



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

January 7, 2022

Mr. Omar Ochoa
City Attorney
City of Edinburg
P.O. Box 1079
Edinburg, Texas 78540

OR2022-00580

Dear Mr. Ochoa:

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# 924566 (ORR# P001141-100521).

The City of Edinburg (the "city") received a request for information pertaining to a named individual. You claim the submitted information is excepted from disclosure under sections 552.103 and 552.137 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

Initially, 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, as follows:

[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[.]

Id. § 552.022(a)(1). The submitted information includes a completed investigation that is subject to section 552.022(a)(1). The city must release the completed investigation pursuant to section 552.022(a)(1) unless it is excepted from disclosure under section

¹ We understand you to raise section 552.137 of the Government Code based on your markings.
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552.108 of the Government Code or is made confidential under the Act or other law. *See id.* Although the city seeks to withhold the information subject to section 552.022 of the Government Code under section 552.103 of the Government Code, this section 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, which we marked, under section 552.103 of the Government Code. However, because sections 552.117 and 552.137 of the Government Code make information confidential under the Act, we will consider the applicability of these exceptions for the information at issue.² Further, we will consider the city's argument under section 552.103 for the information not subject to section 552.022.

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 request, a lawsuit styled *Torres v. City of Edinburg*, Cause No. C-1728-21-C, was filed and is currently pending against the city in the 139th Judicial District Court of Hidalgo 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

² 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 (1987), 480 (1987), 470 (1987).

substance of the lawsuit claims. Based on these representations and our review, we find the information at issue is related to the pending litigation. Therefore, we conclude the city may withhold the information we marked under section 552.103 of the Government Code.

Generally, however, once information has been obtained by all parties to the litigation though 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).

We understand the city will withhold e-mail addresses subject to section 552.137 of the Government Code pursuant to Open Records Decision No. 684.³ Section 552.137 of the Government Code excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body[,]” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). Gov’t Code § 552.137(a)-(c). We understand the city seeks to withhold the private e-mail address of public officials who used their private e-mail addresses to conduct official government business. However, in *Austin Bulldog v. Leffingwell*, 490 S.W.3d 240 (Tex. App.—Austin 2016, no pet.), the court concluded section 552.137 does not except from disclosure the private e-mail addresses of government officials who use their private e-mail addresses to conduct official government business. *Id.* at 250. Therefore, we find the city has failed to demonstrate the e-mail addresses at issue are excepted from disclosure under section 552.137 of the Government Code, and the city may not withhold them on that ground.

Section 552.117(a)(2) of the Government Code excepts from public disclosure the home address, home telephone number, emergency contact information, and social security number of a current or honorably retired peace officer, as well as information that reveals whether the current or honorably retired peace officer has family members, regardless of whether the current or honorably retired peace officer complies with sections 552.024 and 552.1175 of the Government Code. *See* Gov’t Code §§ 552.117(a)(2); 552.003(1-b) (defining “honorably retired” for purposes of the Act). We note, for purposes of section 552.117, “family member” means a spouse, minor child, or adult child who resides in the person’s home. *See id.* § 552.117(c) (providing that “family member” has meaning assigned by Fin. Code § 31.006(d)). Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. In this instance, however, it is unclear whether the individual whose information is at issue is a current or honorably retired peace officer as defined by article 2.12. If the individual at issue is a current or honorably retired peace officer as defined by article 2.12, then the city must withhold the information we marked under section 552.117(a)(2) of the Government Code. Conversely, if the individual at issue is not a current or honorably retired peace officer as defined by article 2.12, the information at issue may not be withheld under section 552.117(a)(2) of the Government Code.

³ Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain information without the necessity of requesting an attorney general decision.

If the individual at issue is not a current or honorably retired peace officer, then the individual's personal information may be subject to section 552.117(a)(1) of the Government Code, which excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former employee of a governmental body who requests this information be kept confidential under section 552.024. Gov't Code § 552.117(a)(1). 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). The city may only withhold the information at issue under section 552.117(a)(1) if the individual at issue elected confidentiality under section 552.024 prior to the date on which the request for this information was made. If the individual at issue is not a current or honorably retired peace officer as defined by article 2.12 of the Code of Criminal Procedure but timely requested confidentiality pursuant to section 552.024, the city must withhold the information we marked under section 552.117(a)(1). However, if the individual at issue did not timely request confidentiality pursuant to section 552.024, the city may withhold any of the information at issue under section 552.117(a)(1).

In summary, the city may withhold the information we marked under section 552.103 of the Government Code. If the individual at issue is a current or honorably retired peace officer as defined by article 2.12, then the city must withhold the information we marked under section 552.117(a)(2) of the Government Code. If the individual at issue is not a current or honorably retired peace officer as defined by article 2.12 of the Code of Criminal Procedure but timely requested confidentiality pursuant to section 552.024, the city must withhold the information we marked under section 552.117(a)(1). The city must release the remaining information pursuant to section 552.022(a)(1) 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 <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,

Joseph Hoggatt
Assistant Attorney General
Open Records Division

JWH/jm

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Enc. Submitted documents

c: Requestor
(w/o enclosures)