



March 2, 2001

Ms. Elizabeth Lutton  
Senior Attorney  
City of Arlington  
P.O. Box 231  
Arlington, Texas 76004-0231

OR2001-0807

Dear Ms. Lutton:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 144790.

The Arlington Police Department (the "department") received a request for the complete personnel file of a specified police officer. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.117, 552.115, 552.119, 552.122, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative samples of information.<sup>1</sup>

Initially, we note that Exhibit 3 contains a document that has been filed with a court. Documents filed with a court are public documents and must be released. *See Gov't Code* § 552.022(a)(17) (providing that information contained in a public court record is public information); *Star-Telegram, Inc. v. Walker*, 834 S.W.2d 54, 57-58 (Tex. 1992). We have marked the document which has been filed with a court and must be released.

You assert that the submitted information in Exhibit 3, as well as the personnel information, is excepted from disclosure under section 552.103 of the Government Code. Section 552.103(a) provides 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.

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<sup>1</sup>In reaching our conclusion here, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *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 that submitted to this office.

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, 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 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 588 (1991). Further, litigation must be pending or reasonably anticipated on the date the requestor applies to the public information officer for access. Gov't Code § 552.103(c).

To establish that litigation is reasonably anticipated, a governmental body must provide this office “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. 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 serve to 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).

You have provided a copy of a memo from a police officer which reflects that the requestor has filed a complaint concerning a police officer. The police officer states that the requestor said he was going to sue the department and gave the officer his lawyer’s business card. However, the mere fact that an individual threatens litigation and has hired an attorney does not establish reasonably anticipated litigation. Therefore, we conclude that the department has failed to demonstrate reasonably anticipated litigation under section 552.103 of the Government Code. Accordingly, you may not withhold the submitted information under section 552.103 of the Government Code. Because you have raised no other exceptions for the documents in Exhibit 3, you must release this information.<sup>2</sup>

You contend that information in Exhibit 4 is excepted under section 552.117 of the Government Code. Section 552.117(2) of the Government Code excepts from public disclosure a peace officer’s home address, home telephone number, social security number, and information indicating whether the peace officer has family members regardless of whether the peace officer made an election under section 552.024 of the Government Code. Section 552.117(2) applies to peace officers as defined by article 2.12 of the Code of

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<sup>2</sup>We acknowledge that Exhibit 3 contains the requestor’s driver’s license number, license plate numbers, and VIN number which are protected under section 552.130 of the Government Code. However, the requestor has a special right of access to his own information under section 552.023 of the Government Code.

Criminal Procedure. We agree that the information you have marked must be withheld under section 552.117(2) of the Government Code. We have also marked some additional information in Exhibit 4 that you must withhold under section 552.117(2) of the Government Code.

You contend that information in Exhibits 5, 8, and 10 is excepted under section 552.101 in conjunction with common law privacy. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses common law privacy. Common law privacy excepts from disclosure private facts about an individual. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information may 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).

This office has found that the following types of information are excepted from required public disclosure under constitutional or common law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps), personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990), and information concerning the intimate relations between individuals and their family members, *see* Open Records Decision No. 470 (1987).

Prior decisions of this office have found that financial information relating to an individual ordinarily satisfies the first requirement of the test for common law privacy, but that there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. Open Records Decision Nos. 545 (1990), 373 (1983). A public employee's allocation of his salary to a voluntary investment program offered by his employer is a personal investment decision, and information about it is excepted from disclosure by a common law right of privacy. Open Records Decision No. 545 (deferred compensation plan). Information revealing that an employee participates in a group insurance plan funded partly or wholly by the governmental body is not excepted from disclosure. Open Records Decision No. 600 at 10 (1992). For example, this office has held that an employee's participation in the Texas Municipal Retirement System or in a group insurance plan funded by the governmental body is not excepted from disclosure under common law privacy. *Id.*; Open Records Decision No. 480 (1987). We have marked for release a document in Exhibit 5 which shows participation in the Texas Municipal Retirement System. We note, however, that the designation of a retirement beneficiary is protected from disclosure under section 552.101. Open Records Decision No. 600 (1992).

The employee's optional coverages will generally be funded by the employee and not the state. An employee's decision to enroll for optional coverages is a personal financial decision to allocate part of his compensation to optional benefits, and, therefore, the related information is excepted from disclosure by a right of privacy. Having reviewed the submitted information in Exhibit 5, it appears that most of the documents relate to optional coverages and voluntary payroll deductions which are excepted from disclosure under section 552.101 in conjunction with common law privacy. If the department, however, partly funds the employee's insurance, the information is not protected under common law privacy and may not be withheld on that basis. We have also marked some information in Exhibit 4 which reveals the employee's optional coverages and must be withheld. Further, we assume that the coverage for health insurance for the employee involves a transaction between the employee and the department and, therefore, is not protected under common law privacy. We have marked the information that we believe involves a transaction between the employee and the department and must be released. With regard to the information that must be released, we have marked information that must be withheld under section 552.117(2) of the Government Code. You must withhold the remainder of the information in Exhibit 5.

With regard to Exhibit 8, we agree that some of the information you marked in red reveals personal financial information of the employee and must be withheld under section 552.101 in conjunction with common law privacy. Further, we have marked additional financial information that you must withhold. With regard to the remaining information that you have marked in red, we believe that there is a legitimate public interest in the past conduct of a police officer. Accordingly, you must withhold the information we have marked in Exhibit 8, including information excepted under section 552.117(2), and release the remaining information you marked in red.

You also contend that medical information in Exhibit 10 is excepted under section 552.101 and common law privacy. After reviewing the information in Exhibit 10, we find that most of the medical information is excepted under section 552.101 in conjunction with the Medical Practice Act ("MPA"), section 159.002(b) of the Occupations Code. Section 552.101 also encompasses information protected by statute. Section 159.002(b) provides the following:

A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

Thus, access to medical records is governed by provisions outside the Public Information Act. *See* Open Records Decision No. 598 (1991). The MPA provides for both confidentiality of medical records and certain statutory access requirements. Occ. Code §§ 159.002, .003. Medical records may be released only in accordance with the MPA. Open Records Decision No. 598 (1991). Based on our review of the submitted information, we

conclude that most of the submitted documents in Exhibit 10 are the records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that were created or maintained by a physician and are subject to the MPA. We have marked the documents that may only be released in accordance with the MPA.

We also note that Exhibit 10 contains a mental health record. Chapter 611 of the Health and Safety Code provides for the confidentiality of records created or maintained by a mental health professional. Section 611.002(a) reads as follows:

Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.

Health & Safety Code § 611.002. Section 611.001 defines a “professional” as (1) a person authorized to practice medicine, (2) a person licensed or certified by the state to diagnose, evaluate or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals. *See* Open Records Decision No. 565 (1990). We have marked the mental health record that the department may release only as provided by sections 611.004 and 611.0045 of the Health and Safety Code.

With regard to the remaining information in Exhibit 10, we conclude that it is not the type of medical information that must be withheld under section 552.101 and common law privacy. Therefore, you must withhold the marked information in Exhibit 10, including information excepted under section 552.117(2), but release the remaining information.

Exhibit 6 contains W-4 forms. Title 26 section 6103(a) of the United States Code renders tax return information confidential. The term “return information” includes “the nature, source, or amount of income” of a taxpayer. 26 U.S.C. 6103(b)(2). This term has been interpreted by federal courts to include any information gathered by the Internal Revenue Service regarding a taxpayer’s liability under title 26 of the United States Code. *Mallas v. Kolak*, 721 F. Supp 748 (M.D.N.C. 1989). Our office has specifically held that W-4 Forms must be withheld in their entirety. Open Records Decision No. 600 at 9 (1992). Therefore, you must withhold the submitted W-4 Forms in Exhibit 6.

Further, Exhibit 9 contains an I-9 form. Release of employment eligibility verification form I-9 is governed by title 8, section 1324a of the United States Code. This statute provides that I-9 forms “may not be used for purposes other than for enforcement of [the immigration laws of] this chapter” and for enforcement of other federal statutes governing crime and criminal investigations. 8 U.S.C. § 1324a(b)(5); *see* 8 C.F.R. § 274a.2(b)(4). Release of this document under chapter 552 of the Government Code would not be for a permitted purpose;

accordingly, we conclude that the I-9 form in Exhibit 9 is confidential and must be withheld under section 552.101 of the Government Code. Further, you must withhold the social security card in Exhibit 9 under section 552.117(2) of the Government Code.

Exhibit 11 contains information from a polygraph examination. Section 1703.306 of the Occupations Code 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 apply here. Accordingly, the department must withhold the marked polygraph information under section 1703.306 as encompassed by section 552.101 of the Government Code. Further, we have marked polygraph information that you must withhold in Exhibit 8.

You also assert that the photograph in Exhibit 12 is excepted under section 552.119 of the Government Code. Section 552.119(a), with exceptions that have not been shown to apply here, prohibits the release of photographs that depict peace officers. Thus, you must withhold the photograph of the peace officer in Exhibit 12 under section 552.119(a) unless the peace officer has given written consent to the disclosure of the photograph. Gov't Code § 552.119(b).

Further, you contend that Exhibit 13 contains "test items" which are excepted under section 552.122 of the Government Code. Section 552.122(b) excepts from disclosure test items developed by a licensing agency or governmental body. In Open Records Decision No. 626 (1994), this office determined that the term "test item" in section 552.122 includes any standard means by which an individual's or group's knowledge or ability in a particular area is evaluated, but does not encompass evaluations of an employee's overall job performance or suitability. Whether information falls within the section 552.122 exception must be determined on a case-by-case basis. Open Records Decision No. 626 at 6 (1994). After reviewing the submitted information in Exhibit 13, we agree that the questions and answers are "test items" which may be withheld under section 552.122 of the Government Code.

Further, you assert that a birth certificate in Exhibit 14 is excepted under section 552.115 of the Government Code. Birth or death records maintained by the bureau of vital statistics of the Texas Department of Health or a local registration official are excepted from required public disclosure under section 552.115 of the Government Code. However, since the birth certificate at issue does not appear to be held by the bureau of vital statistics or local registration officials, section 552.115 is inapplicable. However, you must withhold the marked information under section 552.117(2) of the Government Code.

You also assert that information in Exhibit 7 must be withheld under section 552.130 of the Government Code. Section 552.130(a) of the Government Code excepts from disclosure 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. We have marked the information that you must withhold under section 552.130(a) of the Government Code. Further, you must withhold the copy of the driver's license in Exhibit 9.

In conclusion, you must withhold the marked information under section 552.101 in conjunction with common law privacy. Further, the submitted medical records may only be released in accordance with the MPA and mental records under section 611.002 of the Health and Safety Code. You must withhold the W-4 and I-9 forms pursuant to federal law. Further, you must withhold polygraph information under section 552.101 in conjunction with section 1703.306 of the Occupations Code. We agree with the information that you marked under section 552.117(2) and have marked additional information that must be withheld under section 552.117(2). You must also withhold the photograph of the peace officer under section 552.119 of the Government Code and you may withhold information that is excepted under section 552.122 of the Government Code. Finally, you must withhold information under section 552.130. You 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 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

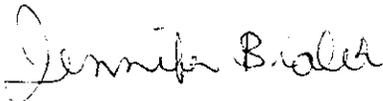
should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

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).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

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,



Jennifer H. Bialek  
Assistant Attorney General  
Open Records Division

JHB/er

Ref: ID# 144790

Encl: Marked documents

cc: Mr. Daniel Horan  
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(w/o enclosures)