



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

January 16, 2019

Mr. Neal Falgoust  
Assistant City Attorney  
City of Austin  
P.O. Box 1088  
Austin, Texas 78767-8828

OR2019-01462

Dear Mr. Falgoust:

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# 746423 (PIR# X001220, X001221, X001222).

The City of Austin (the "city") received three requests from the same requestor for (1) fifteen categories of information pertaining to a named individual, (2) all communications and information pertaining to the requestor, and (3) all communications and information of a named individual pertaining to the requestor. You state you have no information responsive to portions of the requests.<sup>1</sup> You inform us you have released some information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.103, 552.107, 552.108, and 552.116 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.<sup>2</sup>

Initially, we note some of the requested information may have been the subject of a previous request for information, in response to which this office issued Open Records Letter

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<sup>1</sup>The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983).

<sup>2</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 those records contain substantially different types of information than that submitted to this office.

No. 2011-02855 (2011). In that ruling, we determined the city may withhold certain submitted e-mails as attorney-client privileged under section 552.107 of the Government Code, but the remaining information must be released to the extent the non-privileged e-mails existed separate and apart from their respective e-mail string. We also held the city was required to withhold e-mail addresses pursuant to section 552.137 of the Government Code. We have no indication the law, facts, or circumstances on which the prior ruling was based have changed. Accordingly, the city may continue to rely on Open Records Letter No. 2011-02855 as a previous determination and withhold or release the identical information in accordance with that ruling. *See* Open Records Decision No. 673 at 6-7 (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 information is or is not excepted from disclosure). However, we will address the city's arguments against disclosure for information not previously ruled upon.

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). We note portions of the submitted information consist of completed investigations. This information is subject to section 552.022(a)(1). The city must release the information subject to section 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. *See id.* 552.022(a)(1). 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 may be withheld under section 552.103. However, as information subject to section 552.022(a)(1) may be withheld under section 552.108 of the Government Code, we will consider your argument under 552.108 for the information at issue. Further, we will consider your arguments under sections 552.103, 552.107, 552.108, and 552.116 of the Government Code for the information not subject to section 552.022(a)(1) of the Government Code.

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 claiming section 552.103 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).*

The city states, and provides documentation showing, prior to its receipt of the instant requests, a lawsuit styled *Margaret Haule v. The City of Austin, Texas and Elizabeth Cary Clerico Grace*, Cause No. D-1-GN-18-003628, was filed and is currently pending against the city in the 261st United States District Court in Travis County, Texas. Therefore, we agree litigation was pending on the date the city received the present request for information. The city also states the information at issue pertains to the substance of the lawsuit claims. Based on these representations and our review, we find portions of the information at issue are related to the pending litigation. Therefore, we conclude the city may withhold the information we marked under section 552.103 of the Government Code.<sup>3</sup>

Generally, however, 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. *See Open Records Decision Nos. 349 (1982), 320 (1982).* Thus, information that has either been obtained from or provided to all parties to the pending litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. *See Attorney General Opinion MW-575 (1982); see also Open Records Decision No. 350 (1982).*

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<sup>3</sup>As our ruling is dispositive, we need not address the city's remaining arguments against disclosure of this information.

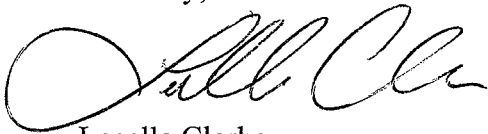
Section 552.108(a)(2) of the Government Code excepts from disclosure information concerning an investigation that did not result in conviction or deferred adjudication. *See* Gov't Code § 552.108(a)(2). A governmental body claiming section 552.108(a)(2) must demonstrate the requested information relates to a criminal investigation that has concluded in a final result other than 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). The city states the remaining information relates to closed criminal investigations conducted by the Austin Police Department that did not result in conviction or deferred adjudication. Based on this representation and our review, we agree section 552.108(a)(2) is applicable to the information the city marked. Thus, the city may withhold the information it marked under section 552.108(a)(2) of the Government Code.<sup>4</sup>

In summary, the city may continue to rely on Open Records Letter No. 2011-02855 as a previous determination and withhold or release the identical information in accordance with that ruling. The city may withhold the information we marked under section 552.103 of the Government Code. The city may withhold the information it marked under section 552.108(a)(2) 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](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,



Lecelle Clarke  
Attorney  
Open Records Division

LC/eb

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<sup>4</sup>As our ruling is dispositive, we need not address the city's remaining arguments against disclosure of this information.

Ref: ID# 746423

Enc. Submitted documents

c: Requestor  
(w/o enclosures)