



OFFICE of the ATTORNEY GENERAL  
GREG ABBOTT

April 9, 2003

Ms. Nancy O. Williams  
Assistant City Attorney  
City of Irving  
825 West Irving Boulevard  
Irving, Texas 75060

OR2003-2404

Dear Ms. Williams:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 179091.

The City of Irving (the "city") received a request for information pertaining to La Cima Club and all records and personnel files of eleven named employees, including files kept by three named supervisors. The requestor specifically excludes information such as home addresses, telephone numbers, and social security numbers. Although you state that the information pertaining to La Cima Club will be released, you claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.102, and 552.103 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and reviewed the submitted information.<sup>2</sup>

Initially, we must address the city's obligations under section 552.301 of the Government Code. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and *state the exceptions that apply* not later than the tenth business day after the date of receiving the written request. The city received the request on January 21, 2003. You did

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<sup>1</sup>Although the city also asserts section 552.305, we note that section 552.305 is not an exception to disclosure, but permits an interested third party to submit to the attorney general reasons why the requested information should not be released.

<sup>2</sup>We assume that the 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.

not, however, assert section 552.117 as an exception to disclosure until February 11, 2003, which was more than ten business-days after the city's receipt of the request. However, as section 552.117 of the Government Code provides a compelling reason to overcome the presumption of openness resulting from the city's failure to comply with section 552.301, we will address your argument under that exception as well. *See* Open Records Decision No.150 (1977) (presumption of openness overcome by a showing that the information is made confidential by another source of law or affects third party interests).

Next, we note that much of the information at issue may be subject to previous rulings. In Open Records Letter No. 2002-4225 (2002), this office considered a request to the city for the records of seven of the employees listed in the present request from the files of the three supervisors listed in the present request. Further, in Open Records Letter No. 2002-7390 (2002), this office considered a request to the city for the human resource personnel files and records of ten of the employees listed in the present request. To the extent that any of the information subject to the present request has previously been ruled on, and the remaining criteria for a "previous determination" established by this office in Open Records Decision No. 673 (2001) have been met, the city must release or withhold this information in accordance with Open Records Letter Nos. 2003-4225 and 7390.<sup>3</sup>

We also note that the submitted records include information that is subject to section 552.022 of the Government Code, which provides in pertinent part as follows:

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:

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(3). The submitted records include information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body that must be released under section 552.022 unless it is expressly

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<sup>3</sup>The four criteria for this type of "previous determination" are 1) the records or information at issue are precisely the same records or information that were previously submitted to this office pursuant to section 552.301(e)(1)(D) of the Government Code; 2) the governmental body which received the request for the records or information is the same governmental body that previously requested and received a ruling from the attorney general; 3) the attorney general's prior ruling concluded that the precise records or information are or are not excepted from disclosure under the Act; and 4) the law, facts, and circumstances on which the prior attorney general ruling was based have not changed since the issuance of the ruling. *See* Open Records Decision No. 673 (2001).

confidential under other law. Although the city raises section 552.103 of the Government Code with regard to this information, section 552.103 is a discretionary exception to disclosure that protects the governmental body's interests and may be waived. As such, it is not "other law" that makes information confidential for purposes of section 552.022. *See* Open Records Decision No. 473 (1987) (section 552.103 is a discretionary exception that may be waived); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the city may not withhold under section 552.103 any of the information to which section 552.022 is applicable. However, we will address the city's claim that some of the information is excepted under sections 552.101 and 552.102. We will also address section 552.136 for some of the information to which section 552.022 is applicable.

You assert that some of the requested information is confidential under the Medical Practice Act (the "MPA"). Occ. Code §§ 151.001-165.160. Section 159.002 of the Occupations Code provides in pertinent part:

(b) 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.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Medical records must be released upon the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Occ. Code §§ 159.004, .005. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). For your convenience, we have marked the documents that are medical records subject to the MPA.

You also claim exception under section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by statutes such as the Family and Medical Leave Act, 29 U.S.C. § 2654 (the "FMLA"). Section 825.500 of chapter V of title 29 of the Code of Federal Regulations identifies the record-keeping requirements for employers that are subject to the FMLA. Subsection (g) of section 825.500 states that

[r]ecords and documents relating to medical certifications, recertifications or medical histories of employees or employees' family members, created for purposes of FMLA, shall be maintained as confidential medical records in separate files/records from the usual personnel files, and if ADA is also applicable, such records shall be maintained in conformance with ADA confidentiality requirements ..., except that:

- (1) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations;
- (2) First aid and safety personnel may be informed (when appropriate) if the employee's physical or medical condition might require emergency treatment; and
- (3) Government officials investigating compliance with FMLA (or other pertinent law) shall be provided relevant information upon request.

29 C.F.R. § 825.500(g). Although the city claims that it has marked some of the submitted materials that must be withheld under the FMLA, we found no documents marked as such, and upon review of the remaining submitted information, we conclude that the FMLA is not applicable to any of the remaining submitted documents.

Section 552.101 also encompasses information protected by the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101 et seq. (the "ADA"). The ADA provides that information about the medical conditions and medical histories of applicants or employees must be 1) collected and maintained on separate forms, 2) kept in separate medical files, and 3) treated as a confidential medical record. In addition, information obtained in the course of a "fitness for duty examination," conducted to determine whether an employee is still able to perform the essential functions of his job, is to be treated as a confidential medical record. 29 C.F.R. § 1630.14(c). *See also* Open Records Decision No. 641 (1996). The Equal Employment Opportunity Commission (the "EEOC") has determined that medical information for the purposes of the ADA includes "specific information about an individual's disability and related functional limitations, as well as general statements that an individual has a disability or that an ADA reasonable accommodation has been provided for a particular individual." *See* Letter from Ellen J. Vargyas, Legal Counsel, EEOC, to Barry Kearney, Associate General Counsel, National Labor Relations Board, 3 (Oct. 1, 1997). Although the city claims that it has marked some of the submitted materials that must be withheld under the ADA, we found no documents marked as such, and upon review of the remaining submitted information, we conclude that the ADA is not applicable to any of the remaining submitted documents.

You argue that other submitted information is excepted from disclosure under section 552.101 of the Government Code in conjunction with common-law privacy and under section 552.102. 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 v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), for information claimed to be protected under the doctrine of common-law privacy.

Common-law privacy protects information if it (1) contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person and (2) is not of legitimate concern to the public. *Industrial Found.* 540 S.W.2d 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. In addition, this office has found that the following types of information are excepted from required public disclosure under common-law privacy: an individual’s criminal history when compiled by a governmental body, *see* Open Records Decision No. 565 (citing *United States Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989)), 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), and personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992) (information revealing that an employee participates in and has enrolled persons in addition to himself in a group insurance plan funded partly or wholly by the governmental body is not excepted from disclosure, whereas designation of beneficiary of employee’s retirement benefits and optional insurance coverage, choice of particular insurance carrier, direct deposit authorization, and forms allowing employee to allocate pretax compensation to group insurance, health care, or dependent care are protected), 545 (1990) (a public employee’s allocation of his salary to a voluntary investment program or to optional insurance coverage which is offered by his employer is a personal investment decision and information about it is excepted from disclosure under the common law right of privacy). We have reviewed the information that you claim is excepted under sections 552.101 and 552.102 and have marked those portions that are protected by common-law privacy and must be withheld.

We note that the submitted materials include fingerprint information subject to sections 559.001, 559.002, and 559.003 of the Government Code, which provide as follows:

**Sec. 559.001. DEFINITIONS.** In this chapter:

- (1) "Biometric identifier" means a retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry.
- (2) "Governmental body" has the meaning assigned by Section 552.003 [of the Government Code], except that the term includes each entity within or created by the judicial branch of state government.

**Sec. 559.002. DISCLOSURE OF BIOMETRIC IDENTIFIER.** A governmental body that possesses a biometric identifier of an individual:

- (1) may not sell, lease, or otherwise disclose the biometric identifier to another person unless:
  - (A) the individual consents to the disclosure;
  - (B) the disclosure is required or permitted by a federal statute or by a state statute other than Chapter 552 [of the Government Code]; or
  - (C) the disclosure is made by or to a law enforcement agency for a law enforcement purpose; and
- (2) shall store, transmit, and protect from disclosure the biometric identifier using reasonable care and in a manner that is the same as or more protective than the manner in which the governmental body stores, transmits, and protects its other confidential information.

**Sec. 559.003. APPLICATION OF CHAPTER 552.** A biometric identifier in the possession of a governmental body is exempt from disclosure under Chapter 552.

It does not appear to this office that section 559.002 permits the disclosure of the submitted fingerprint information. Therefore, the city must withhold the fingerprints in the submitted documents, which we have marked, under section 552.101 in conjunction with section 559.003 of the Government Code.

We also note that the submitted documents contain employee W-4 forms that must be withheld under section 552.101. Employee W-4 forms are excepted from disclosure under section 552.101 in conjunction with section 6103(a) of title 26 of the United States Code.

Open Records Decision No. 600 (1992). The city must therefore withhold the W-4 forms, which we have marked, under section 552.101.

You argue that section 552.117 may be applicable to some of the submitted information. Section 552.117 excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024.<sup>4</sup> 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, the city 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 this information was made. For those employees who timely elected to keep their personal information confidential, the city must withhold any information that reveals whether these employees have family members. The city may not withhold this information under section 552.117 for those employees who did not make a timely election to keep the information confidential. We have marked the information that reveals whether employees have family members.

We note that the responsive information includes Texas driver's license numbers that are excepted from disclosure under section 552.130. Section 552.130 of the Government Code excepts from public disclosure information relating to a driver's license or motor vehicle title or registration issued by an agency of this state. Accordingly, we have marked the information that you must withhold pursuant to section 552.130.

We also note that the submitted documents contain account numbers that are subject to section 552.136 of the Government Code. Section 552.136 makes certain access device numbers confidential and provides in pertinent part:

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

- (1) obtain money, goods, services, or another thing of value;
- (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

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<sup>4</sup>As previously noted, the requestor does not seek home addresses, telephone numbers, or social security numbers. Thus, we need not address the applicability of section 552.117 to home addresses, telephone numbers, or social security numbers.

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Gov't Code § 552.136. Accordingly, the city must withhold the account numbers that we have marked pursuant to section 552.136 of the Government Code.

We turn now to the information which you claim is excepted under section 552.103 of the Government Code. Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state or a political subdivision is or may be a party. 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 on the date the governmental body receives the request for information, 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 section 552.103(a).

The mere chance of litigation will not trigger section 552.103(a). Open Records Decision No. 452 at 4 (1986). To demonstrate that litigation is reasonably anticipated, the governmental body must furnish *concrete* evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *Id.*

This office has stated that a pending EEOC complaint indicates that litigation is reasonably anticipated. Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982). In this instance, the requestor has filed an EEOC complaint. However, the EEOC has dismissed the requestor's complaint and issued a Notice of Right to Sue letter dated April 19, 2002. The notice indicates that the complainant has the right to sue on the claim for ninety days following the date of receipt of the notice. You inform us that the city received the request for information on January 21, 2003, which is more than ninety days from the date of the notice. The city provides no further evidence of any objective steps toward litigation taken by the requestor. As such, based upon the information provided, we cannot agree that, in this instance, litigation was reasonably anticipated by the city on the date it received the request.

You have also provided documentation showing that one of the requestor's former co-workers, Pete Talleos, filed suit against the city prior to its receipt of this request. Our review of the submitted information shows that it is related to the pending litigation for purposes of section 552.103(a). Thus, with the exception of a document we have marked for release, you have demonstrated the applicability of section 552.103 to the information you marked.

We note, however, that once the information has been obtained by all parties to anticipated or pending litigation, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). Mr. Talleos has seen some of the submitted information. Thus, the city must release to the requestor the responsive information that has been seen by Mr. Talleos in the pending suit. We also note that the applicability of section 552.103(a) ends when the litigation is concluded. Attorney General Opinion MW-575 at 2 (1982); Open Records Decision Nos. 350 at 3 (1982), 349 at 2 (1982).

In summary, to the extent that any of the information subject to the present request has previously been ruled on, and the remaining criteria for a "previous determination" have been met, the city must release or withhold this information in accordance with Open Records Letter Nos. 2003-4225 and 7390. Medical records may be released only in accordance with the MPA. The city must withhold the information that we have marked under sections 552.101, 552.117, 552.130, and 552.136. With the exception of the information that we have marked for protection under section 552.136, the city must release the information that we have marked under section 552.022. During the pendency of the litigation, the city may withhold under section 552.103 the requested information it has marked, except for the document we have marked for release, and the information to which Mr. Talleos previously had access. The remaining information must be released.

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 Dep't of Pub. 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



Heather Pendleton Ross  
Assistant Attorney General  
Open Records Division

HPR/sdk

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