



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

November 29, 1995

Mr. Brad Neighbor
First Assistant City Attorney
City of Garland
P.O. Box 469002
Garland, Texas 75046-9002

OR95-1296

Dear Mr. Neighbor:

You ask whether certain information is subject to required public disclosure pursuant to chapter 552 of the Government Code. Your request was assigned ID# 36939.

The City of Garland (the "city") received a request for all personal history statements and all pre-polygraph statements submitted within the last twenty-four months by all unsuccessful applicants for employment with the city's police department. You contend that the requested information is excepted from required disclosure pursuant to sections 552.101, 552.102, 552.103, and 552.122 of the Government Code.¹ You have submitted for our review a representative sample of the personal history statements, and a sample copy of the pre-polygraph statement.² Additionally, you have submitted for our

¹In a subsequent letter to this office, you discuss section 143.089 of the Local Government Code. We note, however, that the request in this instance is for information relating to unsuccessful applicants and not for information about employees of the police department. Consequently, section 143.089 is inapplicable.

²We note that the personal history statement that you have submitted for our review is a copy of the personal history statement that the requestor's client submitted with his employment application. You state that you have already released this document to the requestor. This particular statement is not responsive to the request for information since it was completed by a former employee. However, we will address it as if it were a blank statement for the purpose of considering your arguments.

In reaching our conclusion here, we assume that the representative sample of records submitted to this office is truly representative of the requested records as a whole. *See Open Records Decision Nos. 499 (1988), 497 (1988)* (where requested documents are numerous and repetitive, governmental body should submit representative sample; but if each record contains substantially different information, all must be submitted). This open records letter does not reach, and therefore does not authorize the withholding of

review a copy of the EEOC charge of discrimination under the Americans with Disabilities Act filed by the requestor's client, a former employee of the police department.

To secure the protection of section 552.103(a), 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 will be a party. Open Records Decision No. 551 (1990) at 5. A pending complaint before the EEOC indicates a substantial likelihood of litigation. Open Records Decision No. 336 (1982) at 1. In this case, you have demonstrated that you reasonably anticipate litigation; you provided this office with a copy of a discrimination complaint filed with the EEOC. You have not, however, demonstrated that the requested information relates to the complaint filed with the EEOC. The EEOC complaint reflects that the requestor's client is complaining of discrimination under the Americans with Disabilities Act. You do not indicate how the requested information relates to the subject matter of the complaint. Moreover, neither the complaint on its face nor the other correspondence you sent to this office indicates how the requested information relates to the complaint. Thus, this office cannot conclude that you have met your burden of demonstrating that the requested information relates to the complaint, and the city may not withhold the requested information pursuant to section 552.103.

You contend that the pre-polygraph statements sought by the requestor are excepted from required disclosure pursuant to section 552.122(b). Section 552.122(b) excepts from required public disclosure a test item developed by a licensing agency or governmental body. In reviewing the pre-polygraph statement submitted, we conclude that it does not consist of test items. See Open Records Decision No. 626 (1994) at 6. The pre-polygraph statement appears to be a questionnaire that an applicant completes before undergoing a polygraph examination. The pre-polygraph statement is not a test for purposes of section 552.122(b). The city may not withhold the pre-polygraph statements pursuant to section 552.122(b).

Section 552.102(a), excepts "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."³ Since the request is for information regarding unsuccessful applicants rather than police department

(Footnote continued)

any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

³We note that the open records laws were substantially amended by the Seventy-fourth Legislature. Act of May 29, 1995, 74th Leg., R.S., ch. 1035, 1995 Tex. Sess. Law Serv. 5127 (Vernon) (to be codified as amendments to Gov't Code ch. 552). Section 552.102 was amended during this last legislative session. See Act of May 29, 1995, 74th Leg., R.S., ch. 1035, § 6, 1995 Tex. Sess. Law Serv. 5130 (Vernon). This amendment applies only to a request for information that is received by a governmental body on or after September 1, 1995. *Id.* § 26(a), 1995 Tex. Sess. Law Serv. at 5142 (Vernon).

employees, section 552.102(a) is inapplicable in this instance. Additionally, we note that, in any event, the common-law privacy test under section 552.102 is the same as is applied under 552.101.

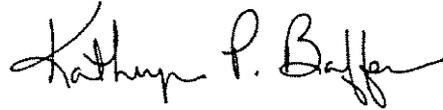
Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Information may be withheld under common-law privacy if it meets the criteria the Supreme Court of Texas articulated for section 552.101 in *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Under *Industrial Foundation*, a governmental body must withhold information on common-law privacy grounds only if the information is highly intimate or embarrassing *and* it is of no legitimate concern to the public. The right to privacy guaranteed under the United States Constitution protects two related interests: (1) the individual's interest in independence in making certain kinds of important decisions, and (2) the individual's interest in avoiding disclosure of personal matters. See Open Records Decision No. 478 (1987) at 4. The first interest applies to the traditional "zones of privacy," such as marriage, procreation, contraception, family relationships, child rearing, and education. See Open Records Decision No. 447 (1986) at 4. The second protects information by employing a balancing test that weighs the privacy interest of the individual against the public interest. Open Records Decision No. 478 at 4. It protects against "invasions of privacy involving the most intimate aspects of human affairs." Open Records Decision No. 455 (1987) at 5 (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490, 492 (5th Cir. 1985)).

Some of the responses contained in the pre-polygraph statements and the personal history statements are protected by privacy, and, therefore, are excepted from required public disclosure pursuant to section 552.101. The two statements also contain the applicants' social security numbers which may be excepted from public disclosure pursuant to section 552.101. Federal law may prohibit the disclosure of the social security numbers that appear on the documents submitted for our review. A social security number is excepted from required public disclosure under section 552.101 of the act in conjunction with 1990 amendments to the federal Social Security Act, § 42 U.S.C. § 405(c)(2)(C)(viii)(I), *if it was obtained or is maintained by a governmental body pursuant to any provision of law enacted on or after October 1, 1990*. See Open Records Decision No. 622 (1994). Based on the information you have provided, we are unable to determine whether the social security numbers at issue are confidential under this federal statute. We note, however, that section 552.352 of the Government Code imposes *criminal penalties for the release of confidential information*. Therefore, prior to releasing any social security number information, the city should ensure that the information is not confidential under this federal statute.

We conclude that the city must release all of the questions asked on both types of documents. We have marked the response information that is protected by privacy and that the city must withhold pursuant to section 552.101. The city must release the remaining information.

We are resolving this matter with this informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink that reads "Kathryn P. Baffes". The signature is written in a cursive style with a large initial 'K' and a long, sweeping underline.

Kathryn P. Baffes
Assistant Attorney General
Open Records Division

KPB/rho

Ref: ID# 36939

Enclosures: Marked documents

cc: Mr. Steven W. Collins
Attorney At Law
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(w/o enclosures)