



May 25, 2000

Ms. Sara Shiplet Waitt  
Senior Associate Commissioner  
Legal and Compliance Division  
Texas Department of Insurance  
P.O. Box 149104  
Austin, Texas 78714-9104

OR2000-2088

Dear Ms. Waitt:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 135585.

The Texas Department of Insurance (the "department") received a request for information relating to a named employee. Although you indicate that the department has released some of the requested materials, you seek to withhold the submitted, marked information under sections 552.101, 552.102, 552.103, 552.111, 552.116, 552.117, and 552.130 of the Government Code. We have considered the exceptions you claim and have reviewed the information at issue.

Initially, you claim that some of the submitted information is protected from disclosure under the common law right to privacy as encompassed by sections 552.101 and 552.102 of the Government Code. Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected under the doctrine of common law privacy as incorporated by section 552.101 of the Public Information Act. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by common law privacy and excepts from disclosure private facts about an individual. *Id.* Therefore, 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 at 1 (1992).

We note that information revealing the designation of beneficiaries of insurance and retirement funds is confidential under the right of privacy. Open Records Decision No. 600 at 10 (1992). Consequently, the beneficiary information, which you have marked, is excepted from required public disclosure under section 552.101. We also agree that the direct deposit authorization form relates to a personal financial decision of the employee and is, therefore, protected from disclosure by section 552.101. *See* Open Records Decision No. 600 (1992) (concluding that following information is protected by privacy: designation of beneficiary of employee's retirement benefits, direct deposit authorization, and forms allowing employee to allocate pretax compensation to group insurance, health care or dependent care).

You have also submitted a copy of the employee's W-4 form which you claim is confidential by law. Section 552.101 also encompasses information protected by other statutes. You state, and we agree, that employee W-4 forms are protected from disclosure by 26 U.S.C. § 6103(a). We also note that the Employment Eligibility Verification, Form I-9, is confidential pursuant to 8 U.S.C. § 1324a(b)(5). Therefore, these documents must be withheld from disclosure under section 552.101.

Next you contend that some of the responsive documents are excepted from disclosure under section 552.103 of the Government Code. Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state or a political subdivision is or may be a party. The governmental 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. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.--Austin, 1997, no pet.); *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 at 4 (1990). The department must meet both prongs of this test for information to be excepted under section 552.103(a).

The mere chance of litigation will not trigger section 552.103(a). Open Records Decision No. 452 at 4 (1986). To demonstrate that litigation is reasonably anticipated, the governmental body must furnish *concrete* evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986).

You advise that the documents you seek to withhold under section 552.103 relate to a pending charge of discrimination filed with the Texas Commission on Human Rights (the "TCHR"). The TCHR operates as a federal deferral agency under section 706(c) of title VII, 42 U.S.C. § 20003-5. 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 at 2 (1983), 336 (1982). After careful review, we agree that the department reasonably anticipates litigation relating to the discrimination complaint. We also agree that the documents you have marked relate to the anticipated litigation and may be withheld.

In reaching this conclusion, however, we assume that the opposing parties in the anticipated litigation have not previously had access to the records at issue. Generally, once records have been obtained by the opposing parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to the records. Open Records Decision Nos. 349 (1982), 320 (1982). Similarly, section 552.103(a) does not authorize withholding materials which have been previously released to the public. Open Records Decision No. 436 (1986). Finally, we note that the applicability of section 552.103(a) ends once the litigation has concluded. Attorney General Opinion MW-575 (1982), Open Records Decision No. 350 (1982).

You also seek to withhold some of the submitted documents under section 552.116 as audit working papers. Section 552.116 provides as follows:

(a) An audit working paper of an audit of the state auditor or the auditor of a state agency or institution of higher education as defined by Section 61.003, Education Code, is excepted from [public disclosure]. If information in an audit working paper is also maintained in another record, that other record is not excepted from [public disclosure] by this section.

(b) In this section:

(1) 'Audit' means an audit authorized or required by a statute of this state or the United States and includes an investigation.

(2) 'Audit working paper' includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

Gov't Code § 552.116. You indicate, and the documents reflect, that the department initiated an internal audit to determine the extent of an employee's personal use of state resources. See Gov't Code § 2102.003 (defining term "audit" to include investigation described by Gov't Code § 321.0136). You explain that this "audit/investigation was conducted by [the department's] internal auditor in accordance with the Texas Internal Auditing Act. Based

on your representations and our review of the documents, we agree that the documents you have marked are audit working papers that are excepted from disclosure under section 552.116.

You have also marked information which you claim must be withheld from disclosure pursuant to section 552.117(1) of the Government Code. Section 552.117 excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. You have submitted evidence that the referenced employee has elected to withhold his home address, telephone number, social security number and family member information from public disclosure. We agree that this information must be withheld pursuant to section 552.117(1). We have marked additional section 552.117 information that must also be withheld under this exception.

Finally, you state that some of the submitted information is excepted from disclosure under section 552.130 which governs the release and use of information obtained from motor vehicle records. Section 552.130 provides in relevant part as follows:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

- (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]
- (2) a motor vehicle title or registration issued by an agency of this state[.]

Gov't Code § 552.130. Therefore we agree that, pursuant to section 552.130, the department must withhold the copy of the employee's Texas driver's license, as well as, the remaining, driver's license information you have marked. Except as noted above, the remaining information in the submitted documents must be released to the requestor.

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 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

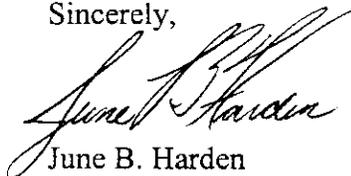
governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

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,



June B. Harden  
Assistant Attorney General  
Open Records Division

JBH/ljp

Ref: ID# 135585

Encl. Submitted documents

cc: Ms. Julia A. Diggs  
2905 Allison Drive  
Austin, Texas 78741  
(w/o enclosures)