



October 6, 1999

Mr. Charles D. Olson
Haley & Davis
510 S. Valley Mills Drive, Suite 600
Waco, Texas 76710

OR99-2847

Dear Mr. Olson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID#s 128319 and 128485.

The City of Marlin (the “city”) received a request for information pertaining to city police officers who were terminated in the past year. The city received another request for the personnel files of named city police officers and information regarding disciplinary matters concerning such individuals. The city seeks to withhold portions of the information responsive to these requests under sections 552.101, 552.102, 552.103, 552.108, and 552.111 of the Government Code. Since the information the city seeks to withhold in response to the first request is included in that which the city seeks to withhold in response to the second, we are addressing in this one ruling both of the city’s requests for an attorney general decision.

Section 552.101 protects “information considered to be confidential by law, either constitutional, statutory, or by judicial decision,” including information coming within the common-law right to privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Common-law privacy protects information if it is highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, *and* it is of no legitimate concern to the public. *Id.* at 683-85.

Section 552.102(a) protects

information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, except that all information in the personnel file of an employee of a governmental body is to be made available to that employee or the

employee's designated representative as public information is made available under this chapter.

Section 552.102(a) is designed to protect public employees' personal privacy. The scope of section 552.102(a) protection, however, is very narrow. *See* Open Records Decision No. 336 (1982). *See also* Attorney General Opinion JM-36 (1983). The test for section 552.102(a) 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.).

In our opinion, the Notice of Tax Levy included in the submitted information, is personal financial information protected by common law privacy under sections 552.101 and 552.102. *See* Open Records Decision Nos. 600 (1992), 545 (1990). You must withhold this document.

Section 552.103(a), known as the litigation exception, excepts from required public disclosure 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 the requested information relates to pending or reasonably anticipated litigation to which the governmental body is a party. However, absent special circumstances, once information has been obtained by all parties to the litigation, either through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982).

Although you argue that the city anticipates litigation to which some of the information at issue relates, it appears that information has already been made available to the opposing party in such anticipated litigation. Therefore, none of the information may be withheld under section 552.103(a).

Section 552.108 excepts from required public disclosure

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if:

(1) release of the information would interfere with the detection, investigation, or prosecution of crime;

(2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication; or

(3) it is information that:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state [and]

(b) An 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 . . . if:

(1) release of the internal record or notation would interfere with law enforcement or prosecution;

(2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication; or

(3) the internal record or notation:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

You argue that release of the information for which you claim the protection of section 552.108 “could well interfere with ongoing criminal investigations and/or prosecutions,” “would give notice to those being investigated that multiple investigations have occurred and/or are ongoing in certain specific areas of town,” and “may well tip off persons involved in criminal activity that they may have been the subject of an investigation which may have resulted in a warrant for their arrest.” Having reviewed your arguments and the information at issue, it is our opinion that you have not made a sufficiently specific showing that release of the information at issue would interfere with law enforcement or that the material is otherwise within the scope of the section 552.108 exception. None of the information may be withheld under that provision.

Section 552.111 excepts interagency and intra-agency memoranda and letters, but only to the extent that they contain advice, opinion, or recommendation intended for use in the entity’s policymaking process. Open Records Decision No. 615 (1993). The purpose of this section is “to protect from public disclosure advice and opinions *on policy matters* and to encourage frank and open discussion within the agency in connection with its decision-making processes.” *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.--San Antonio 1982, writ ref’d n.r.e.) (emphasis added). In Open Records Decision No. 615, this office stated that

to come within the [section 552.111] exception, information must be related to the *policymaking* functions of the governmental body. An agency’s policymaking functions do not encompass routine internal administrative and personnel matters [Emphasis in original.]

In Open Records Decision No. 429 (1985), this office indicated that information protected by section 552.111 must be prepared by a person or entity with an official reason or duty to provide the information in question. *See also* Open Records Decision Nos. 283 (1981), 273 (1981). This helps assure that the information plays a role in the deliberative process; if it does not, it is not entitled to protection under section 552.111. Open Records Decision No. 464 (1987). *See Wu v. National Endowment of the Humanities*, 460 F.2d 1030 (5th Cir.), *cert. denied*, 410 U.S. 926 (1972).

You claim the protection of section 552.111 only for the April 14, 1999 memorandum from the police chief to the city manager. In our opinion, this document, which deals with a personnel matter, does not relate to broader policy making functions of the city such as to be within the scope of the section 552.111 exception. You may not withhold Exhibit B under section 552.111.

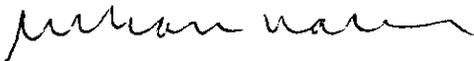
We note that some of the submitted information must be withheld under section 552.117. Section 552.117(2) excepts from disclosure the home address, telephone number, social security number and family information of a peace officer as defined by article 2.12 of the

Code of Criminal Procedure. We have marked information which must be withheld under section 552.117(2).

The rest of the submitted information must be released.

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.

Sincerely,



William Walker
Assistant Attorney General
Open Records Division

WMW/ch

Ref: ID# 128485

Encl. Submitted documents

cc: Ms. Wendy Saltzman
Reporter, KXTX-TV
6700 American Plaza, Box 2636
Waco, Texas 76702
(w/o enclosures)