



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

August 29, 1997

Ms. Barbara G. Heptig  
Assistant City Attorney  
City of Arlington  
P.O. Box 231  
Arlington, Texas 76004-0231

OR97-1979

Dear Ms. Heptig:

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# 108179.

The City of Arlington (the "city") received a request for a variety of information pertaining to the requestor's client, a reprimanded employee of the city. You state that some of the requested information has been released, however, the remaining responsive information is excepted from disclosure pursuant to sections 552.101, 552.103, 552.108, and 552.117 of the Government Code. We have considered the exceptions and arguments you have raised and have reviewed the submitted information.

Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the governing body is or may be a party. The city 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. The city must meet both prongs of this test for information to be excepted under section 552.103(a).

Litigation cannot be regarded as "reasonably anticipated" unless there is concrete evidence showing that the claim that litigation may ensue is more than mere conjecture. Open Records Decision Nos. 452 (1986), 331 (1982), 328 (1982). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision

Nos. 452 (1986), 350 (1982). This office has concluded that litigation is reasonably anticipated when an attorney's letter demands damages and threatens to file suit, Open Records Decision No. 551 (1990), and when an attorney makes a written demand for disputed payments and promises further legal action if they are not forthcoming. Open Records Decision No. 555 (1990).

You state that the requestor's client "is currently litigating with [the city] a disciplinary action taken against him in 1996," which has proceeded to the level of an administrative appeal hearing before an Administrative Law Judge. It appears that you are characterizing this process as an adversarial administrative hearing. However, a hearing of this type is, generally, not considered a "contested case" under the Administrative Procedure Act, Gov't Code §§ 2001.001 *et seq.* (1993), and we have not recognized such hearings as quasi-judicial proceedings under section 552.103(a). See Open Records Decision No. 588 (1991). We have reviewed a letter from the attorney representing the reprimanded employee in which the attorney challenges the grounds of the reprimand against the employee. In this instance, based on the administrative appeal hearing and the facts presented, we conclude the city has not met its burden in establishing that litigation is reasonably anticipated in this case. Therefore, the city may not withhold any of the submitted records pursuant to this exception at this time.

Section 552.108 excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime," and "[a]n internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution." Gov't Code § 552.108; see *Holmes v. Morales*, 924 S.W.2d 920 (Tex. 1996). You contend that "[t]he Internal Affairs investigative reports should be withheld under Section 552.108(b), . . . [because] Arlington Fire Department is a law enforcement agency." You claim that the personnel records of the police officer, including the internal affairs file, are excepted from disclosure by section 552.108. This office has determined that section 552.108 does not protect general personnel information from public disclosure. Open Records Decision No. 562 (1990) at 10 (applying predecessor statute). Moreover, the internal affairs documents submitted to this office appear to relate only indirectly to law enforcement or prosecution. See *Morales v. Ellen*, 840 S.W.2d 519, 526 (Tex. App.--El Paso 1992, writ denied) (where no criminal investigation or prosecution results from investigation of police officer for alleged misconduct, section 552.108 is inapplicable); Open Records Decision No. 350 (1982). Therefore, we conclude that the city may not withhold the responsive records under section 552.108 of the Government Code.

You also claim that some of the submitted records should be withheld pursuant to section 552.101. Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses both common-law and constitutional privacy. For information to be protected from public disclosure under the common-law right of privacy, the information must meet the criteria set

out in *Industrial Foundation of the South v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information must 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 records at issue relate to the job performance and work behavior of a public employee. There is a legitimate public interest in the work behavior of a public employee and how he or she performs job functions. Open Records Decision Nos. 470 (1987) at 4 (public has legitimate interest in job performance of public employees), 423 (1984) at 2 (scope of public employee privacy is narrow). Therefore, having reviewed the information at issue, we note that we did not find any information which is protected by the common-law right to privacy, pursuant to section 552.101. Furthermore, the right of privacy is personal to an individual.<sup>1</sup> See generally Attorney General Opinion H-917 (1976); Open Records Decision No. 272 (1981).

Section 552.101 also excepts from disclosure information that is made confidential by statute. In Open Records Decision No. 641 (1996), this office determined that medical information obtained pursuant to the Americans with Disabilities Act of 1990 (the "ADA"), 42 U.S.C. § 12101 *et seq.*, is confidential under section 552.101 of the Government Code in conjunction with 42 U.S.C. § 12112. See also 29 C.F.R. § 1630.14(b)(1). Additionally, certain medical records are confidential under section 552.101 of the Government Code in conjunction with the Medical Practice Act, ("MPA"), V.T.C.S. article 4495b. Medical records may be released only in accordance with the MPA. Open Records Decision No. 598 (1991); see V.T.C.S. art. 4495b, § 5.08(c), (j). In reviewing the submitted information, it appears that neither the provisions of the ADA nor the MPA apply to the information.

We next address whether some of the requested information must be withheld pursuant to sections 552.117 and 552.024. Section 552.117 of the Government Code excepts from public disclosure information relating to the home address, home telephone number, and social security number of a current or former government employee or official, as well as information revealing whether that employee or official has family members. Section 552.117 requires you to withhold this information for an official, employee, or former employee who requested that this information be kept confidential under section 552.024. See Open Records Decision Nos. 622 (1994), 455 (1987). You may not, however, withhold this information if the employee had not made a request for confidentiality under section 552.024 prior to the time this request for the documents was made. Whether a particular piece of information is public must be determined at the time the request for it is made.

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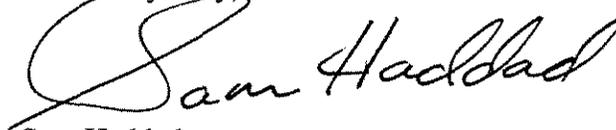
<sup>1</sup>Section 552.023 grants an individual or an individual's representative access to information that is otherwise excepted from required public disclosure based on a law that protects that individual's privacy interests. See Open Records Decision No. 587 (1991).

Open Records Decision No. 530 (1989) at 5.<sup>2</sup> Accordingly, you must redact the information subject to section 552.117 wherever it is located in the submitted records.

Finally, we consider your arguments, and the claimed proprietary interests at issue, regarding the release of the submitted hearing transcript, which was submitted by the city. Section 552.002(a) defines the term "public information" to include information that is "collected, assembled, or maintained . . . (1) by a governmental body; or (2) for a governmental body *and the governmental body owns the information or has a right of access to it.*" Gov't Code § 552.002(a) (emphasis added). It appears to us that the information at issue is "collected, assembled, or maintained" by the city, and the city has access to some, if not all, of the requested information. *See generally* Open Records Decision No. 558 (1990) (where governmental body has right of access to or ownership of information prepared by outside entity, information is subject to Open Records Act). Governmental bodies are required to make public information available to the public, *see* Gov't Code § 552.221, unless it falls within one of the exceptions enumerated in subchapter C of the Open Records Act. Since you have not established that it is excepted from disclosure, we conclude that the submitted transcript of the hearing must be released to the requestor. Accordingly, we suggest that if you have any concerns over the costs associated with providing the requestor with the submitted transcript, that you contact the Open Records Administrator for the General Services Commission. *See* Gov't Code §§ 552.261-.273.

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,



Sam Haddad  
Assistant Attorney General  
Open Records Division

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<sup>2</sup>We further note that even if the employee did not make the election to keep his or her social security number confidential prior to the commission's receipt of this request, federal law may prohibit disclosure of his or her social security number. A social security number is excepted from required public disclosure under section 552.101 of the act in conjunction with the 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 number is confidential under this federal statute. We note, however, that section 552.352 of the Open Records Act imposes criminal penalties for the release of confidential information.

SH/alg

Ref.: ID# 108179

Enclosures: Submitted documents

cc: Ms. Genice A.G. Rabe  
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(w/o enclosures)

