



July 14, 2000

Mr. Brendan Hall  
Law Offices Of Brendan Hall  
1221 East Polk  
P.O. Box 2725  
Harlingen, Texas 78550

OR2000-2658

Dear Mr. Hall:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 137076.

The Harlingen Police Department (the “department”), which you represent, received a written request for the following information:

Any and all reports regarding the incident involving Sgt. Mike Garcia on March 13, 2000. Any and all reports include an incident report, accident report and or a miscellaneous report. We are also seeking a print out of the daily log book for March 13, 2000, which should indicate what time the call was received at [sic], the type of call, the location of the incident and the case number of the incident or miscellaneous report.

You have submitted to our office as responsive to the request two “Inter-Departmental Communication” memoranda and the requested “Call Log Report.”<sup>1</sup> You contend that the memoranda and log report are excepted from public disclosure pursuant to sections 552.101, 552.103, and 552.108 of the Government Code. We will discuss each of the exceptions you raised in turn.

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

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<sup>1</sup>You do not indicate that the department has released any responsive information to the requestor, including any incident, offense, or accident report, nor do you contend that any such report is excepted from public disclosure. We assume, therefore, that the department did not create an incident, offense, or accident report in response to the referenced March 13 incident.

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.

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).

Upon review, we conclude that only one small portion of the information submitted to this office is protected by common law privacy. We have marked the information that the department must withhold pursuant to section 552.101.

We next address the applicability of section 552.103 of the Government Code to the information at issue. The test for establishing that section 552.103(a), the "litigation exception," applies to requested information is a two-prong showing that (1) the governmental body is a party to pending or reasonably anticipated litigation 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.*). 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.*

You have not demonstrated that litigation in which the department would be a party is reasonably anticipated in this instance. Nor have you provided evidence to this office that any prosecuting attorney has a litigation interest in withholding the information from the public. Consequently, the department may not withhold any of the information at issue pursuant to section 552.103.

You also contend that section 552.108 excepts the information at issue from public disclosure because the information relates to a pending internal affairs investigation. Although one of the purposes of this exception is to protect law enforcement and crime

prevention efforts by preventing suspects and criminals from using records in evading detection and capture, *see* Open Records Decision Nos. 133, 127 (1976), you have not demonstrated how the release of the information at issue would interfere with law enforcement for purposes of section 552.108(b)(1).<sup>2</sup> Further, because internal affairs investigations are administrative, as opposed to criminal, in nature, we do not believe that section 552.108(b)(2) was intended to protect such investigations, which cannot possibly result in conviction or deferred adjudication absent a related criminal investigation. *See also Morales v. Ellen*, 840 S.W.2d 519, 526 (Tex. App.--El Paso 1992, writ denied) (predecessor statute to section 552.108 not applicable were no criminal investigation resulted). Because you have not demonstrated that the information at issue pertains to a pending criminal investigation or prosecution, the department may not withhold the documents at issue pursuant to any subsection of section 552.108.

Finally, we note that some of the information at issue is protected from public disclosure pursuant to section 552.117(2) of the Government Code, which requires the department to withhold all information that relates to, among other things, the home address and home telephone number of a peace officer as defined by article 2.12, Code of Criminal Procedure. This section also requires the withholding of information that reveals whether the officer has family members. Unlike other public employees, a peace officer need not affirmatively claim confidentiality for this information. Open Records Decision No. 488 (1988); *see also* Open Records Decision No. 506 (1988). We have marked in brackets the department must withhold pursuant to section 552.117(2).

In summary, because none of the information at issue is excepted from public disclosure under either section 552.103 or 552.108 of the Government Code, the department must release the records at issue in their entirety, except for the information we have marked as coming within the common law right of privacy as encompassed by section 552.101 of the Government Code.

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

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<sup>2</sup>We note that police officers are generally required, as a condition of employment, to fully cooperate in internal affairs investigations.

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,



Amanda Crawford  
Assistant Attorney General  
Open Records Division

AEC/RWP/ljp

Ref: ID# 137076

Encl. Submitted documents

cc: Ms. Laura B. Martinez  
Valley Morning Star  
1310 South Commerce Street  
Harlingen, Texas 78550  
(w/o enclosures)