



August 6, 2001

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

OR2001-3412

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# 150294.

The City of Arlington (the "city") received a written request from a former city employee for "all performance reviews, counseling statements and any positive or negative documents" in the requestor's personnel file. You contend that the requested information is excepted from public disclosure pursuant to sections 552.103 and 552.122 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted representative sample documents.¹

You contend that the submitted information in Exhibit 3 is excepted from disclosure pursuant to section 552.103 of the Government Code. Section 552.103 provides in pertinent part:

- (a) Information is excepted from the requirements of Section 552.021 if it is information relating to litigation of a civil or criminal nature to which the

¹In 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 No. 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.

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.

Gov't Code § 552.103(a), (c). Under section 552.103(a) and (c), the governmental body must demonstrate that (1) litigation involving the governmental body was pending or reasonably anticipated at the time of the records request, and (2) the information at issue is related to that litigation. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *see also 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 city has the burden of providing relevant facts and documents to show that the litigation exception is applicable in a particular situation. A 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 "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.² *See* Open Records Decision Nos. 555 (1990); 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). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. *See* Open Records Decision No. 361 (1983).

²In 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).

Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986).

You inform us that the requestor has previously filed a complaint with the United States Department of Labor, Veterans' Employment and Training Service regarding his termination from the city and contend that for purposes of section 552.103 such an action "is similar to a claim filed with the Equal Employment Opportunity Commission (the "EEOC") in that he has filed a complaint with a federal agency alleging employment discrimination." *See* Open Records Decision No. 386 (1983) (filing of complaint with EEOC constitutes evidence that likelihood of litigation against governmental body is more than mere conjecture). However, you have not explained why there exists a likelihood of litigation against the city merely because the requestor filed a complaint with the Department of Labor. In addition, you have failed to explain how litigation is pending or anticipated through a contested case proceeding under the Administrative Procedure Act. *See* Open Records Decision No. 588 (1991). We, therefore, conclude that you have not met your burden under section 552.103 and that none of the information in Exhibit 3 is excepted from public disclosure under this exception.

However, we note that some of the information in Exhibit 3 consists of a police "Incident Report" pertaining to a sexual assault. Section 552.101 of the Government Code protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 protects information coming within the common law right to privacy. *See 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. *See id.* at 683-85. Clearly, the release of information relating to a sexual assault implicates the privacy interests of the assault victim. *See* Open Records Decision No. 339 (1982) (identity of sexual assault victim protected by common law privacy). Although the victim in this instance chose to use a pseudonym in the incident report, we believe that the report contains other information tending to identify the victim. We, therefore, conclude that the city must withhold all information we have marked in Exhibit 3 that tends to identify the sexual assault victim pursuant to section 552.101 of the Government Code in conjunction with the common law right to privacy.

We also note that Exhibit 3 contains driver's license information. Section 552.130(a)(1) of the Government Code requires the city to withhold "information [that] relates to . . . a motor vehicle operator's or driver's license or permit issued by an agency of this state." Accordingly, the city must withhold the Texas driver's license number we have marked in Exhibit 3 pursuant to section 552.130(a)(1) of the Government Code.

You claim that certain tests taken by the requestor while he was attending the Arlington Police Academy in Exhibit 4 are excepted from public disclosure pursuant to section 552.122(b) of the Government Code. Section 552.122(b) of the Government Code

protects a “test item developed by a . . . governmental body.” Section 552.122(b) is applicable only where the test item constitutes a “standard means by which an individual’s or group’s knowledge or ability in a particular area is evaluated.” Additionally, when answers to test questions might reveal the questions themselves, the answers may be withheld under section 552.122(b). *See* Open Records Decision No. 626 at 8 (1994). This exception does not apply to evaluations of an employee’s overall job performance or suitability. *See id.* at 6. Whether information falls within the section 552.122(b) exception must be determined on a case-by-case basis. *See id.*

After reviewing the information in Exhibit 4, we agree that the test items you submitted to our office constitute a standard means by which an individual’s or group’s knowledge or ability in a particular area is evaluated. The city, therefore, may withhold the test items in Exhibit 4 in their entirety pursuant to section 552.122(b) of the Government Code.

In summary, the only information contained in Exhibit 3 that is excepted from public disclosure is the information we have marked as coming under the protection of sections 552.101 in conjunction with the common law right to privacy and the Texas driver’s license number which is protected by section 552.130(a)(1). The city may withhold Exhibit 4 in its entirety pursuant to section 552.122(b).

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,



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/RWP/seg

Ref: ID# 150294

Enc. Marked documents

c: Mr. Ronald Wilkins
1731 Duster Circle
Arlington, Texas 76018
(w/o enclosures)