



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

May 23, 2017

Mr. Michael Shaunessy
Counsel for City of Hutto
McGinnis Lochridge
600 Congress Avenue, Suite 2100
Austin, Texas 78701

OR2017-11157

Dear Mr. Shaunessy:

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# 658975.

The City of Hutto (the "city"), which you represent, received a request for all memos, letters, and correspondence prepared by three named employees on two specified dates. You state the city released some information. You claim portions of the submitted information are excepted from disclosure under sections 552.101, 552.103, 552.104, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Initially, we note some of the submitted information may have been the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2017-11094 (2017). In that ruling, we determined: (1) to the extent the requested information is identical to the information previously requested and ruled upon by this office, we conclude the city must rely on Open Records Letter No. 2017-04729 (2017) as a previous

¹We assume that 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.

determination and withhold or release the identical information in accordance with that ruling; (2) the city must withhold the employees' dates of birth in the submitted information under section 552.102(a) of the Government Code; (3) the city must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy; (4) the city may withhold the information it marked under section 552.107(1) of the Government Code; (5) the city may withhold the information it marked under section 552.108(a)(1) of the Government Code; (6) 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 it marked, and the additional information we marked, under section 552.117(a)(1) of the Government Code; however, the marked cellular telephone number may be withheld only if a governmental body does not pay for the cellular telephone service; (7) the city must withhold the account numbers it marked under section 552.136 of the Government Code; (8) with the exception of the requestor's e-mail address, to the extent the remaining personal e-mail addresses are not the personal e-mail addresses of the city officials or employees, this information is subject to section 552.137 and must be withheld under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their release or subsection 552.137(c) applies; (9) the city may withhold the social security number it marked under section 552.147 of the Government Code; and (10) the city must release the remaining information. We have no indication there has been any change in the law, facts, or circumstances on which the previous ruling was based. Accordingly, to the extent the requested information is identical to the information previously requested and ruled upon by this office, we conclude the city must rely on Open Records Letter No. 2017-11094 as a previous determination and withhold or release the identical information in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). However, to the extent the information in the instant request is not identical to the information responsive in Open Records Letter No. 2017-11094, we will address the city's arguments against disclosure.

Next, we note the city redacted portions of e-mail strings in the submitted information. You do not assert, nor does our review of the records indicate, you have been authorized to withhold this information without seeking a ruling from this office. *See id.* § 552.301(a); Open Records Decision No. 673 (2001). Therefore, information must be submitted in a manner that enables this office to determine whether the information comes within the scope of an exception to disclosure. In this instance, we are unable to discern the nature of the redacted information. Therefore, the city has failed to comply with section 552.301 of the Government Code as to this information, and this information is presumed public under section 552.302 of the Government Code. Accordingly, the city must release this redacted information.

You assert the submitted information is excepted from disclosure in its entirety under section 552.103 of the Government Code. 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.

...

(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 sufficient to establish the applicability of section 552.103 to the information it seeks to withhold. To meet this burden, the governmental body must demonstrate: (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) the information at issue is related to that litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See Open Records Decision No. 551 at 4 (1990).*

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 litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* This office has found a pending complaint with the Equal Opportunity Employment Commission (“EEOC”) indicates litigation is reasonably anticipated. *See Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982), 281 at 1 (1981).*

You inform us that, after the city received the request for information, an attorney notified the city “she represented several female employees who were planning on filing sex discrimination suits against the [city].” You state, and provide documentation showing, the attorney at issue subsequently filed discrimination claims on behalf of three city employees against the city with the EEOC. However, you do not inform our office that, at the time the city received the instant request, any part had taken any concrete steps toward the initiation of litigation regarding this matter. Accordingly, we find you have failed to demonstrate the

city reasonably anticipated litigation on the date it received the instant request for information. Therefore, the city may not withhold any of the remaining information under section 552.103 of the Government Code.

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. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987). The court of appeals has concluded public citizens’ dates of birth are protected by common-law privacy pursuant to section 552.101. *See Paxton v. City of Dallas*, No. 03-13-00546-CV, 2015 WL 3394061, at *3 (Tex. App.—Austin May 22, 2015, pet. denied) (mem. op.). Upon review, we find the information we marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Therefore, 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 you have not demonstrated any of the remaining information is highly intimate or embarrassing and not of legitimate public concern. Thus, none of the remaining information may be withheld under section 552.101 in conjunction with common-law privacy.

Section 552.104(a) of the Government Code excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104(a). The “test under section 552.104 is whether knowing another bidder’s [or competitor’s information] would be an advantage, not whether it would be a decisive advantage.” *Boeing Co. v. Paxton*, 466 S.W.3d 831, 841 (Tex. 2015). Although the city raises section 552.104, we find it has failed to demonstrate the release of the information you have marked would give advantage to a competitor or bidder. Thus, the city may not withhold any portion of the remaining information under section 552.104(a).

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 member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov’t Code § 552.137(a)-(c). The e-mail addresses at issue are not excluded by subsection (c). Therefore, the city must withhold the personal e-mail addresses in the remaining information under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure.

In summary, to the extent the requested information is identical to the information previously requested and ruled upon by this office, we conclude the city must rely on Open Records Letter No. 2017-11094 as a previous determination and withhold or release the identical information in accordance with that ruling. The city must release the information it redacted without prior authorization from our office. The city must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy. The city must withhold the personal e-mail addresses in the remaining information under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure. The city must release the remaining 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,



Ramsey A. Abarca
Assistant Attorney General
Open Records Division

RAA/bw

Ref: ID# 658975

Enc. Submitted documents

c: Requestor
(w/o enclosures)