



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

June 2, 2017

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

OR2017-12053

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# 660154.

The City of Hutto (the "city"), which you represent, received a request for all termination letters and performance evaluations pertaining to a named former employee, and e-mails between two named individuals pertaining to that former employee's termination during a specified time period. You claim the submitted information is excepted from disclosure under sections 552.103 and 552.137 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 some of the requested information may have been the subject of a previous ruling from this office. In Open Records Letter No. 2017-11238 (2017), this office ruled 1) to the extent the submitted information is identical to the information previously submitted and ruled on by this office, the city must continue to rely on Open Records Letter Nos. 2017-04729 (2017), 2017-11094 (2017), and 2017-11157 (2017) as previous

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<sup>1</sup>We 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.

determinations and withhold or release the information in accordance with those rulings; 2) to the extent the individuals whose information is at issue timely requested confidentiality under section 552.024 of the Government Code, the city must generally withhold the marked information under section 552.117(a)(1) of the Government Code but may withhold the marked cellular telephone number only if a governmental body does not pay for the cellular telephone service; 3) to the extent the e-mail addresses at issue are not the personal e-mail addresses of city officials or employees and subsection (c) does not apply, the city must withhold the e-mail addresses at issue under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their release; and 4) the city must release the remaining information.. We have no indication the law, facts, or circumstances upon which the prior ruling was based have changed. Accordingly, to the extent the requested information is identical to the information previously requested and ruled upon, the city must continue to rely on Open Records Letter No. 2017-11238 as a previous determination, and withhold or release the previously ruled upon information in accordance with it. *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 a 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 current request is not encompassed by the prior ruling, we will consider the exceptions you raise.

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[.]

Gov't Code § 552.022(a)(1). Some of the submitted information consists of completed evaluations that are subject to section 552.022(a)(1). The city must release the information at issue pursuant to subsection 552.022(a)(1) unless it is excepted from disclosure under section 552.108 of the Government Code or expressly made confidential under the Act or other law. Although you raise section 552.103 of the Government Code for the information at issue, this section is a discretionary exception to disclosure 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); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, none

of the information subject to section 552.022(a)(1), which we have marked, may be withheld under section 552.103, and the city must release it. However, we will consider the city's arguments for the information not subject to section 552.022.

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). 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 assert the submitted information not subject to section 552.022 of the Government Code is excepted under section 552.103 of the Government Code. 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 submitted information not subject to section 552.022 under section 552.103 of the Government Code.

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). Gov’t Code § 552.137(a)-(c). Section 552.137 does not apply to an institutional e-mail address, the general e-mail address of a business, an e-mail address of a person who has a contractual relationship with a governmental body, an e-mail address of a vendor who seeks to contract with a governmental body, an e-mail address maintained by a governmental entity for one of its officials or employees, or an e-mail address provided to a governmental body on a letterhead. *See id.* § 552.137(c). We are unable to determine whether the e-mail address within the submitted information, which is located within e-mails communicating official business of the city, belongs to a city official or employee. Further, we are unable to determine whether the e-mail address at issue is excluded by subsection (c). Thus, we rule conditionally. To the extent the e-mail address within the submitted information is the personal e-mail address of a city official or employee, or to the extent subsection (c) applies, this information is not subject to section 552.137 and may not be withheld on that basis. *See Austin Bulldog v. Leffingwell*, 490 S.W.3d 240 (Tex. App.—Austin 2016, no pet.) (holding personal e-mail addresses of government officials used to conduct official government business are not e-mail addresses of “members of the public” for purposes of Gov’t Code § 552.137(a)). However, to the extent the e-mail address within the submitted information is not the personal e-mail address of a city official or employee and subsection (c) does not apply, this information is subject to section 552.137 and must be withheld under section 552.137, unless the owner of the e-mail address affirmatively consents to its release.

In summary, to the extent the requested information is identical to the information previously requested and ruled upon, the city must continue to rely on Open Records Letter No. 2017-11238 as a previous determination, and withhold or release the previously ruled upon information in accordance with it. To the extent the e-mail address within the submitted information is the personal e-mail address of a city official or employee, or to the extent subsection (c) applies, this information is not subject to section 552.137 and may not be withheld on that basis. 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](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,

A handwritten signature in black ink, appearing to read 'Meredith L. Coffman', with a long, sweeping horizontal line extending to the right.

Meredith L. Coffman  
Assistant Attorney General  
Open Records Division

MLC/bw

Ref: ID# 660154

Enc. Submitted documents

c: Requestor  
(w/o enclosures)