



January 24, 2000

Mr. Chris M. Borunda  
Assistant City Attorney  
The City of El Paso  
3 Civic Center Plaza  
El Paso, Texas 79901-1196

OR2000-0225

Dear Mr. Borunda:

You ask whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 131567.

The City of El Paso (the "city") received a request for "all documents involved in the administrative review involving all persons in the administrative investigation of" two named fire department employees, including the requestor. The request specifically seeks "all written statements, photographs, videos, recorded telephone conversations, recorded conversations, and any other document involved in this investigation." You contend that the requested information is excepted from disclosure under section 552.103 of the Government Code.

You explain that the requested information

relates to personnel matters that are under current investigation by the El Paso Fire Department in conjunction with the City Attorney's Office. At the conclusion of this investigation, disciplinary action may result against city employees and at that time these employees will have the right to appeal any such punishment to a hearing office [sic] appointed by the Civil Service Commission. . . . Every disciplinary appeal may potentially result in a lawsuit . . . .

The Seventy-sixth Legislature amended section 552.103 of the Government Code to read as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature 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.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

A governmental body has the burden of providing relevant facts and documents to show the applicability of an exception in a particular situation. The test for establishing that section 552.103(a) applies is a two-prong showing that (1) litigation is pending or reasonably anticipated at the time the request for the information is received, and (2) the information at issue is related to that litigation. *University of Texas Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.--Austin, 1997), *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.).

You argue that this office should recognize the disciplinary appeal process as a form of litigation under the Public Information Act; however, you also state that the requested information relates to current personnel investigations and that, "[a]t the conclusion of this investigation, disciplinary action may result against City employees and at that time these employees will have the right to appeal any such punishment" to a hearing officer. Thus, even assuming *arguendo* that the disciplinary appeal process constitutes "litigation" for purposes of section 552.103, you have not demonstrated that in this particular instance such litigation was reasonably anticipated at the time the city received the records request; any such conclusion would be based on pure speculation or conjecture. We therefore conclude that the city may not withhold any of the requested information under section 552.103. .

We have identified, however, a few small portions of the records at issue that implicate a city employee's privacy interests. Although the attorney general will not ordinarily raise an exception that might apply but that the governmental body has failed to claim, *see* Open Records Decision No. 325 at 1 (1982), we will raise section 552.101 of the Government Code because the release of confidential information could impair the rights of third parties and because the improper release of confidential information constitutes a misdemeanor. *See* Government Code § 552.352.

Section 552.101 protects “information considered to be confidential by law, either constitutional, statutory, or by judicial decision,” including 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.

In *Industrial Foundation*, the Texas Supreme Court considered intimate and embarrassing information that relates 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. This office has also determined that common-law privacy protects the following information: the kinds of prescription drugs a person is taking, Open Records Decision No. 455 (1987); the results of mandatory urine testing, *id.*; illnesses, operations, and physical handicaps of applicants, *id.*; the fact that a person attempted suicide, Open Records Decision No. 422 (1984); the names of parents of victims of sudden infant death syndrome, Attorney General Opinion JM-81; and information regarding drug overdoses, acute alcohol intoxication, obstetrical/gynecological illnesses, convulsions/seizures, or emotional/mental distress. Open Records Decision No. 343 (1982). We have marked in brackets the information the city must withhold from the public pursuant to the common law right of privacy.

The documents you submitted to this office also contain information protected under section 552.117(1) of the Government Code, which requires that the city withhold the home addresses, home telephone numbers, and social security numbers of city employees, as well as information revealing whether the employees have family members. Accordingly, the city must redact these types of information from the records at issue, but only if the employee had elected to keep this information confidential in accordance with section 552.024 of the Government Code. Assuming the relevant employee made such an election prior to the city’s receipt of the records request, we conclude that these types of information must be withheld.<sup>1</sup> *See* Open Records Decision No. 530 (1989). Because you raise no other exception to required public disclosure, the city must release the remaining information.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by

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<sup>1</sup>We have marked additional information that comes under the protection of section 552.117.

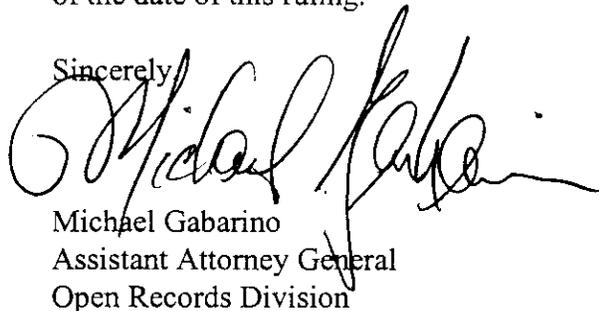
filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely



Michael Gabarino  
Assistant Attorney General  
Open Records Division

MG/RWP/ch

Ref.: ID#131567

Encl. Submitted documents

cc: Mr. Sergio Apodaca  
13868 Desert Willow  
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(w/o enclosures)