



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

May 31, 1996

Mr. Robert G. Gervais  
Assistant City Attorney  
City of Galveston  
Legal Department  
P.O. Box 779  
Galveston, Texas 77553-0779

OR96-0852

Dear Mr. Gervais:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 39309.

The City of Galveston Police Department (the "department") received a request for "all releasable documents generated, received, or maintained" by the department regarding a police officer. You contend that the requested information is protected from required public disclosure under sections 552.101, 552.102, 552.103, 552.107, and 552.117 of the Government Code. You state that all documents which the department objects to disclosing have been marked and that redacted copies of the information sent to this office have already been provided to the requestor.

We first address your assertion that sections 552.103 and 552.107 except from required public disclosure "all communications from the law firm" representing this officer in pending litigation.<sup>1</sup> Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation 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 is or may be a party. The department 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

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<sup>1</sup>We note that you have not raised sections 552.103 or 552.107 with regard to any other information responsive to the request.

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. You have provided this office with an Original Petition showing that this officer is involved in pending litigation. Our review of the communications from the law firm shows that these records are related to the subject of the pending litigation. Since you have shown the applicability of section 552.103(a), all communications from the law firm may be withheld from disclosure. As we rule that these communications may be withheld under section 552.103(a), we need not address whether these communications may also be withheld under section 552.107.

In making the determination that these communications from the law firm may be withheld from disclosure under section 552.103(a), we assume that these documents have not been seen by the opposing parties to the litigation. Generally, 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. Open Records Decision No. 349 (1982) at 2. If the opposing parties in the litigation have seen or had access to any of the information in these records, there would be no justification for now withholding those records from disclosure under section 552.103(a). Also, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982) at 3.

We next address your assertion that some of the requested information is excepted from required public disclosure under section 552.117(2) of the Government Code. Section 552.117(2) requires that the department withhold its peace officers' home addresses, telephone numbers, and social security numbers, and information that reveals whether the peace officer or former peace officer has family members. We find that the individual to whom the request relates is a peace officer as defined by Article 2.12, Code of Criminal Procedure, and, consequently, the department must withhold, pursuant to section 552.117(2), all the information you have marked and other documentation which reveals this information.

We next address your assertion that portions of the enclosed materials are excepted from required public disclosure under section 552.101 as information deemed confidential by judicial decisions which recognize a constitutional and common-law right to privacy. You also raise section 552.102, which protects "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." The protection of section 552.102 is the same as that of the common-law right to privacy under section 552.101. *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.). Consequently, we will consider the applicability of these two exceptions together.

In order to be within the common-law right to privacy, the information must (1) 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 (2) be of no legitimate concern to the public. *Industrial Found. of the South v. Texas Industrial Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), cert. denied, 430 U.S. 931 (1977).

Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently, and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 (1987) at 4. The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common-law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985), cert. denied, 474 U.S. 1062 (1986)).

With the exception of certain financial information, criminal history record information, and one document in the records submitted relating to the officer's membership in a private association, we find nothing in the documents submitted to this office which is "highly intimate or embarrassing," nor is any of the information within the "zones of privacy" nor does it concern the "most intimate aspects of human affairs."<sup>2</sup>

Financial information concerning an individual may be protected by a common-law right of privacy. See Open Records Decision Nos. 545 (1990), 523 (1989). You have submitted to this office documentation regarding retirement fund information and financial history information. Each of these items relate to personal investment decisions and personal financial information which this office has previously held is excepted under a common-law right to privacy. See Open Records Decision Nos. 545 (1990), 600 (1992). Therefore, these items must be withheld under section 552.101 of the Government Code. You also submitted the officer's W-4 form which is confidential under federal law and, therefore, also must be withheld under section 552.101. 26 U.S.C. § 6103; see also Open Records Decision No. 600 (1992) at 8-9.

The files submitted for our review also include criminal history record information ("CHRI") that appears to have been generated by the Texas Crime Information Center ("TCIC") or the National Crime Information Center ("NCIC"). The dissemination of CHRI obtained from the NCIC network is limited by federal law.

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<sup>2</sup>We found some information in the "Factual Findings" of the Work History and Traffic Record sections of the department's "Evidence Organizer and Report of Background Investigation" which may be considered "highly intimate and embarrassing." However, this office has previously held that a common-law right of privacy does not protect facts about a public employee's misconduct on the job or complaints made about his performance. See Open Records Decision Nos. 438 (1986), 230 (1979), 219 (1978). Therefore, this information may not be withheld from the requestor.

See 28 C.F.R. § 20.1; Open Records Decision No. 565 (1990) at 10-12. The federal regulations allow each state to follow its individual law with respect to CHRI it generates. Open Records Decision No. 565 (1990) at 10-12. Sections 411.083(b)(1) and 411.089(a) of the Government Code authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release the information except to another criminal justice agency for a criminal justice purpose, Gov't. Code § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from the Texas Department of Public Safety ("DPS") or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. See generally *id.* §§ 411.090 - .127. Thus, any CHRI generated by the federal government or another state may not be made available to the requestor except in accordance with federal regulations, see Open Records Decision No. 565 (1990), and any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F. In addition, as for CHRI generated within Texas, common-law privacy prohibits the disclosure of such information to anyone other than the subject of the information. See *Houston Chronicle Publishing Co. v. City of Houston*, 531 S.W.2d 177, 188 (Tex. Civ. App.--Houston [14th Dist.] 1975), writ *ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976); Open Records Decision Nos. 616 (1993), 565 (1990). Each of the documents you have marked which contain CHRI must be withheld from public disclosure under section 552.101 of the Government Code.

Thus, you must withhold under section 552.101 the financial information, criminal history record information, and the document relating to the officer's membership in a private association. However, none of the other information you have marked as information, which should be withheld under a constitutional or common-law right of privacy, may be withheld under section 552.101.

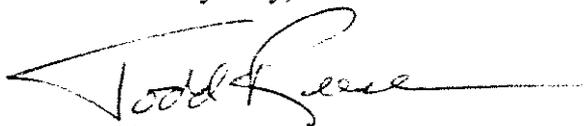
Finally, you contend that certain records relating to an internal affairs investigation which did not result in any disciplinary action taken is excepted from required public disclosure under section 552.101 under the holding of *City of San Antonio v. Texas Attorney General*, 851 S.W.2d 916 (Tex. App.--Austin 1993, writ *denied*). You state that the City of Galveston is a "civil service municipality." Therefore, section 143.089 of the Local Government Code is applicable. Section 143.089(g) provides:

A fire or police department may maintain a personnel file on a fire fighter or police officer employed by the department for the department's use, but the department may not release any information contained in the department file to any agency or person requesting information relating to a fire fighter or police officer. The department shall refer to the director or the director's designee a person or agency that requests information that is maintained in the fire fighter's or police officer's personnel file.

In *City of San Antonio*, the court addressed a request for information contained in a police officer's personnel file maintained by the city police department for its use and addressed the applicability of section 143.089(g) to that file. The records included in the personnel file related to complaints against the police officer for which no disciplinary action was taken. The court determined that section 143.089(g) made these records confidential. *City of San Antonio*, 851 S.W.2d at 949. Therefore, information maintained by the department which relates to an investigation that does not result in disciplinary action must be withheld from required public disclosure under section 552.101 of the act in conjunction with section 143.089(g) of the Local Government Code.<sup>3</sup>

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 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Todd Reese  
Assistant Attorney General  
Open Records Division

RTR/rho

Ref.: ID# 39309

Enclosures: Submitted documents

cc: Mr. Rick Klingbeil  
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(w/o enclosures)

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<sup>3</sup>We note that section 143.089(g) requires a police department who receives a request for information maintained in a file under section 143.089(g) to refer that person to the civil service director or the director's designee.

We also note that if an internal affairs investigation were to result in disciplinary action, then "any record, memorandum, or document relating to" the disciplinary action must be placed in the personnel files maintained by the civil service commission under section 143.089(a) and must be released by the civil service commission under section 143.089(f) of the Local Government Code.