under the Act or other law. Gov't Code § 552.022(a)(1). Although you raise section 552.103 of the Government Code, 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). As such, section 552.103 does not make information confidential for the purposes of section 552.022. Therefore, the city may not withhold the completed report or completed investigation under section 552.103 of the Government Code. However, you also raise sections 552.101, 552.108, and 552.152 of the Government Code for the completed report and investigation subject to section 552.022(a)(1). We note sections 552.101 and 552.152 can make information confidential under the Act. Accordingly, we will address your arguments under sections 552.101, 552.108, and 552.152 for the information subject to section 552.022(a)(1), as well as the remaining information. We will also address your argument under section 552.103 for the information 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). 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 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. *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 under section 552.103(a). 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 demonstrate that 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. 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).

You claim the city reasonably anticipates litigation because the parents of the individual involved in the specified incident have hired attorneys and the attorneys have publicly threatened to file suit. The city asserts the information at issue pertains to the incident that is the basis of the anticipated litigation. Based on these representations and our review, we find the city has established it reasonably anticipated litigation on the date it received the request for information and the information at issue is related to that litigation. Therefore, we find the city may withhold the information you have marked that is not subject to section 552.022(a)(1) under section 552.103 of the Government Code.<sup>3</sup>

We note 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. 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), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Section 552.101 of the Government Code excepts from public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 552.101 encompasses information protected by other statutes. The relevant language of section 58.007 of the Family Code reads as follows:

(c) Except as provided by Subsection (d), law enforcement records and files concerning a child and information stored, by electronic means or otherwise, concerning the child from which a record or file could be generated may not be disclosed to the public and shall be:

(1) if maintained on paper or microfilm, kept separate from adult files and records;

(2) if maintained electronically in the same computer system as records or files relating to adults, be accessible under controls that are separate and distinct from controls to access electronic data concerning adults; and

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<sup>3</sup>As our ruling on this information is dispositive, we do not address your remaining claims against its disclosure.

(3) maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subchapters B, D, and E.

...

(e) Law enforcement records and files concerning a child may be inspected or copied by a juvenile justice agency as that term is defined by Section 58.101, a criminal justice agency as that term is defined by Section 411.082, Government Code, the child, and the child's parent or guardian.

...

(j) Before a child or a child's parent or guardian may inspect or copy a record or file concerning the child under Subsection (e), the custodian of the record or file shall redact:

...

(2) any information that is excepted from required disclosure under Chapter 552, Government Code, or other law.

Fam. Code § 58.007(c), (e), (j)(2). Juvenile law enforcement records relating to conduct that occurred on or after September 1, 1997 are confidential under section 58.007. For purposes of section 58.007(c), a "child" is a person who is ten years of age or older and under seventeen years of age at the time of the reported conduct. *See id.* § 51.02(2). Section 58.007 allows the review or copy of juvenile law enforcement records by a child's parent or guardian. *Id.* § 58.007(e). However, section 58.007(j)(2) provides that information subject to any other exception to disclosure under the Act or other law must also be redacted. *See id.* § 58.007(j)(2).

Some of the information at issue pertains to juvenile delinquent conduct occurring after September 1, 1997; therefore, this information is subject to section 58.007. However, the requestor is a representative of the juvenile offender. Accordingly, information pertaining to the requestor's clients' child may not be withheld under section 552.101 of the Government Code on that ground. *See id.* § 58.007(e). However, because you assert the information at issue is excepted under section 552.108 of the Government Code, we must address whether the information at issue is excepted under that section. *See id.* § 58.007(j)(2).

Section 552.108(b)(2) of the Government Code excepts from disclosure "[a]n internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution . . . if: . . . (2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication[.]" Gov't Code § 552.108(b)(2). A governmental body

claiming section 552.108(b)(2) must demonstrate the information at issue relates to a concluded criminal case that did not result in a conviction or deferred adjudication. *See id* § 552.301 (e)(1)(A) (governmental body must provide comments explaining why exceptions raised should apply to information requested). You state the information you have marked pertains to a concluded criminal case that did not result in a conviction or deferred adjudication. Based on your representations, we agree section 552.108(b)(2) is applicable to the information at issue.

Section 552.108 does not except from disclosure “basic information about an arrested person, an arrest, or a crime.” *Id.* § 552.108(c). Section 552.108(c) refers to the basic “front-page” information held to be public in *Houston Chronicle*, *see* 531 S.W.2d at 186-187; *see also* Open Records Decision No. 127 (1976) (summarizing types of information considered to be basic information). Accordingly, with the exception of basic information, which must be released, the city may withhold the information you have marked under section 552.108(b)(2) of the Government Code.

Section 552.117(a)(2) of the Government Code 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.<sup>4</sup> Gov’t Code § 552.117(a)(2). Section 552.117 also encompasses a personal cellular telephone number, 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). Accordingly, the city must withhold the information we have marked under section 552.117(a)(2) of the Government Code; however, the city may only withhold the cellular telephone numbers at issue under section 552.117 if the cellular telephone service was not provided to the employee at issue at public expense. However, we find none of the remaining information you seek to withhold consists of the home address, home telephone number, emergency contact information, social security number, or family member information of a peace officer. Therefore, none of the remaining information at issue may be withheld under section 552.117(a)(2).

Section 552.152 of the Government Code provides:

Information in the custody of a governmental body that relates to an employee or officer of the governmental body is excepted from the requirements of Section 552.021 if under the specific circumstances pertaining to the employee or officer, disclosure of the information would subject the employee or officer to a substantial threat of physical harm.

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<sup>4</sup>“Peace officer” is defined by article 2.12 of the Texas Code of Criminal Procedure.

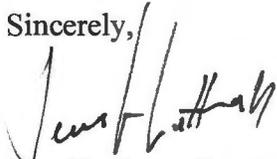
Gov't Code § 552.152. You state release of the remaining submitted personnel information could bring harm to the officer at issue. Upon review, we find you have failed to demonstrate the release of the information at issue would subject any individual to a substantial threat of harm. Accordingly, none of the remaining submitted information may be withheld under section 552.152 of the Government Code.

In summary, the TCOLE identification number is not subject to the Act and need not be released to the requestor. Except for the information previously withheld under section 552.101 of the Government Code in conjunction with section 58.007(c) of the Family Code, to the extent the submitted information is identical to the information previously submitted and ruled on by this office, we conclude the city must continue to rely on Open Records Letter No. 2015-25698 as a previous determination and withhold or release the information at issue in accordance with that ruling. The city may withhold the information you have marked that is not subject to section 552.022(a)(1) under section 552.103 of the Government Code. With the exception of basic information, which must be released, the city may withhold the information you have marked under section 552.108(b)(2) of the Government Code. The city must withhold the information we have marked under section 552.117(a)(2) of the Government Code. The remaining information must be released.<sup>5</sup>

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,



Jennifer Luttrall  
Assistant Attorney General  
Open Records Division

JL/akg

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<sup>5</sup>Because the requestor has a right of access to certain information that otherwise would be excepted from release under the Act, the city must again seek a decision from this office if it receives a request for this information from a different requestor.

Ref: ID# 598840

Enc. Submitted documents

c: Requestor  
(w/o enclosures)