



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

January 30, 1998

Ms. J. Sage White
City of Austin - Law Department
P.O. Box 1546
Austin, Texas 78767-1546

OR98-0304

Dear Ms. White:

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# 112112.

The City of Austin (the "city") received two requests for information related to an investigation conducted by the city's Employee Relations Division concerning the Occupational Health and Safety Division, as well as other information. Because the two requestors seek identical information, we have combined these two requests into one ruling which we have assigned the identification number set forth above. You state that you are releasing some of the requested information to the requestors, but assert that the information pertaining to the investigation is excepted from disclosure pursuant to sections 552.101, 552.103, 552.111 and 552.117 of the Government Code. We have considered your arguments and have reviewed the information submitted.

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 governing 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. The governing body must meet both prongs of this test for information to be excepted under section 552.103(a).

You inform this office that both requestors have filed discrimination complaints with the Equal Employment Opportunity Commission ("EEOC"), as well as with the Texas Commission on Human Rights ("TCHR"), and that the complaints before the TCHR are still pending. The TCHR operates as a federal deferral agency under section 706(c) of title VII, 42 U.S.C. § 2000e-5. The Equal Employment Opportunity Commission ("EEOC") defers jurisdiction to the TCHR over

complaints alleging employment discrimination. *Id.* This office has stated that a pending EEOC complaint indicates litigation is reasonably anticipated. Open Records Decision Nos. 386 (1983) at 2, 336 (1982) at 1.

By showing that the complaint filed with the TCHR is pending, you have shown that litigation is reasonably anticipated in this case. However, upon review of the documents submitted, including your argument to this office as well as the "Charge of Discrimination" filed with the EEOC by each requestor, we are unable to conclude that the requested information is related to the pending litigation. Therefore, you may not withhold the requested information pursuant to section 552.103(a).

We will next address your argument for withholding certain information under section 552.111. Section 552.111 excepts "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." This exception applies not only to internal memoranda, but also to memoranda prepared by consultants of a governmental body. Open Records Decision Nos. 462 (1987) at 14, 298 (1981) at 2. In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. An agency's policymaking functions, however, do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. Open Records Decision No. 615 (1993) at 5-6.

Upon review of the information you have marked to be withheld under section 552.111, we conclude this information relates to internal administrative or personnel matters, and thus, it may not be withheld under section 552.111.

Section 552.101 excepts from required public disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision and incorporates the doctrine of common-law 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 Found. of the S. 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 records at issue relate to the job performance of public employees. There is a legitimate public interest in how a public servant conducts himself while on-duty and how he performs his 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). However, with the exception of one document which we have marked to be released, we agree that

you must withhold under common-law privacy the information which you have marked to be withheld under section 552.101.

Finally, we note the submitted information contains the address of a governmental employee. 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 at 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. Open Records Decision No. 530 (1989) at 5.

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,



Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/ch

Ref.: ID# 112112

Enclosures: Marked documents

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