



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

May 30, 1997

Ms. Lan P. Nguyen
Assistant City Attorney
City of Houston
P.O. Box 1562
Houston, Texas 77251-1562

OR97-1238

Dear Ms. Nguyen:

You have asked 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# 106084.

The City of Houston (the "city") received a request for various documents relating to the appeal of a Houston firefighter's indefinite suspension from the Houston Fire Department. The city asserts that certain documents are excepted from disclosure pursuant to sections 552.103(a) and 552.107(1) of the Government Code. Specifically, the city asserts that Exhibits 2 and 4 contain information that directly relates to the pending appeal and, thus, are excepted from disclosure under section 552.103(a). Further, the city contends that Exhibit 4 contains attorney-client communications which are excepted from public disclosure under section 552.107(1). We have considered the exceptions you raised and reviewed the submitted documents.

Section 552.103(a) of the Government Code reads as follows:

(a) Information is excepted from [required public disclosure] if it is information:

(1) relating to litigation of a civil or criminal nature or settlement negotiations, 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; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

To secure the protection of section 552.103(a), a governmental body must demonstrate that requested information "relates" to a pending or reasonably anticipated judicial or quasi-judicial proceeding. Open Records Decision No. 588 (1991). You argue that a civil service hearing is "litigation" for purposes of section 552.103(a).

This office has determined that a contested case under the Administrative Procedure Act (the "APA"), Government Code chapter 2001, constitutes "litigation." See Open Records Decision Nos. 588 (1991) (former State Board of Insurance proceeding), 301 (1982) (hearing before Public Utilities Commission). Civil service hearings are not subject to the APA, but to Local Government Code chapter 143.

In the situation at hand, the fire fighter has chosen to appeal to an independent third party hearing examiner under Local Government Code section 143.057. That provision provides that an independent third party hearing examiner has the same duties and powers as the Civil Service Commission (the "commission"), including the right to issue subpoenas. See Local Gov't Code § 143.057(f); see also *id.* § 143.010(d), (e) (commission subpoena authority). The commission is required to conduct the hearing fairly and impartially and render a just and fair decision. See *id.* § 143.010(g). The instant hearing is apparently also to be conducted pursuant to the American Arbitration Association Labor Arbitration Rules, which grant the arbitrator authority to judge the relevance of evidence offered. Thus, discovery takes place and evidence is presented at the hearing, and the independent third party hearing examiner hears and resolves questions of fact.

A district court may hear an appeal of a hearing examiner's award only on the grounds that the arbitration panel was without jurisdiction or exceeded its jurisdiction or that the order was procured by fraud, collusion or other unlawful means. *Id.* § 143.057(j); see also *id.* § 143.057(c) (decision to appeal to independent third party hearing examiner results in waiver of all rights to appeal to district court except as provided by Local Gov't Code § 143.057(j)). Thus, the district court does not serve as the forum for resolving the controversy on the basis of evidence; the civil service hearing so serves.

We believe that the procedures in place under Local Government Code chapter 143 and the arbitration rules should govern the release of information that relates to an appeal conducted pursuant to Local Government Code chapter 143. The documents labeled (d), (e), (f), (g), and (m) clearly relate to the pending appeal and, thus, may be withheld from disclosure based on section 552.103(a). You have not explained, nor is it apparent, how the remaining documents labeled (a), (b), (k), (l), and (s) relate to the appeal. Therefore, these documents may not be withheld pursuant to section 552.103(a).

We emphasize that once the opposing party in the pending appeal has seen or had access to any of the information in these documents, there is no justification for withholding that information pursuant to section 552.103(a). Open Records Decision Nos. 349 (1982), 320 (1982). In addition, the applicability of section 552.103(a) ends once the

appeal is concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

You also claim that the information contained in Exhibit 4 is excepted from disclosure pursuant to section 552.107(1) of the Government Code. Section 552.107(1) excepts information from disclosure if:

it is information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Civil Evidence, the Texas Rules of Criminal Evidence, or the Texas Disciplinary Rules of Professional Conduct.

Gov't Code § 552.107(1). In Open Records Decision No. 574 (1990), this office concluded that section 552.107(1) excepts from public disclosure only "privileged information," that is, factual information or requests for legal advice communicated by the client to the attorney and legal advice or opinion rendered by the attorney to the client. *Id.* at 7-8. Section 552.107(1) does not, however, protect purely factual information. *Id.* Having reviewed Exhibit 4, we find that it consists entirely of the attorney's legal advice or opinion. Thus, the department may withhold the entire document from disclosure under section 552.107(1).

We note that the documents labeled (a), (b), (k), (l), and (s) contain information that is confidential under the doctrine of common-law privacy. Section 552.101 of the Government Code excepts from disclosure information that is confidential by law such as the common-law right to privacy. Common-law privacy excepts from disclosure private facts about an individual. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information may be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 (1992) at 1. The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683. *See also* Open Records Decision No. 600 (1992) (personal financial information not relating to transaction with government protected by privacy). We have marked the confidential information that must be withheld based on common-law privacy.

We also note that these documents contain information that may be protected by section 552.117 of the Government Code. Section 552.117 protects from required public disclosure a public employee's former and current home addresses, home telephone number, and social security number, as well as information about the employee's family members. Open Records Decision Nos. 622 (1994), 455 (1987). This information is protected only if the employee requests that it be kept confidential pursuant to section 552.024 of the Government Code. The city may not, however, withhold this information for an employee

who made a request for confidentiality under section 552.024 after the request for information was made. Whether a particular piece of information is public must be determined at the time the request is made. Open Records Decision No. 550 (1990) at 5. We have marked the information that may be excepted from disclosure under § 552.117.¹

Finally, the documents labeled (a), (b), (k), (l), and (s) include medical records, access to which is governed by the Medical Practice Act (the "MPA"), article 4495b of Vernon's Texas Civil Statutes. Section 5.08(b) and (c) of the MPA provide:

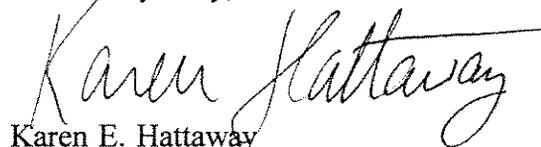
(b) Records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician are confidential and privileged and may not be disclosed except as provided in this section.

(c) Any person who receives information from confidential communications or records as described in this section other than the persons listed in Subsection (h) of this section who are acting on the patient's behalf may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

The medical records, which we have marked, may be released only as provided under the MPA. Open Records Decision No. 598 (1991).

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,



Karen E. Hattaway
Assistant Attorney General
Open Records Division

KEH/SAB/ch

Ref.: ID# 106084

Enclosures: Marked documents

¹We note that the social security numbers obtained or maintained by a governmental body pursuant to any provision of law enacted on or after October 1, 1990 are confidential under the 1990 amendments to the federal Social Security Act, § 42 U.S.C. § 405(c)(2)(C)(viii)(I). See Open Records Decision No. 622 (1994).

cc: Mr. L. Don Luttrell
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(w/o enclosures)

