



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

July 15, 2003

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

OR2003-4911

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# 184225.

The City of Irving (the "city") received two requests from the same requestor for access to: (1) "any and all information and files in organizational development department, employee relationship department, and risk management department" in the city's human resource department pertaining to eleven named individuals, and (2) any and all e-mail communications between eight named individuals. You state that much of the responsive information has either been the subject of previous rulings by this office or has been released to the requestor. However, you claim that the remainder of the requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.111, 552.117, and 552.130 of the Government Code and Rule 192.5 of the Texas Rules of Civil Procedure.¹ We have considered the exceptions you claim and reviewed the submitted information.

¹Pursuant to section 552.301(b), a governmental body must raise any exceptions to disclosure within ten-business days of receiving the request for information. Gov't § Code 552.301(b). In this instance, you did not raise sections 552.107, 552.111, and 552.130 of the Government Code or Rule 192.5 of the Rules of Civil Procedure within ten-business days. Because sections 552.107, 552.111, and Rule 192.5 are discretionary provisions, you have waived them by failing to raise them in a timely fashion. *See* Open Records Decision Nos. 677 at 8-9 (2002), 676 at 5-6 (2002), 630 at 4 (1994) (governmental body may waive attorney-client privilege under section 552.107(1)), 473 (1987) (governmental body may waive section 552.111); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). However, because section 552.130 provides a compelling reason to overcome the presumption of openness, the city has not waived section 552.130.

Initially, we address your statement that much of the responsive information has been addressed in previous rulings by this office. In Open Records Letter Nos. 2003-2404 (2003), 2002-7390 (2002), 2002-5869 (2002), and 2002-4225 (2002), this office considered requests to the city for the records of many of the same individuals named 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. 2003-2404, 2002-7390, 5869, and 4225.²

We next note that the submitted records include information that is subject to section 552.022 of the Government Code. Section 552.022 makes certain information public, unless it is expressly confidential under other law. One category of public information under section 552.022 is "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by [s]ection 552.108[.]" Gov't Code § 552.022(a)(1). Another category of public information under section 552.022 is "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). A third category of public information under section 552.022 is "all working papers, research material, and information used to estimate the need for or expenditure of public funds or taxes by a governmental body, on completion of the estimate." Gov't Code § 552.022(a)(5). The submitted records include information that must be released under section 552.022 unless it is expressly 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. The city must release the documents we have marked under 552.022, unless they are confidential under other law. We will address the applicability of other law to the documents that are subject to section 552.022 below.

²The 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).

You assert that some of the submitted 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.

We note that included among the completed reports are accident report forms that appear to have been completed pursuant to chapter 550 of the Transportation Code. *See* Transp. Code § 550.064 (officer's accident report). Section 550.065(b) states that, except as provided by subsection (c), accident reports are privileged and confidential. Section 550.065(c)(4) provides for the release of accident reports to a person who provides two of the following three pieces of information: (1) date of the accident; (2) name of any person involved in the accident; and (3) specific location of the accident. *See* Transp. Code § 550.065(c)(4). Under this provision, the Department of Public Safety or another governmental entity is required to release a copy of an accident report to a person who provides the agency with two or more pieces of information specified by the statute. *Id.* In the situation at hand, the requestor has not provided the city with two of the three pieces of information regarding the accident reports at issue. Thus, the city must withhold the submitted accident reports, which we have marked, under section 550.065(b) of the Transportation 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 section 402.083 of the Labor Code, which pertains to records of the Texas Workers' Compensation Commission ("TWCC"), and provides in part: (a) Information in or derived from a claim file regarding an employee is confidential and may not be disclosed by the commission except as provided by this subtitle. Labor Code

§ 402.083(a). This provision makes confidential information in TWCC's claim files. *See* Open Records Decision No. 619 (1993). Section 402.086(a) of the Labor Code essentially transfers this confidentiality to information that other parties obtain from the TWCC's files. Section 402.086(a) provides as follows: (a) Information relating to a claim that is confidential under this subtitle remains confidential when released to any person, except when used in court for the purposes of an appeal. Labor Code § 402.086(a). In Open Records Decision No. 533 (1989), this office determined that the predecessor provision to sections 402.083 and 402.086 protected information received from the Industrial Accident Board (now the TWCC), but did not protect information regarding workers compensation claims that the governmental body did not receive from the TWCC. You do not inform us, and we are not otherwise able to determine, whether the city received any of the information in question from the TWCC. To the extent, however, that the city received any responsive information relating to a workers' compensation claim from the TWCC, any such information is confidential under sections 402.083 and 402.086 of the Labor Code and must be withheld from disclosure under section 552.101 of the Government Code. Information relating to a workers' compensation claim that the city did not receive from TWCC is not confidential under sections 402.083 and 402.086 and thus is not excepted from disclosure under section 552.101.

Next, we address your claim that the identities of insured persons are excepted under section 552.101 in conjunction with article 21.07-6, section 14A of the Insurance Code. Section 14A of article 21.07-6 provides:

- (a) Information that identifies an individual covered by a plan is confidential.
- (b) During the time the information described in Subsection (a) of this section is in an administrator's custody or control, the administrator shall take all reasonable precautions to prevent disclosure or use of the information for a purpose unrelated to administration of the plan.

Ins. Code art. 21.07-6, 14A(a)-(b). We conclude that this provision applies only to information in the custody or control of an "administrator." *See* Ins. Code art. 21.07-6, § (1)(1) (defining "administrator"). You have not demonstrated that any of the submitted information is in the administrator's custody or control. Therefore, we conclude that you have failed to demonstrate the applicability of section 14A of article 21.07-6 of the Insurance Code to the submitted information. Accordingly, the identities of insured persons may not be withheld under article 21.07-6 of the Insurance Code.

You also contend that some of the submitted information is confidential under section 552.101 in conjunction with common-law privacy. Section 552.101 of the Government Code includes information protected by the common law right of privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976). The doctrine of common-law privacy protects information that contains highly intimate or

embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person and the information must be of no legitimate concern to the public. *Id.* This office has found that some kinds of medical information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps).

You also argue that the submitted information contains personal financial information that is confidential under section 552.101 and common-law privacy. This office has determined that some personal financial information is highly intimate or embarrassing and thus meets the first part of the *Industrial Foundation* test. Open Records Decision Nos. 545 (1990) (common-law privacy protects personal financial information not relating to the financial transaction between an individual and a governmental body), 523 (1989) (common-law privacy protects credit reports, financial statements, and other personal financial information), 373 (1983) (common-law privacy protects assets and income source information). In this instance, we conclude that the information that is subject to section 552.022 does not contain the type of information that is intimate or embarrassing for purposes of common-law privacy. Therefore, you may not withhold any information under section 552.101 and common-law privacy.

We now turn to your argument under section 552.117 of the Government Code. Section 552.117(1) 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. Whether a particular piece of information is protected by section 552.117(1) 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 not withhold the individuals' personal information under section 552.117 if they did not make a request for confidentiality under section 552.024 of the Government Code prior to the date on which the request for this information was received. If the employees and former employees made timely elections under section 552.024, the city must withhold most of the information you have marked and the additional information we have marked under section 552.117(1). We note, however, that the requestor has a special right of access to her own personal information.³ *See* Gov't Code § 552.023 (person or person's authorized representative has special right of access to information that relates to person and that is protected from disclosure by laws intended to protect person's privacy interest).

³ Because the requestor's information may be confidential with respect to the general public if he made a timely section 552.024 election, the department should again seek a decision from this office if it receives a future request for this information from an individual other than the requestor.

We note that if a social security number is not excepted under section 552.117, it may be withheld in some circumstances under section 552.101 of the Government Code. A social security number or "related record" 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 or 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 the social security numbers in the document 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, 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 note that some of the documents that must be released under section 552.022 contain information that is confidential 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; or
- (3) a personal identification document issued by an agency of this state of a local agency authorized to issue an identification document.

You must withhold the Texas driver's license information, vehicle registration, and license plate numbers that you have marked, as well as additional information that we have marked, under section 552.130.

Finally, we note that some of the documents that must be released under section 552.022 contain account numbers. Section 552.136 of the Government Code states that "[n]otwithstanding 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. The city must, therefore, withhold the marked account numbers under section 552.136.

With respect to the information that is not subject to section 552.022, we address your claim 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.*

You inform us that a suit entitled *Peter Talleos v. City of Irving*, No. 02-9342-J (191st Dist. Ct., Dallas County, Tex.) was pending at the time the request for information was received and is still pending. Furthermore, upon consideration of your representations concerning the subject matter of the litigation and our review of the submitted information, we conclude that the submitted information is related to the pending litigation. Therefore, you may withhold the remaining submitted information under section 552.103.

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (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. 2003-2404, 2002-7390, 2002-5869, and 2002-4225. You must release the information that we have marked as subject to section 552.022, with the exception of the information that is confidential under the MPA, section 550.065 of the Transportation Code, or sections 552.117, 552.130, and 552.136 of the Government Code. You must also withhold any information relating to a workers’ compensation claim that the city received

from TWCC. You may withhold the remaining information under section 552.103 of the Government Code.

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).

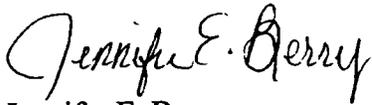
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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,

A handwritten signature in black ink that reads "Jennifer E. Berry". The signature is written in a cursive style with a large initial "J".

Jennifer E. Berry
Assistant Attorney General
Open Records Division

JEB/seg

Ref: ID# 184225

Enc: Submitted documents

c: Ms. Kay Sheets
615 Dickey Drive
Euless, Texas 76040
(w/o enclosures)