



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 20, 2019

Ms. Rebekah A. Wendt
Assistant City Attorney
City of Houston
P.O. Box 368
Houston, Texas 77001-0368

OR2019-23157

Dear Ms. Wendt:

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# 781349 (GC No. 25969).

The City of Houston (the "city") received a request for certain categories of information pertaining to specified payroll estimates created during a certain period of time. You claim the submitted information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information. We have also received and considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit written comments regarding why information should or should not be released).

Initially, we note some of the information you have submitted, which we have marked, is not responsive to the request because it does not consist of the specific information requested. This ruling does not address the public availability of any information that is not responsive to the request, and the city is not required to release such information in response to this request.¹

Next, we note the requestor claims the city failed to comply with the procedural requirements of the Act in requesting a ruling from this office. Section 552.301 of the

¹ As we are able to make this determination, we need not address your argument against disclosure of this information.

Government Code prescribes the procedures a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(b) of the Government Code, a governmental body must ask for the attorney general's decision and state the exceptions that apply within ten business days after receiving the request. *See id.* § 552.301(b). We note the Act requires a request for public information sent by electronic mail or facsimile transmission be submitted to the officer for public information or that person's designee. *Id.* § 552.301(c). In this instance, the city submits documentation demonstrating the requestor first submitted his request for information by electronic mail to the city's Administration and Regulatory Affairs Department, which you inform us is not the designated public information office for the city, on May 7, 2019. *See id.* (written request made through e-mail must be sent to governmental body's officer for public information, or officer's designee, in order to trigger deadlines provided by Act). Thus, we find the requestor's e-mailed request of May 7, 2019, was not a valid request for purposes of the Act, and the city did not violate the procedural requirements of section 552.301 of the Government Code with respect to that request. The city informs us the current request was received by the city on May 30, 2019.² Accordingly, the ten-business-day deadline for requesting a ruling from this office was June 13, 2019. The city submitted the information required by section 552.301(b) in an envelope postmarked June 12, 2019. *See id.* § 552.308(a)(1) (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Therefore, we find the city complied with the procedural requirements of section 552.301(b) of the Government Code in requesting this decision.

Next, we note the majority of the responsive information is subject to section 552.022(a) of the Government Code, which provides, in pertinent part:

[T]he following categories of information are public and not excepted from required disclosure unless made confidential under this chapter or other law:

...

(2) the name, sex, ethnicity salary, title, and dates of employment of each employee and officer of a governmental body[.]

Id. § 552.022(a)(2). The information at issue consists of names, salaries, and titles of city employees subject to section 552.022(a)(2). The city must release this information pursuant to section 552.022(a)(2), unless it is made confidential under the Act or other law. *See id.* Although the city raises section 552.103 of the Government Code for this information, 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); 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 any

² The city informs this office that the mayor's office is the custodian of all city records.

of the information subject to section 552.022(a)(2), which we indicated, under section 552.103. As you raise no further exceptions to disclosure of this information, the city must release the information we indicated pursuant to section 552.022(a)(2) of the Government Code. However, we will address the city's argument against disclosure of the remaining responsive information.

Section 552.103 of the Government Code provides as follows:

(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 to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing (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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

The city states, and provides documentation showing, a lawsuit styled *Houston Police Officers' Union v. City of Houston*, Cause No. 2018-85465, was pending against the city in the 157th Judicial District Court of Harris County, Texas, when it received the instant request for information. The city informs us the complaint at issue was dismissed prior to the date the city received the instant request for information. However, the city states an appeal of the dismissal was filed on May 15, 2019. The city further states the information at issue directly relates to the pending litigation. Based on these representations, the submitted documentation, and our review of the submitted information, we find the city was party to pending litigation at the time it received the instant request, and the information at issue is related to the pending litigation for the purposes of section 552.103. Therefore, the city may withhold the information we marked under section 552.103(a) of the Government Code.

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. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing parties in the pending 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).

In summary, the city must release the responsive information we indicated pursuant to section 552.022(a)(2) of the Government Code. The city may withhold the responsive information we marked under section 552.103 of the Government Code.

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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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,



Emily Kunst
Assistant Attorney General
Open Records Division

EK/gw

Ref: ID# 781349

Enc. Submitted documents

c: Requestor
(w/o enclosures)