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ATTORNEY GENERAL OF TEXAS

June 16, 2017

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

OR2017-13406

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# 662422.

The City of Hutto (the "city"), which you represent, received a request for a former city official's personnel file. You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.117, 552.119, 552.130, 552.136, 552.137, and 552.147 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

¹Although you also raise section 552.1175 of the Government Code for information at issue, we note section 552.117 of the Government Code is the proper exception to raise for information the city holds in an employment capacity. *See* Gov't Code §§ 552.117, .1175.

²We 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.

Initially, we note the submitted information contains a peace officer's Texas Commission on Law Enforcement ("TCOLE") identification number.³ 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:
 - (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 TCOLE'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.

Next, we note some of the remaining information is subject to section 552.022 of the Government Code, which provides in pertinent 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:

³The Texas Commission on Law Enforcement Officer Standards and Education was renamed the Texas Commission on Law Enforcement by the 83rd Legislature. See Act of May 6, 2013, 83rd Leg., R.S., ch. 93, § 1.01, 2013 Tex. Gen. Laws 174, 174.

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by [s]ection 552.108 [of the Government Code];

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body; [and]

...

(17) information that is also contained in a public court record[.]

Id. § 552.022(a)(1), (3), (17). The remaining information includes completed evaluations subject to section 552.022(a)(1). The city must release this information pursuant to section 552.022(a)(1) unless it is excepted from disclosure under section 552.108 of the Government Code or is made confidential under the Act or other law. *See id.* § 552.022(a)(1). Additionally, the remaining information includes information in an account, contract, or voucher relating to the receipt or expenditure of funds by the city that is subject to section 552.022(a)(3), as well as information contained in a public court record subject to section 552.022(a)(17). This information must be released unless it is made confidential under the Act or other law. *See id.* § 552.022(a)(3), (17).

You seek to withhold the information at issue under section 552.103 of the Government Code. However, section 552.103 is discretionary in nature 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); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the city may not withhold the information subject to section 552.022 of the Government Code, which we have marked, under section 552.103 of the Government Code. Further, although you assert the information subject to section 552.022(a)(17) is excepted from disclosure under section 552.101 of the Government Code in conjunction with common-law privacy, we note information filed with a court is not protected by common-law privacy. *See Star-Telegram v. Walker*, 834 S.W.2d 54 (Tex. 1992) (common-law privacy not applicable to court-filed document). As such, the city may not withhold the information subject to section 552.022(a)(17) of the Government Code under section 552.101 of the Government Code in conjunction with common-law privacy. However, we will consider the argument under section 552.101, which protects information made confidential under law, in conjunction with common-law privacy for the information that is not subject to section 552.022(a)(17) of the Government Code. We will also address your assertion of sections 552.117 and 552.130 of the Government Code, which make information confidential

under the Act, to the information subject to section 552.022.⁴ Additionally, we will consider your arguments against disclosure for the information not subject to section 552.022.

Section 552.103 of the Government Code provides, in part, the following:

(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 [s]ubsection (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 that claims an exception to disclosure under section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate 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 the pending or anticipated litigation. *See 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 provide this office "concrete evidence showing the claim that litigation may ensue 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

⁴We note section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act. *See* Gov't Code § 552.147(b).

the governmental body from an attorney for a potential opposing party.⁵ Open Records Decision No. 555 (1990); *see also* 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). We also note the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. *See* Open Records Decision No. 361 (1983). This office has concluded that litigation was reasonably anticipated when the potential opposing party filed a complaint with the Equal Employment Opportunity Commission (the “EEOC”). *See* Open Records Decision No. 336 (1982).

You assert, prior to its receipt of the instant request, the city reasonably anticipated litigation relating to charges of discrimination, retaliation, and wrongful termination made against a city official. You state, and provide documentation showing, prior to the district’s receipt of the instant request for information, three former city employees filed discrimination claims against the city with the EEOC. Furthermore, you state, and provide documentation showing, prior to the city’s receipt of the present request, the city received a litigation hold notice from the attorney representing the individuals who filed the EEOC complaints informing the city of its duty preserve all evidence relevant to the claims at issue. Based on your representations and our review, we find the city reasonably anticipated litigation when it received the request for information. We also find the city has established the information at issue is related to the anticipated litigation for purposes of section 552.103(a) of the Government Code. Therefore, we find the city may withhold the remaining information not subject to section 552.022 of the Government Code under section 552.103(a) of the Government Code.⁶

We note that once the 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. Open Records Decision No. 349 at 2 (1982). We also note that the applicability of section 552.103(a) ends when the litigation is concluded. Attorney General Opinion MW-575 (1982) at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2.

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

⁵In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

⁶As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

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 or embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. However, this office has noted the public has a legitimate interest in information that relates to public employees and their conduct in the workplace. *See, e.g.*, Open Records Decision Nos. 562 at 10 (1990) (personnel file information does not involve most intimate aspects of human affairs but in fact touches on matters of legitimate public concern), 470 at 4 (1987) (job performance does not generally constitute public employée's private affairs), 444 at 3 (1986) (public has obvious interest in information concerning qualifications and performance of government employees), 405 at 2 (1983) (manner in which public employee's job was performed cannot be said to be of minimal public interest), 329 (1982) (reasons for employee's resignation ordinarily not private). Upon review, we find you have failed to demonstrate the remaining information at issue is highly intimate or embarrassing and not of legitimate public concern. Therefore, the city may not withhold the remaining information at issue under section 552.101 of the Government Code on that basis.

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). We note section 552.117(a)(1) is not applicable to a former spouse or the fact that a governmental employee has been divorced. Whether a particular piece of 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). Therefore, a governmental body must withhold information under section 552.117 on behalf of a current or former official or employee only if the individual made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. You have submitted an election form for the individual whose information is at issue in which this individual timely elected confidentiality of his information. Upon review, we find some of the information you have marked is not information that is subject to section 552.117. This information, which we have marked for release, may not be withheld under section 552.117. Accordingly, with the exception of the information we have marked for release, the city must withhold the information you have marked and we have marked for withholding relating to this individual under section 552.117(a)(1) of the Government Code.

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* Gov't Code § 552.130. Accordingly, the city must withhold the motor vehicle record information you have marked under section 552.130 of the Government Code.

In summary, the submitted TCOLE identification number is not subject to the Act and need not be released to the requestor. The city may withhold the remaining information not subject to section 552.022 of the Government Code, which the city must release, under section 552.103(a) of the Government Code. In releasing the information subject to section 552.022 of the Government Code, with the exception of the information we have marked for release, the city must withhold the information you have marked and we have marked for withholding under section 552.117(a)(1) of the Government Code, as well as the motor vehicle record information you have marked under section 552.130 of the Government Code.

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,



Cole Hutchison
Assistant Attorney General
Open Records Division

CH/sb

Ref: ID# 662422

Enc. Submitted documents

c: Requestor
(w/o enclosures)