



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

December 6, 2019

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

OR2019-34398

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# 800408 (GC No. 26180).

The City of Houston (the "city") received a request for information pertaining to complaints made to the city's health department regarding two named establishments. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note some of the submitted information is not responsive to the present request because it was created after the date of the present request. This ruling does not address the public availability of the non-responsive information, which we have marked, and the city need not release it in response to this request.

Next, we note some of the responsive 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). The responsive information includes completed investigations that are subject to section 552.022(a)(1). The city must release the completed investigations, which we have marked, pursuant to section 552.022(a)(1) unless they are excepted from disclosure under section 552.108 of the Government Code or is made confidential under the Act or other law. *See id.* 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 responsive information subject to subsection 552.022(a)(1) may be withheld under section 552.103. However, the Texas Supreme Court has held the common-law informer's privilege is "other law" for the purpose of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328,336 (Tex. 2001); *Tex. Comm'n on Envtl. Quality v. Abbott*, No. GB-300417 (126th Dist. Ct, Travis County, Tex.). Thus, we will consider your argument under the common-law informer's privilege for the information at issue. Further, we will consider your arguments under section 552.103 for the responsive information not subject to section 552.022.

Section 552.103 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 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 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 provides documentation showing civil citation cases were pending before the Houston Municipal Court when the city received the instant request for information. You state the information at issue is related to the pending cases. Based on your representations, the submitted documentation, and our review of the information at issue, we find litigation was pending when the city received this request for information, and the information at issue is related to the pending litigation for the purposes of section 552.103. Therefore, we find the city may withhold the information that is not subject to section 552.022 of the Government Code, which we have marked, under section 552.103 of the Government Code.¹

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).

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 Code § 552.101. Section 552.101 encompasses information other statutes make confidential, such as section 81.046(b) of the Health and Safety Code, which provides as follows:

(b) Reports, records, and information relating to cases or suspected cases of diseases or health conditions are not public information under [the Act], and may not be released or made public on subpoena or otherwise except as provided by Subsections (c), (d), and (f).

Health & Safety Code § 81.046(b). In Open Records Decision No. 577 (1990), this office concluded any information acquired or created during an investigation under chapter 81 of the Health and Safety Code is confidential and may not be released unless an exception set out in the statute applies. *See* ORD 577; Health & Safety Code § 81.046(b)-(d), (f). We note some of the submitted information relates to cases or suspected cases of food-borne illness, thus, section 81.046 governs the release of the information at issue. We understand none of the release provisions of section 81.046 are applicable. Accordingly, the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 81.046(b) of the Health and Safety Code.²

¹As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

² As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

Section 552.101 of the Government Code also encompasses the common-law informer's privilege, which Texas courts have long recognized. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969). The informer's privilege protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority. *See Open Records Decision No. 208 at 1-2 (1978)*. The informer's privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." *Open Records Decision No. 279 at 1-2 (1981)* (citing 8 John H. Wigmore, *Evidence in Trials at Common Law*, § 2374, at 767 (J. McNaughton Rev. Ed. 1961)). The report must be of a violation of a criminal or civil statute. *See Open Records Decision Nos. 582 at 2 (1990)*, 515 at 4 (1988). However, witnesses who provide information in the course of an investigation but do not make a report of the violation are not informants for the purposes of claiming the informer's privilege. The privilege excepts the informer's statement only to the extent necessary to protect that informer's identity. *Open Records Decision No. 549 at 5 (1990)*. We note the informer's privilege does not apply where the informant's identity is known to the individual who is the subject of the complaint. *See ORD 208 at 1-2*.

The city states portions of the remaining responsive information identify complainants who reported possible violations of sections 10-451(b)(1), 20-25, and 47-741(a) of the city's Code of Ordinances to the city's Health and Human Services Department, which has the authority to enforce these provisions of the city's Code. You inform us a violation of these ordinances carries civil penalties. You also state the subjects of the complaints do not already know the identities of the informers. Upon review, we find the city has demonstrated the applicability of the common-law informer's privilege to some of the information at issue. Thus, the city may withhold the information we have marked under section 552.101 of the Government Code in conjunction with the common-law informer's privilege. However, we note the remaining responsive information does not identify an individual who reported a violation of law to the city for purposes of the informer's privilege, and thus, the remaining information may not be withheld under section 552.101 in conjunction with the common-law informer's privilege.

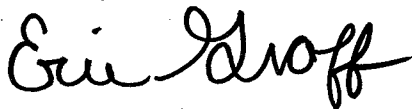
In summary, the city may withhold the information that is not subject to section 552.022 of the Government Code, which we have marked, under section 552.103 of the Government Code. The city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 81.046(b) of the Health and Safety Code. The city may withhold the information we have marked under section 552.101 of the Government Code in conjunction with the common-law informer's privilege. The city must release the remaining responsive 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 <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,

A handwritten signature in black ink that reads "Erin Groff". The signature is written in a cursive style with a large, stylized "E" and "G".

Erin Groff
Assistant Attorney General
Open Records Division

EMG/be

Ref: ID# 800408

Enc. Submitted documents

c: Requestor
(w/o enclosures)