



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

March 4, 1996

Ms. Margaret E. Barnes  
Neiman Barnes L.L.P.  
386 W. Main  
Lewisville, Texas 75067

OR96-0287

Dear Ms. Barnes:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 38520.

The City of Lewisville Police Department (the "city") received an open records request for information relating to an individual's application for employment. You state that you have provided the requestor with the majority of the requested information. You seek to withhold certain, limited information, however, and assert that sections 552.102, 552.103, and 552.111 of the Government Code except this information from required public disclosure. You have provided us with a copy of the information you seek to withhold.

Section 552.102(a) protects "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy . . . ." Section 552.102 is designed to protect public employees' personal privacy and does not apply to applicants for employment. Open Records Decision No. 455 (1987) at 8. Thus, this exception is not applicable in the situation at hand. Moreover, the scope of section 552.102 is very narrow. See Open Records Decision No. 336 (1982); see also Attorney General Opinion JM-36 (1983). The test for section 552.102 protection is the same as that for information protected by common-law privacy under section 552.101: the information must contain highly intimate or embarrassing facts about a person's *private* affairs such that its release would be highly objectionable to a reasonable person *and* the information must be of no legitimate concern to the public. *Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 550 (Tex. App.-Austin 1983, writ ref'd n.r.e.).

The information you wish to withhold relates to the background and the evaluation of an applicant for public employment. This information is not of a highly intimate or embarrassing nature and there exists a legitimate public interest in the background and qualifications of an applicant for public employment. *See, e.g.,* Open Records Decision Nos. 455 (1987) at 8-9 (background information relating to applicants for public employment not excepted under common law privacy); 257 (1980) at 2-3 (legitimate public interest in names and qualifications of applicants). Thus, the information you have submitted is not excepted under either sections 552.101 or 552.102.

You also argue that the information is excepted from disclosure under section 552.103 of the Government Code. Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state is or may be a party. A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *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 (1990) at 4. A governmental body must meet both prongs of this test for information to be excepted under 552.103.

In the situation at hand, the city has not shown that litigation is reasonably anticipated. You point out that the open records request received by the city was copied to an attorney and argue that this suggests that a lawsuit will be filed. Section 552.103, however, requires more than mere conjecture that litigation will ensue. Open Records Decision No. 518 (1989) at 5. The single fact that a request for information is made by a rejected applicant and copied to an attorney is not sufficient to show that litigation is reasonably anticipated for purposes of section 552.103. *See* Open Records Decision No. 361 (1983) at 2 (open records request sent by attorney on behalf of rejected applicant is not sufficient to invoke litigation exception). Thus, you may not withhold the requested information under section 552.103.

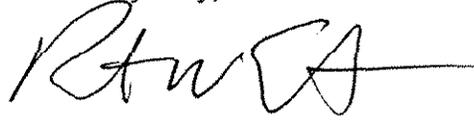
Finally, you assert that the information is excepted from disclosure under section 552.111 of the Government Code. Section 552.111 excepts from disclosure "only those internal agency communications consisting of advice, recommendations, opinions and other material reflecting the deliberative or policymaking processes of the governmental body at issue." Open Records Decision No. 615 (1993) at 5. This exception is intended to protect advice and opinions given on policy matters and to encourage frank and open discussions within an agency in connection with the agency's decision-making processes. *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 412 (Tex. App.--Austin 1992, no writ) (citing *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.--San Antonio 1982, writ ref'd n.r.e.)). The policymaking functions of an agency, however, do not encompass routine internal administrative and personnel matters. Open Records

Decision No. 615 (1993) at 5. Furthermore, section 552.111 does not except purely factual information from disclosure. *Id.*

Although the information you submitted generally consists of advice, opinion or recommendations, it relates to a specific personnel situation and is not about the policymaking functions of the city. Therefore, you may not withhold this information under section 552.111 and you must release this information to the requester.

We are resolving this matter with an 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 should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Robert W. Schmidt  
Assistant Attorney General  
Open Records Division

RWS/ch

Ref: ID# 38520

Enclosures: Submitted documents

cc: Mr. Charles E. Boykin  
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Fort Worth, Texas 76134-4414  
(w/o enclosures)