



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

November 9, 2020

Mr. Jim D. McLeroy
City Attorney
City of Sulphur Springs
201 North Davis Street
Sulphur Springs, Texas 75482

OR2020-28138

Dear Mr. McLeroy:

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# 852718.

The City of Sulphur Springs (the "city") received a request for information pertaining to a particular incident and a specified address. You claim the submitted information is excepted from disclosure under section 552.103 of the Government Code. We have considered your claimed exception and reviewed the submitted information.

Initially, we note some of the submitted information was the subject of previous requests for information, in response to which this office issued Open Records Letter Nos. 2020-11937 (2020) and 2020-15940 (2020). In Open Records Letter No. 2020-11937, we ruled the city (1) must withhold the submitted dates of birth under section 552.101 of the Government Code in conjunction with common-law privacy; (2) must withhold the submitted driver's license number and issuing state under section 552.130 of the Government Code; and (3) must release the remaining information. In Open Records Letter No. 2020-15940, we ruled the city (1) may, to the extent the submitted information is identical to the information previously requested and ruled upon by this office, rely on Open Records Letter No. 2020-11937 as a previous determination and withhold or release the identical information in accordance with that ruling; (2) must withhold all public citizens' dates of birth under section 552.101 of the Government Code in conjunction with common-law privacy; (3) must withhold certain motor vehicle record information under section 552.130 of the Government Code; and (4) must release the remaining information. Section 552.007 of the Government Code provides if a governmental body voluntarily

releases information to any member of the public, the governmental body may not withhold such information from further disclosure, unless its public release is expressly prohibited by law or the information is confidential by law. *See* Gov't Code § 552.007; Open Records Decision No. 518 at 3(1989); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). Accordingly, pursuant to section 552.007, the city may not now withhold the previously released information, unless its release is expressly prohibited by law or the information is confidential by law. We note section 552.103 does not prohibit the release of information or make information confidential. *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 section 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), 177 at 3 (1977) (statutory predecessor to Gov't Code § 552.108 subject to waiver). Thus, the city may not now withhold information this office previously ordered to be released under section 552.103. Further, we note the requestor in this instance is the authorized representative of an individual whose information may have been at issue in the previous rulings. Thus, the requestor has a right of access to his client's information pursuant to section 552.023 of the Government Code and it may not be withheld from him on the basis of section 552.101 in conjunction with common-law privacy or section 552.130 of the Government Code. *See* Gov't Code § 552.023(a) (“[a] person or a person's authorized representative has a special right of access, beyond the right of the general public, to information held by a governmental body that relates to the person and that is protected from public disclosure by laws intended to protect that person's privacy interests”); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individuals request information concerning themselves). Accordingly, we find the circumstances have changed with respect to the information belonging to the requestor's client, and the city may not rely on Open Records Letter Nos. 2020-11937 and 2020-15940 as previous determinations with regard to that information. *See* Open Records Decision No. 673 at 7 8 (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 that information is or is not excepted from disclosure). Therefore, the city may not withhold the information belonging to the requestor's client under section 552.101 in conjunction with common-law privacy or in conjunction with section 552.130 of the Government Code in accordance with Open Records Letter Nos. 2020-11937 and 2020-15940 but instead must release this information to this requestor pursuant to section 552.023 of the Government Code. However, as to the remaining information that was the subject of the prior rulings, we have no indication the law, facts, and circumstances on which the prior rulings were based have changed. Thus, the city must continue to rely on Open Records Letter Nos. 2020-11937 and 2020-15940 as previous determinations and withhold or release the remaining information at issue in accordance with those rulings.¹ ORD 673.

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

Next, we note the city has redacted some of the submitted information. A governmental body that seeks to withhold requested information must submit to this office a copy of the information, labeled to indicate which exceptions apply to which parts of the copy, unless the governmental body has received a previous determination for the information at issue. Gov't Code § 552.301(a), (e)(1)(D). We understand the city has redacted motor vehicle record information pursuant to section 552.130(c) of the Government Code. *Id.* § 552.130(c)-(e) (governmental body allowed to redact motor vehicle record information without necessity of seeking attorney general decision but must notify requestor in accordance with section 552.130(e)). However, to the extent the submitted information is not subject to Open Records Letter Nos. 2020-11937 and 2020-15940, we note the city has not been authorized to withhold dates of birth without seeking a ruling from this office. *Id.* § 552.301 (a); ORD 673. As such, this information must be submitted in a manner that enables this office to determine whether the information comes within the scope of an exception to disclosure. In this instance, we can discern the nature of the remaining redacted information. In the future, however, the city should refrain from redacting any information it is not authorized to withhold in seeking an open records ruling. Failure to do so may result in the presumption the redacted information is public. *See* Gov't Code § 552.302.

Next, we note the submitted information includes police officers' body worn camera recordings. Body worn cameras are subject to chapter 1701 of the Occupations Code. Chapter 1701 provides the procedures a requestor must follow when seeking a body worn camera recording. Section 1701.661 provides, in relevant part, the following:

(a) A member of the public is required to provide the following information when submitting a written request to a law enforcement agency for information recorded by a body worn camera:

- (1) the date and approximate time of the recording;
- (2) the specific location where the recording occurred; and
- (3) the name of one or more persons known to be a subject of the recording.

Occ. Code § 1701.661(a). In this instance, the requestor does not provide the requisite information under section 1701.661(a). As the body worn camera recordings at issue were not properly requested pursuant to chapter 1701 of the Occupations Code, our ruling does not reach this information and they need not be released.² However, pursuant to section 1701.661(b), a "failure to provide all the information required by [s]ubsection (a) to be part of a request for recorded information does not preclude the requestor from making a future request for the same recorded information." *Id.* § 1701.661(b).

Next, we note some of the remaining information may be subject to section 552.022 of the

² As we are able to make this determination, we need not address your remaining argument against disclosure of this information.

Government Code, which 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 information at issue contains a completed criminal investigation and a completed internal affairs investigation subject to section 552.022(a)(1), which we have marked and indicated. This information must be released 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.* Although you assert the information at issue is excepted from disclosure under section 552.103 of the Government Code, this exception to disclosure is discretionary 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 section 552.103); Open Records Decision No. 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, none of the information subject to section 552.022(a)(1) may be withheld under section 552.103. However, as section 552.101 of the Government Code can make information confidential under the Act, we will consider the applicability of this exception to the information at issue.³ Further, we will consider your argument under section 552.103 for the information not subject to section 552.022.

Section 552.103 of the Government Code provides, in 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.

³ The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481, 480 (1987), 470 (1987).

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).

To establish that litigation is reasonably anticipated, a governmental body must provide this office with “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” See ORD 452 at 4. Whether litigation is reasonably anticipated must be determined on a case-by-case basis. See *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 the governmental body from an attorney for a potential opposing party.⁴ ORD 555; see Open Records Decision No. 518 at 5 (1989) (litigation must be “realistically contemplated”). On the other hand, this office has determined that 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). Further, 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. Open Records Decision No. 361 (1983).

The city states the requestor is an attorney representing an individual allegedly injured by a city police officer. The city has also submitted an official complaint filed by the individual against the office at issue. Further, the city states the individual has publicly threatened to file suit numerous times. Based on these representations, our review of the information at issue, and the totality of the circumstances, we determine the city has established it reasonably anticipated litigation prior to the date it received the request for information. We further find the information at issue is related to the anticipated litigation for purposes of section 552.103. Accordingly, we conclude the city may generally withhold the information not subject to 552.022(a)(1) of the Government Code under section 552.103 of the Government Code.

However, we note the information normally found on the front page of an offense or incident report is generally considered public. *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976); see Open Records Decision No. 127 (1976). This

⁴ In addition, this office has concluded litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, see Open Records Decision No. 336 (1982); 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).

office has stated basic information about a crime may not be withheld under section 552.103 of the Government Code even if it is related to the litigation. Open Records Decision No. 362 (1983). Thus, we find the basic offense information from the information at issue may not be withheld on the basis of section 552.103 of the Government Code. Therefore, with the exception of basic information, the city may withhold the information not subject to 552.022(a)(1) of the Government Code under section 552.103(a) of the Government Code.

We note, however, the purpose of section 552.103 of the Government Code is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to the litigation to obtain such information through discovery procedures. See ORD 551 at 4-5. Thus, 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). Further, the applicability of section 552.103(a) ends once the litigation has concluded. See Attorney General Opinion MW-575 (1982); see also Open Records Decision No. 350 (1982).

Section 552.101 of the Government Code excepts “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t 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 and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. See Open Records Decision No. 455 (1987). The Third Court of Appeals has concluded public citizens’ dates of birth are protected by common-law privacy pursuant to section 552.101. See *Paxton v. City of Dallas*, No. 03-13-00546-CV, 2015 WL 3394061, at *3 (Tex. App.—Austin May 22, 2015, pet. denied) (mem. op.). We note the requestor has a right of access to his client’s date of birth pursuant to section 552.023 of the Government Code. See Gov’t Code § 552.023(a); ORD 481 at 4. Upon review, we find some of the remaining information satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, the city has failed to demonstrate any of the remaining information is highly intimate or embarrassing and not of legitimate concern to the public. Therefore, the city may not withhold any of the remaining information under section 552.101 in conjunction with common-law privacy.

In summary, with the exception of the information that must be released to this requestor pursuant to section 552.023 of the Government Code, the city must continue to rely on Open Records Letter Nos. 2020-11937 and 2020-15940 as previous determinations and withhold or release the information at issue in accordance with those rulings. As the body worn camera recordings at issue were not properly requested pursuant to chapter 1701 of the Occupations Code, our ruling does not reach this information and it need not be

released. With the exception of basic information, the city may withhold the information that is not subject to section 552.022 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 common law privacy. The city must release the remaining information.⁵

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,

Erin Groff
Assistant Attorney General
Open Records Division

EMG/rm

Ref: ID# 852718

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁵ We note the requestor has a right of access to some of the information being released. *See* Gov't Code § 552.023(a); ORD 481 at 4. Thus, the city must again seek a decision from this office if it receives another request for the same information from another requestor.