



August 2, 2000

Mr. Terrence Welch
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OR2000-2927

Dear Mr. Welch:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 137621.

The Town of Flower Mound (the "town") received three separate requests for similar information regarding several former employees of the Public Works Division. The first request is for "the entire personnel file" of a specific individual and "entire divisional files" for two other individuals. The second request is for personnel files for six specific individuals (including two of the individuals named in the first request) and "any written statements regarding a personnel investigation between May 4 and May 17 by any of these employees." Finally, the third request is for "investigation records that led to [the] May 16 firing of" the same six individuals named in the second request. The responsive information consists of representative samples of internal investigation files and personnel files regarding the subjects of the three requests. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.103, and 552.117 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted representative sample of the information at issue.²

We begin with your claim that the submitted information is excepted from disclosure under section 552.103. Section 552.103(a) excepts from disclosure information relating to

¹We understand you to raise sections 552.101 and 552.117 in regard to your claims which you deem "standard personnel file exceptions."

²We assume that the "representative sample" of records submitted to this office is truly representative of all of the information at issue. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach and, therefore, does not authorize the withholding of any other requested records to the extent that those records contain substantially different types of information than those submitted to this office.

litigation to which a governmental body is or may be a party. The governmental body has the burden of providing relevant facts and documents to show that section 552.103(a) is applicable in a particular situation. In order to meet this burden, the governmental body must show that (1) litigation has been pending or reasonably anticipated since the date of receipt of the request, 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); Gov't Code § 552.103. The governmental body must meet both prongs of this test for information to be excepted under section 552.103.

To establish that litigation is reasonably anticipated, a governmental body must provide this office with "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.³ Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Nor does the mere fact that an individual hires an attorney and alleges damages establish that litigation is reasonably anticipated. Open Records Decision No. 361 at 2 (1983). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986).

In this case, you explain that the submitted materials pertain to several internal investigations conducted by the town in regard to allegations of various types of misconduct. As a result of these investigations, seven employees were fired and one resigned.⁴ You believe that two of the fired employees intend to sue the town. To substantiate this belief, you have provided this office with tape recordings of the termination hearings of these two former employees. The tape recordings depict the former employees saying that they have each retained counsel. One of the former employees also states that the town should expect something via certified mail in the near future. You also point us toward a submitted newspaper article in which one of these employees states that he was fired as part of a "cover up." However, based on your representations and the information you have submitted, it appears that neither former

³In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

⁴You have provided this office with several newspaper articles and a press release regarding the investigations and subsequent terminations.

employee has actually threatened to sue the town. Moreover, there is no evidence, and you have not stated, that either of these former employees' attorneys has contacted the town. Therefore, you have not demonstrated that either former employee has actually taken objective steps toward filing suit against the town.

You also base your claim of section 552.103 on the notion that criminal charges may be filed against one of the terminated employees. However, you explain that the filing of criminal charges would be conditioned upon the former employee taking certain actions. You have provided this office with evidence that the former employee may intend to take such actions. However, we find that the possibility of criminal litigation ensuing has been, and presumably remains, too conjectural to be reasonably anticipated. Consequently, we find that the town has not met its burden in regard to its claim under section 552.103. Therefore, the town may not withhold any of the submitted information under section 552.103.

We now turn to your argument that portions of the submitted information are confidential under section 552.101 in conjunction with common law and constitutional privacy, and under section 552.102. Section 552.102 of the Government Code 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 Government Code. Therefore, we will address your claim of section 552.102 by addressing the applicability of 552.101 to the information at issue.

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. The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating 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. However, common law privacy does not apply to embarrassing or intimate information "unless the records [at issue] are also of no legitimate interest to the public." Open Records Decision No. 470 at 4 (1987); *see also* Open Records Decision No. 464 (1987). The public has a genuine interest in information concerning a public employee's job performance and the reasons for dismissal, demotion, or promotion. Open Records Decision No. 444 at 5-6 (1986); *see also* Open Records Decision No. 208 (1978) (disciplinary action against public employee available to public).

Section 552.101 also incorporates the constitutional right to privacy. The United States Constitution protects two kinds of individual privacy interests. The first interest is an individual's interest in independently making certain important personal decisions about matters that the United States Supreme Court has stated are within the "zones of privacy," as described in *Roe v. Wade*, 410 U.S. 113 (1976) and *Paul v. Davis*, 424 U.S. 693 (1976).⁵ The second individual privacy interest involves matters that are outside the zones of privacy but that implicate an "individual's interest in non-disclosure or confidentiality." Open Records Decision No. 455 at 4 (1987) (*quoting Fadjo v. Coon*, 633 F.2d 1172, 1175 (5th Cir. 1981)). To determine whether a given situation triggers the constitutional right to privacy, this office applies a balancing test, weighing the individual's interest in privacy against the public right to know the information. *See* Open Records Decision No. 455 at 5 (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490, 492 (5th Cir. 1985)).

You state that portions of the submitted documents provide detailed information about alleged sexual encounters between various former employees. You contend that such information is intimate and embarrassing, and that there is no public interest in this information. We disagree. The allegations concern public employees engaging in sexual activities during work time and while using public property. Furthermore, these employees were terminated due to investigations into these allegations. As explained above, there is a legitimate as well as significant public interest in a public employee's job performance and the reasons for dismissal. Open Records Decision No. 444 at 5-6 (1986); *see also* Open Records Decision No. 208 (1978) (disciplinary action against public employee available to public). Accordingly, none of the submitted materials that concern the alleged sexual activities of the former employees is confidential under common law or constitutional privacy. Therefore, the town may not withhold these materials under section 552.101. However, in our review of the submitted materials, we discovered that some personal information contained in Exhibit 24 meets the test for common law privacy. Therefore, while the town may not withhold any of the materials regarding the alleged sexual activities of the former employees, it must withhold the information that we have marked as confidential under section 552.101 in conjunction with common law privacy.

Common law privacy, as encompassed by section 552.101, also protects personal financial information. In Open Records Decision No. 373 (1983), we concluded that personal financial information can generally be considered highly intimate and embarrassing:

In our opinion, all financial information relating to an individual – including sources of income, salary, mortgage payments, assets, medical and utility bills, social security and veterans benefits, retirement and state assistance benefits, and credit history – ordinarily satisfies the first requirement of common law privacy, in that it constitutes highly intimate or embarrassing

⁵The "zones of privacy" implicated in the individual's interest in independently making certain kinds of decisions include matters related to marriage, procreation, contraception, family relationships, and child rearing and education.

facts about the individual, such that its public disclosure would be highly objectionable to a person of ordinary sensibilities. . . .

However, information regarding a financial transaction between an individual and a governmental body is a matter of legitimate public interest not generally protected from public disclosure by common law privacy. Open Records Decision Nos. 590 at 3 (1991), 523 at 3-4 (1989). Having reviewed the submitted personnel files, Exhibits 18 through 24, we find that these materials contain personal financial information that is confidential under common law privacy. Therefore, the town must withhold the information that we have marked under section 552.101.

Next, we turn to your argument regarding section 552.101 and the informer's privilege. The "informer's privilege," incorporated into the Public Information Act by section 552.101, has long been recognized by Texas courts. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928). It protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law enforcement authority, provided that the subject of the information does not already know the informer's identity. Open Records Decision Nos. 515 at 3 (1988), 208 at 1-2 (1978). The informer's privilege protects the identities of individuals who report violations of statutes to the police or similar law enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." Open Records Decision No. 279 at 2 (1981) (citing Wigmore, *Evidence*, § 2374, at 767 (McNaughton rev. ed. 1961)). The report must be of a violation of a criminal statute or a civil statute that falls within the realm of quasi-criminal law enforcement. *See* Open Records Decision Nos. 582 at 2 (1990), 515 at 2, 4-5 (1988).

You contend that the employee statements contained in Exhibits 8 and 9 fall under the informer's privilege aspect of section 552.101. However, none of these statements by themselves alleges any violations of criminal or quasi-criminal statutes. *See* ORD No. 515 at 3. Furthermore, the statements appear to have been made to town officials who do not have the authority to enforce specific laws. *See id.* at 5 (holding that public employees seeking some form of redress from their employer for their complaints is not the kind of information protected by the informer's privilege because the employees had not reported violations of law or suspected violations of the law to officials charged with enforcing specific laws). Therefore, the informers' privilege does not apply to any of the submitted information.⁶

⁶In addition, we note that while it is not absolutely clear, the employee statements contained in Exhibits 8 and 9 do not appear to be complaints which the employees made on their own initiatives, but rather solicited statements made pursuant to an internal investigation. The basis for the informer's privilege is "to protect informers from retaliation and thus encourage them to cooperate with law enforcement efforts." ORD No. 515 at 5. We do not believe that this policy is furthered by protecting names of people who simply answer questions posed by investigators. This would be another reason that the informer's privilege is inapplicable to Exhibits 8 and 9.

Next, we note that the submitted investigative materials contain information derived from polygraph examinations. Section 552.101 also encompasses confidentiality provisions such as section 1703.306 of the Occupations Code. Section 1703.306(a) generally provides:

A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person

Occ. Code § 1703.306. While section 1703.306 provides various exceptions to confidentiality, none of the exceptions applies here. Accordingly, the town must withhold the portions of the submitted materials that reveal the results of polygraph examinations under section 1703.306 as encompassed by section 552.101 of the Government Code. We have marked this information that the town must withhold.

Now we turn to what you call the “standard personnel file exceptions.” You state that the following types of information are confidential: “home addresses, home telephone numbers, social security numbers, health information, criminal history background checks, health benefits information and financial information not subject to disclosure due to common law privacy” As explained earlier in this ruling, we agree that the submitted personnel files contain personal financial information that is confidential under section 552.101 in conjunction with common law privacy. Accordingly, the town must withhold the financial information that we have marked under section 552.101. As to health information, criminal history background checks, and health benefits information, we found no information of these types contained in the submitted documents. Therefore, we only address here the home addresses, home telephone numbers, and social security numbers contained in the submitted documents.

Section 552.117 of the Government Code excepts from required public disclosure information that reveals a public employee’s home address, telephone number, social security number, or whether the public employee has family members, but only if the public employee has requested that this information be kept confidential under section 552.024. *See* Open Records Decision Nos. 622 (1994), 455 (1987). Moreover, a governmental body may not withhold the information of a current or former employee who made the request for confidentiality under section 552.024 *after* the request for information was made. Whether a particular piece of information is protected by section 552.117(1) must be determined at the time the request for that information is made. Open Records Decision No. 530 at 5 (1989). Accordingly, if the former employees who are the subject of the submitted personnel files made timely elections under section 552.024, the town must withhold the employees’ home addresses, home telephone numbers, social security numbers, and information revealing whether they have family members under section 552.117.⁷

⁷We note that one of the submitted personnel files contained a signed form indicating that the relevant former employee had elected for confidentiality of his home address, home telephone number, and social security number. Consequently, we are able to determine that this former employee’s home address, home

Even if the former employees did not timely submit elections under section 552.024, the former employees' social security numbers may be confidential nevertheless under section 552.101 in conjunction with federal law. As explained above, section 552.101 excepts from required public disclosure information that is considered confidential by law. Accordingly, section 552.101 encompasses confidentiality provisions such as the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). This provision makes confidential social security numbers and related records that have been obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* Therefore, if the social security numbers contained in the submitted documents meet the criteria of section 405(c)(2)(C)(viii)(I), then they are confidential under this provision as encompassed by section 552.101.

Finally, we note that the submitted documents contain confidential motor vehicle information. Section 552.130 of the Government Code prohibits the release of information that relates to a motor vehicle operator's or driver's license or permit issued by an agency of this state or a motor vehicle title or registration issued by an agency of this state. Therefore, under section 552.130, the city must withhold the Texas driver's license numbers and motor vehicle records contained in the submitted documents. We have marked the information that the town must withhold under section 552.130.

In conclusion, the town must withhold the information that we have marked under section 552.101 in conjunction with common law privacy. The town must also withhold the information that we have marked under section 552.101 in conjunction with section 1703.306 of the Occupations Code. In addition, the town must withhold the motor vehicle information that we have marked under section 552.130. Pursuant to section 552.117, the town must withhold the home addresses, home telephone numbers, social security numbers, and information revealing the existence of family members in regard to any of the former employees who submitted timely elections under section 552.024. For those former employees who did not submit timely elections under section 552.024, their social security numbers may still be confidential under section 552.101 in conjunction with federal law depending on whether the social security numbers meet the criteria of section 405(c)(2)(C)(viii)(I). The town must release the remaining requested 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

telephone number, and social security number are in fact confidential under section 552.117. However, the form did not provide for an election of confidentiality in regard to family member information. Therefore, we must leave it for the town to determine whether this former employee has signed a similar form covering family member information.

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,



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Assistant Attorney General
Open Records Division

EJF/ljp

Ref: ID# 137621

Encl Submitted documents

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