



February 19, 2002

Ms. Angela K. Washington
Cowles & Thompson
901 Main Street, Suite 4000
Dallas, Texas 75202-3793

OR2002-0791

Dear Ms. Washington:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 158767.

The City of Rowlett Police Department (the “department”), which you represent, received two requests for information from the same requestor. In his first request, the requestor seeks the internal affairs investigation into the matter that resulted in his client’s termination, any disciplinary recommendations relating to the termination, his client’s internal affairs resumé, and all other internal affairs investigations of his client. In his second request, the requestor seeks his client’s personnel file as well as a memorandum from the chief of police dated November 19, 2001. You claim that the requested information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.108, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We begin by noting that most of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 of the Government Code provides in relevant part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108

Gov't Code § 552.022(a)(1). Exhibits D, F, G, H consist of completed investigations. Exhibit J contains a completed evaluation. This information must be released unless it is confidential under other law or excepted under section 552.108 of the Government Code. Section 552.103 is a discretionary exception and is not other law for the purpose of section 552.022. Open Records Decision No. 663 (1999) (governmental body may waive section 552.103). Therefore, the department may not withhold Exhibits D, F, G, and H, or the evaluation in Exhibit J under section 552.103. Nevertheless, sections 552.101 and 552.102 are confidentiality provisions for the purpose of section 552.022. Furthermore, information under section 552.022(a)(1) may be withheld under section 552.108. Thus, we will address your arguments under sections 552.101, 552.102, and 552.108 with respect to all of the submitted information, including the information in Exhibits D, F, G, H, and J. However, we will only address your section 552.103 argument with respect to the information that is not subject to section 552.022(a)(1).

Section 552.102 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. See *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), cert. denied, 430 U.S. 931 (1977). Accordingly, we will consider your section 552.101 and section 552.102 claims together.

For information to be protected from public disclosure by the common law right of privacy under section 552.101, the information must meet the criteria set out in *Industrial Foundation*. In *Industrial Foundation*, the Texas Supreme Court stated that information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Id.* at 685. 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. *Id.* at 683. You contend that Exhibits F and G contain information that is protected under common law privacy. However, upon reviewing the information in these exhibits, we find that none of the information is so highly intimate or embarrassing that the release of the information would be highly objectionable to a reasonable person. See *id.* at 683-85; Open Records Decision No. 611 (1992). Therefore, we find that none of the submitted information may be withheld under sections 552.101 and 552.102 of the Government Code.

Next, you contend that Exhibits F, G, and H are excepted from disclosure under section 552.108 of the Government Code. Section 552.108 provides, in part:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of Section 552.021 if:

....

(2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication;

....

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from the requirements of Section 552.021 if:

....

(2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication;

....

You contend that the internal affairs investigations contained in Exhibits F, G, and H should be excepted under section 552.108 because the investigations have concluded and they did not result in a conviction or deferred adjudication. However, section 552.108 is inapplicable to a police department's internal administrative investigations that do not involve the investigation or prosecution of crime. *See Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.- El Paso 1992, writ denied). Here, the internal investigation files clearly indicate that the matters investigated are violations of internal procedures, not criminal laws. While some of the exhibits contain criminal investigation information, these investigations did not involve the conduct that was the subject of the internal affairs investigation. Furthermore, you do not specifically argue that these criminal investigations have reached a final result other than conviction or deferred adjudication. Therefore, we find that section 552.108 does not apply to any of the information Exhibit F, G, or H.

We next address your argument under section 552.103 with respect to the information in Exhibits E, I, and J that is not subject to section 552.022. Section 552.103 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.

....

(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 department 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 department 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 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 contend that litigation involving the requestor's client is reasonably anticipated here because the terminated officer has retained an attorney, appealed his termination to the City Manager, and secretly taped conversations. While you have demonstrated that the terminated officer is seeking administrative relief regarding his termination, you have not

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).

provided any concrete evidence that litigation is likely to ensue. Therefore, we find that none of the submitted information may be withheld under section 552.103 of the Government Code.

You also contend that the requested memorandum, contained in Exhibit I, is excepted from disclosure under section 552.111 of the Government Code. Section 552.111 provides that “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency is excepted from [required public disclosure].” This section encompasses both the deliberative process and attorney work product privileges. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000). The deliberative process privilege, as incorporated into the Act by section 552.111, protects from disclosure interagency and intra-agency communications consisting of advice, opinion, or recommendations on policymaking matters of a governmental body. *See City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Open Records Decision No. 615 at 5 (1993). An agency’s policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. ORD 615 at 5-6. Additionally, the deliberative process privilege does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); ORD 615 at 4-5.

You state that the memorandum, which pertains to a new general order, “contains opinions related to the policymaking processes of the” department. However, based on our review of the submitted information, we find that the memorandum does not contain advice, opinion, or recommendations relating to the policy mission of the department. *See Gov’t Code § 552.111; City of Garland v. Dallas Morning News*, 969 S.W.2d 548, 557 (Tex. App.—Dallas 1998, pet. granted); Open Records Decision No. 631 at 3 (1995) (report addressing university’s affirmative action policies involves university’s educational mission). Therefore, the department may not withhold Exhibit I under section 552.111 of the Government Code.

Next, you indicate that some of the submitted information is excepted from disclosure under section 552.130 of the Government Code. 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[.]

The submitted information contains driver's license numbers. To the extent these numbers relate to licenses issued by an agency of the State of Texas, the department must withhold them under section 552.130. Driver's license numbers relating to out-of-state licenses are not protected under section 552.130.

We also note that the submitted documents contain social security numbers that may be excepted from disclosure under section 552.101 of the Government Code. The 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), 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* Open Records Decision No. 622 (1994). 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 department pursuant to any provision of law, enacted on or after October 1, 1990.

Finally, we note that the submitted documents contain polygraph information that must be withheld under section 552.101 of the Government Code. Texas law prohibits the public disclosure of the results of polygraph examinations. Occ. Code § 1703.306. Section 1703.306 of the Occupations Code governs the release of polygraph information and provides:

(a) 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 other than:

- (1) the examinee or any other person specifically designated in writing by the examinee;
- (2) the person that requested the examination;
- (3) a member, or the member's agent, of a governmental agency that licenses a polygraph examiner or supervises or control a polygraph examiner's activities;
- (4) another polygraph examiner in private consultation; or
- (5) any other person required by due process of law.

(b) The board or any other governmental agency that acquires information from a polygraph examination under this section shall maintain the confidentiality of the information.

Occ. Code § 1703.306. This provision prohibits the release of polygraph information to anyone other than those individuals listed in subsection (a). We have marked the polygraph examination information that is confidential pursuant to section 1703.306 of the Occupations Code and must be withheld under section 552.101 of the Government Code unless one of the release provisions in subsection (a) applies.

In summary, the department must withhold Texas driver's license numbers under section 552.130. The department must withhold social security numbers under section 552.101 of the Government Code and the federal Social Security Act if it obtained or maintains the social security numbers pursuant to a provision of law enacted on or after October 1, 1990. Finally, the department must withhold the marked polygraph examination information under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code. The department must release the remainder of the submitted information to the requestor.²

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

²Some of the documents required to be released contain or consist of information that is not subject to release to the general public. See Gov't Code §§ 552.117; 552.352. However, the requestor in this instance has a special right of access to the information. Gov't Code § 552.023. Because some of the information is confidential with respect to the general public, if the department receives a future request for this information from an individual other than the requestor or his client, the department should again seek our decision.

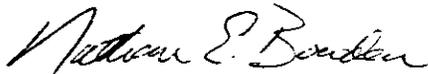
governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge 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 Texas Building and Procurement 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,



Nathan E. Bowden
Assistant Attorney General
Open Records Division

NEB/sdk

Ref: ID# 158767

Enc: Submitted documents

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