



October 9, 2001

Mr. T. Daniel Santee, II
Assistant City Attorney
City of Abilene
P.O. Box 60
Abilene, Texas 79604

OR2001-4551

Dear Mr. Santee:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 153007.

The City of Abilene (the "city") received a request for the personnel file of three city employees, "including the oath of office of each, and any records of past complaints and disciplinary action." You inform us that the city has released to the requestor Officer Wright's oath of office, and Mr. Eltiar's resume, application and personnel action form. You state that the city has no documents responsive to the request for complaints and/or disciplinary records for the three employees. You claim that portions of the requested information are excepted from disclosure under sections 552.101, 552.102, 552.103 and 552.117 of the Government Code. You also assert that Judge Barton's personnel file is not subject to the Act. We have considered your arguments and reviewed the submitted information.

We begin with Judge Barton's personnel file. We believe the judge's personnel file is a judicial record as defined in Rule 12.2 of the Rules of Judicial Administration. *See* Rule 12.2(d). Thus, the required public disclosure of the Judge's personnel file is governed by Rule 12 of the Rules of Judicial Administration, not the Act. *See* Gov't Code § 552.0035(a). This office does not address questions under those rules. *See* Rule 12.9 (providing procedures for appeal of denial of access to judicial records with the Administrative Director of the Office of Court Administration).

We turn now to the exceptions to disclosure you raise for the other files. We consider your claim under section 552.103. Section 552.103 provides in part 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.

....

(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.

The city 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, 481 (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 city must meet both prongs of this test for information to be excepted under 552.103(a).

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.¹ 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

¹In 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).

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).

You argue section 552.103 applies to the information because you contend it relates to both pending and anticipated litigation. You state that the requestor is appealing his conviction for speeding. Officer Wright cited the requestor for speeding. The Assistant County Attorney whose files is being requested handled the case in municipal court. You also inform us that the requestor has threatened to file a civil rights lawsuit and is planning to file grievances with the State Bar of Texas against the judge and county attorney involved with the case. You say the requestor "informed [your] office that he had filed his request in hopes of obtaining information for his trial and/grievance."

We find the city has not established that the information relates to the pending appeal. We further find that the city has not established that the civil litigation is reasonably anticipated. Accordingly, we conclude that the city may not withhold the requested information from the requestor based on section 552.103 of the Government Code.

Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses the doctrine of common law privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Common law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *See id.* This office has found that personal financial information not relating to the financial transaction between an individual and a governmental body is protected from disclosure on privacy grounds. *See* Open Records Decision Nos. 600. This office has also found that information about an individual's prescription drugs, illnesses, operations, and physical handicaps are likewise protected on privacy grounds. *See* Open Records Decision No. 455 (1987). Both files contains private financial information. We have marked this information. The city must withhold the private information from public disclosure based on section 552.101 of the Government Code in conjunction with the common law right to privacy.

Section 552.101 also excepts from disclosure information made confidential by statute. We find that three federal statutes make confidential small portions of the submitted information. First, employee W-4 forms are excepted from disclosure by section 6103(a) of title 26 of the United States Code. Open Records Decision No. 600 (1992). Second, certain information contained in the records submitted is confidential under Title I of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101 *et seq.* *See also* Open Records Decision No. 641 (1996). Third, a social security number may be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are 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.* We have no basis for concluding that any of the social security numbers in the file are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Public Information Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the city pursuant to any provision of law, enacted on or after October 1, 1990. We have marked the information that the city must withhold under section 552.101 in conjunction with federal statutory law.

You raise a Texas statute for the police officer's personnel file. You inform us that the city is a civil service city under chapter 143 of the Local Government Code. Section 143.089 of the Local Government Code contemplates two different types of personnel files, one that the police department is required to maintain as part of the police officer's civil service file, and one that the police department may maintain for its own internal use. Local Gov't Code § 143.089(a), (g).

Section 143.089(g) provides:

A fire or police department may maintain a personnel file on a fire fighter or police officer employed by the department for the department's use, but the department may not release any information contained in the department file to any agency or person requesting information relating to a fire fighter or police officer. The department shall refer to the director or the director's designee a person or agency that requests information that is maintained in the fire fighter's or police officer's personnel file.

In *City of San Antonio v. Texas Attorney General*, 851 S.W.2d 946 (Tex. App.--Austin 1993, writ denied), the court addressed a request for information contained in a police officer's personnel file maintained by the city police department for its use and addressed the applicability of section 143.089(g) to that file. The records included in the personnel file related to complaints against the police officer for which no disciplinary action was taken. The court determined that section 143.089(g) made these records confidential. *City of San Antonio*, 851 S.W.2d at 949. In cases in which a police department takes disciplinary action against a police officer, it is required by section 143.089(a)(2) to place records relating to the investigation and disciplinary action in the personnel files maintained under section 143.089(a). Such records may not be withheld under section 552.101 of the Act. Local Gov't Code § 143.089(f); Open Records Decision No. 562 (1990) at 6.

We are unable to determine whether the documents you submitted to us for review are part of the files maintained by the police department under section 143.089(g). If these

documents are part of the section 143.089(g) file, the city must withhold these documents. If the documents are placed in the personnel file maintained by the civil service commission under section 143.089(a), then the documents must generally be released to the public upon request, unless some provision of chapter 552 of the Government Code permits or requires the civil service commission to withhold the information.² Local Gov't Code § 143.089(f); Gov't Code §§ 552.006, .021; Open Records Decision No. 562 (1990) at 6 (construction of Local Gov't Code § 143.089(f) provision requiring release of information as required by law).

The requested records about the police officer contain information that is excepted from disclosure under section 552.117(2). The city must withhold those portions of the records that reveal the officer's home address, home telephone number, social security number and information about the officer's family members. The city must also withhold the officer's former home addresses and telephone numbers from disclosure. *See* Open Records Decision No. 622 (1994). The records also contain the social security numbers of other police officers. The city must withhold this information from disclosure under section 552.117(2). We have marked these documents accordingly.³

We have marked driver's license information as excepted from public disclosure. Section 552.130 provides in relevant part:

(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[.]

²As the submitted records include an employee performance appraisal report, we note that section 143.089(a)(3) of the Local Government Code requires a civil service director or the director's designee to retain in the civil service file, among other things, the police officer's periodic evaluation by a supervisor.

³We note that the city does not raise section 552.117(1) for information in the county attorney's file. Included in the submitted county attorney file is the form by which the county attorney elected to permit release of his home address and phone number. You indicate that this is the current election form for this employee. We note that the election form does not include an election for release of the employee's social security number or family information. Thus, we assume that the employee has not elected to keep confidential his social security number and family information in accordance with section 552.024 of the Government Code, thereby making section 552.117 inapplicable to any of the county attorney's information. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, a governmental body may only withhold information under section 552.117 on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for the information was made.

You must withhold the Texas driver's license number information under section 552.130.

Finally, the records contain a home e-mail address that is excepted from disclosure under a new exception. Act of May 14, 2001, 77th Leg., R.S., ch. 356 § 1, 2001 Tex. Gen. Law 614 (to be codified as Gov't Code § 552.137); *see also* Act of May 22, 2001, 77th Leg., R.S., ch. 545, § 5, 2001 Tex. Gen. Laws 974, 975 (adding this exception as § 552.136). We have marked the e-mail address that you must not release.

In summary, the Act does not require the city to release the judge's personnel file. As for the other employee files, based on section 552.101 of the Government Code, the city must withhold from public disclosure in accordance with our markings all private financial information and the information subject to federal law. Based on section 552.130, the city must withhold from disclosure the driver's license information. Based on section 552.117(2), the city must withhold the police officer's information covered by that statute. Based on the new exception to be codified as section 552.137, the city must withhold the home e-mail address. The city must release the remaining information 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,

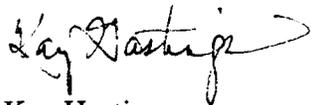
at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

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).

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,



Kay Hastings
Assistant Attorney General
Open Records Division

KH/seg

Ref: ID# 153007

Enc: Submitted documents

c: Mr. Jason Specht
297 Fishing Village Circle
Abilene, Texas 79601
(w/o enclosures)