



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

July 27, 1994

Ms. Maria Angela Flores Beck
Attorney At Law
2014 Oak Ridge Road
P.O. Box 10
La Grange, Texas 78945-0010

OR94-417

Dear Ms. Beck:

As counsel for the City of La Grange (the "city"), you ask whether certain information is subject to required public disclosure under the Texas Open Records Act (the "act"), chapter 552 of the Government Code (former V.T.C.S. article 6252-17a).¹ Your request was assigned ID# 21385.

The city received a request for information relating to the dismissal of two former city employees and their personnel records. You have divided these records into two types: "personnel files" and "evidence files." You state that the evidence files were prepared or gathered by a city council member who conducted an investigation into the alleged wrongdoings perpetuated by the two employees. Some of the information has been made available to the requestor. The city claims, however, that the remaining information in these files is excepted from disclosure by sections 552.101, 552.102, 552.103 and 552.111 of the Government Code. We address your arguments in turn.

We first address your arguments that the complaint and related documents submitted for our review are excepted from disclosure by sections 552.101 and 552.102 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Section 552.102 excepts information in personnel files only if it meets the test under section 552.101 for common-law invasion of privacy. *Hubert v. Harte-Hanks Tex. Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.). Under common-law privacy, information may be withheld if

¹The Seventy-third Legislature has repealed article 6252-17a, V.T.C.S. Acts 1993, 73d Leg., ch. 268, § 46. The Open Records Act is now codified in the Government Code at chapter 552. *Id.* § 1. The codification of the Open Records Act in the Government Code is a nonsubstantive revision. *Id.* § 47.

(1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public.

Industrial Found. v. Texas Indus. Accident Bd., 540 S.W.2d 668, 685 (Tex. 1976), cert. denied, 430 U.S. 931 (1977). Although information relating to an investigation of a public employee may be embarrassing, the public generally has a legitimate interest in knowing about the job performance of public employees. See Open Records Decision Nos. 444 (1986); 405 (1983). In addition, this office has previously determined that the reasons surrounding a public employee's resignation or termination are of legitimate concern to the public and are not protected by common-law privacy. Open Records Decisions Nos. 444; 278 (1981). Moreover, the manner in which a public employee performs his or her job is public information. Open Records Decision No. 405. This applies to both current and former employees. Attorney General Opinion JM-229 (1984). Thus, much of the information is not excepted from disclosure under common-law privacy.²

We note, however, that the requested documents contain information concerning prescription drugs taken by these former employees. Common-law privacy does protect from disclosure the kinds of prescription drugs a person takes; therefore, this information must not be disclosed. Open Records Decision No. 455 (1987) at 5.

The city further claims that the employees' addresses and telephone numbers are protected on the basis of common-law privacy. Although such information is not ordinarily protected from disclosure by common-law privacy, Open Records Decision No. 169 (1977), the act allows public employees and former employees to elect whether the public has access to their home address and telephone number. See Gov't Code §§ 552.024, .117. The employee must state his or her choice, in writing, within 14 days of beginning employment; or after service ends, within 14 days of terminating employment. *Id.* § 552.024(b). If the employee or former employee chooses to prohibit access to this information, it must be withheld from disclosure under section 552.117. If the employee or former employee does not affirmatively elect to prohibit disclosure, this information will be subject to public disclosure. *Id.* § 552.024(d). We note, however, that if an employee has failed to prohibit disclosure of this information, he may not do so in response to an open records request for the information. See Open Records Decision No. 530 (1989). We are unable to determine from the information submitted for our review whether these former employees elected in writing to withhold their home

²The city also argues that the requested records discuss the allegations of wrongdoing against the former employees which were never proven and that this information might "tend to place or portray the two former employees in a bad light in the public eye." In Open Records Decision No. 579 (1990), however, this office specifically held that section 552.101 does not incorporate the common-law tort of false-light privacy. Rather, the privacy aspect of this provision excepts only private facts in accordance with the *Industrial Foundation* common-law privacy test. See *id.* at 7.

addresses and telephone numbers from required public disclosure. If they have not done so within the parameters of section 552.024, the information must be released.

The city further argues that section 552.101 prohibits disclosure of some of the information that is confidential by statutory law. Some of the requested documents include medical records that are specifically exempted from disclosure by the Medical Practice act. V.T.C.S. art. 4495b, § 5.08(b); *see also* Open Records Decision No. 482 (1987). Section 5.08(b) provides:

[R]ecords of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician are confidential and privileged and may not be disclosed except as provided in this section.

The submitted documents contain medical records that were created by a physician. Thus, these medical records must be withheld from public disclosure under section 552.101 in conjunction with the Medical Practice Act.

Furthermore, one of the records submitted for our review pertains to a polygraph examination and results that are confidential by law under section 19A(b) of article 4413(29cc), V.T.C.S. *See* Open Records Decision No. 430 (1985). The requestor does not appear to be associated with persons or agencies to which the polygraph information may be disclosed. *See* V.T.C.S. art. 4413(29cc), § 19A(c). You must therefore withhold the polygraph information pursuant to section 19A of article 4413(29cc).

The city also argues that the requested information is excepted from disclosure under section 552.101 in conjunction with the Texas Open Meetings Act (the "TOMA"), formerly article 6252-17, V.T.C.S., 1993, now codified in the Government Code at chapter 551.³ The city states that these documents were prepared and/or gathered by a city council member as part of the investigation of alleged wrongdoings by these two former city employees. These documents were presented to the city council in executive sessions. This office has held that an investigative report concerning a public employee is public information even if the document was discussed and considered in an executive session, unless the information is otherwise excepted from disclosure under the act. Open Records Decision No. 485 (1987) at 9-10. Therefore, the information at issue in this request is not excepted from disclosure by the mere fact that it was discussed in executive session.

You also contend that the informer's privilege under section 552.101 excepts from disclosure some of the information you have submitted for our review in Attachments B and D. The informer's privilege is in reality the government's privilege to protect the identities of individuals who furnish information regarding violations of the law to

³Acts 1993, 73d Leg., ch. 268, §§ 1, 46, 47 (repealing V.T.C.S. art. 6252-17 and codifying a nonsubstantive revision of the TOMA at Gov't Code ch. 551).

officers charged with enforcing the law. Open Records Decision Nos. 549 (1990) at 4-5; 515 (1988) at 2. The informer's privilege serves to encourage the flow of information to the government by protecting the identity of the informer. *Id.* The basis for the informer's privilege is to protect informers from the fear of retaliation and thus encourage them to cooperate with law enforcement efforts. *Id.* Although the privilege ordinarily applies to the efforts of law enforcement agencies, it can apply to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." Open Records Decision No. 285 (1981) at 1 (quoting Open Records Decision No. 279 (1981) at 1-2; *see also* Attorney General Opinion MW-575 (1982); Open Records Decision No. 515. However, once the identity of an informer is disclosed to those who would have cause to resent the communication, the privilege is no longer applicable. Open Records Decision No. 202 (1978).

We have examined the documents for which you claim the informer's privilege. The documents indicate that a city employee furnished information to a city council member regarding alleged violations of the law by the two former employees. Although the behavior complained of could be considered criminal in nature, such a violation of the law is not enforceable by the city council. Open Records Decision No. 515 at 5. The informer's privilege applies to communications made to administrative officers who have a duty to enforce specific laws, and not to administrative officials in general. *Id.* In this case, the city council has imposed administrative sanctions on the former employees in question, *i.e.*, termination of their employment with the city. However, the city council itself cannot criminally prosecute them for their actions. Moreover, you do not contend that the city council intends to refer the matter to a law enforcement agency for criminal prosecution. We therefore conclude that the requested information is not excepted from disclosure by the informer's privilege component of section 552.101.

The city next contends that section 552.103 excepts some of the requested information from disclosure because it relates to litigation. To secure the protection of section 552.103, a governmental body must demonstrate that the requested information relates to a pending or reasonably anticipated judicial or quasi-judicial proceeding to which the state, or political subdivision is or may be a party. Open Records Decision Nos. 588 (1991); 551 (1990); 452 (1986). However, once information has been obtained by all parties to the litigation, *e.g.*, through discovery or otherwise, no section 552.103 interests exists with respect to that information. Open Records Decision Nos. 349, 320 (1982). Furthermore, the applicability of section 552.103 ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

The city argues that section 552.103 excepts the information from disclosure because one of the two employees has threatened defamation litigation in the past and that the city fears it will be sued if it releases this information. The mere chance of litigation is not sufficient to trigger section 552.103. Open Records Decision Nos. 437 (1986); 331, 328 (1982). To demonstrate that litigation is reasonably anticipated, the governmental body must furnish evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. Open Records Decision

No. 518 (1989). The city has not provided evidence of reasonably anticipated litigation; thus, the city cannot withhold this information under section 552.103.

The city also claims that section 552.111 excepts part of the requested information from disclosure. Section 552.111 excepts "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ) and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. An agency's policymaking functions, however, do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. Open Records Decision No. 615 at 5-6. As the requested information relates to a personnel matter, *i.e.*, the termination of two city employees, we conclude that section 552.111 does not except it from required public disclosure.

In conclusion, the requested information must be released with the exception of the polygraph test results, drug prescription information, medical records, and the addresses and telephone numbers of employees who have elected to prohibit disclosure of the information within the parameters of section 552.024 of the Government Code. We have marked the records that the city must withhold pursuant to section 552.101 of the Government Code.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with an informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact our office.

Yours very truly,



Loretta R. DeHay
Assistant Attorney General
Open Government Section

LRD/JCH/AMS/rho

Ref.: ID# 21385

Enclosures: Marked documents

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(w/o enclosures)