

The ruling you have requested has been amended as a result of litigation and has been attached to this document.



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 14, 2004

Mr. David M. Berman
Nichols, Jackson, Dillard, Hager & Smith, L.L.P.
500 North Akard, Suite 1800
Dallas, Texas 75201

OR2004-0327

Dear Mr. Berman:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 194397.

The City of Duncanville (the "city"), which you represent, received a request for several categories of information about specified parcels of real property in the city, and for "journals kept by Mayor Glenn Repp." You indicate that the city will release some of the requested information to the requestor. You claim, however, that the information you seek to withhold is not public information subject to disclosure under the Public Information Act (the "Act"). In the alternative, you claim that the information at issue is excepted from disclosure under sections 552.103 and 552.109 of the Government Code. We have considered your arguments and reviewed the submitted representative sample of information.¹ We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

We begin by addressing your argument that the submitted information is not public information for purposes of the Act. The Act requires public disclosure only of "public information." *See* Gov't Code § 552.021; *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ *dism'd*);

¹We 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 Nos. 499 (1988), 497 (1988). Here, we do not address any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Open Records Decision No. 452 at 3 (1986). "Public information" is defined under section 552.002 of the Act as:

information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

(1) by a governmental body; or

(2) for a governmental body and the governmental body owns the information or has a right of access to it.

Gov't Code § 552.002(a). You contend that the information at issue is not public information.² In addressing your argument, we first note that part of the submitted information was created prior to May 5, 1998, the date that Mr. Repp was sworn in as mayor of the city. We agree that the portion of the information created before Mr. Repp took office as mayor does not relate to the official business of the city. Accordingly, we determine that the portion of the submitted sample information covering the time period prior to May 5, 1998 was not collected, assembled, or maintained by or for a governmental body pursuant to law or in connection with the transaction of the official business of the city. Thus, we determine that this portion of the information at issue is not public information for purposes of the Act and is not required to be released to the requestor.

We next address the portion of the information at issue covering the period since Mr. Repp was sworn in as mayor of the city. You assert, based on the factors articulated in Open Records Decision No. 635 (1995), that this portion of the information is not public information subject to the Act. In Open Records Decision No. 635, we observed that the following factors are relevant, although not exhaustive, in deciding whether a document is essentially a governmental or personal document: who prepared the document; the nature of its contents; its purpose or use; who possessed it; who had access to it; whether the governmental body required its preparation; and whether its existence was necessary to or in furtherance of official business. *See id.*; *see also* Open Records Decision Nos. 626 (1994) (handwritten notes taken during oral interview by Texas Department of Public Safety promotion board members are public information), 450 (1986) (notes of appraisers taken in the course of teacher appraisals were public information), 120 (1976) (faculty members' written evaluations of doctoral student's qualifying exam are subject to the Act).

In this instance, you state that the documents at issue are maintained by the mayor with his own funds and are not created or maintained with the use of public funds or resources. You indicate that, because the mayor does not have an office at city hall, the information at issue

²The information you have submitted for our review consists of copies of a daily log of occurrences recorded in spiral-bound, ruled-paper notebooks. Each entry contains the date followed by a brief description of events occurring that day; in many of the entries, multiple events are recorded in a numbered list.

is kept by the mayor at his home. You further advise that no other city official or employee has access to the information at issue, and you state that the information "is not used in connection with the transaction of city business."

We note that information is public information within the scope of the Act when it relates to the official business of a governmental body or is maintained by a public official or employee in the performance of official duties, even though the information may be in the possession of an individual. *See* Open Records Decision No. 635 at 4 (1995). Information is not beyond the scope of the Act simply because the information is in the possession of a particular official or employee of a governmental body, rather than the governmental body as a whole. *See id.* at 3 (1995). On the contrary, information that clearly relates to a governmental body's official business is subject to the Act, regardless of whether the information is held by a particular official or employee, the governmental body's administrative offices, or the custodian of records. *Id.*

Upon review, we find that the portion of the submitted documents covering the period since Mr. Repp was sworn in as mayor contains detailed information concerning the daily activities of the mayor in the performance of his official duties with regard to matters of city policy and procedure. In particular, the information at issue documents the mayor's meetings with individual city council members concerning specific initiatives, as well as communications with the city manager and staff concerning the mayor's policy proposals and efforts to work jointly with other municipalities. We also note that the information at issue documents the mayor's planning regarding city management and the economic development of the city.

In sum, we find that the information at issue consists of a record of the activities of the mayor in his official capacity as a public servant on a daily basis. In this regard, we find that the information in the portion of the submitted documents covering the period since Mr. Repp was sworn in as mayor is generally not "personal" in nature, but rather relates to the mayor's performance of his official duties and thus relates to the official business of the city. *See generally* Open Records Decision Nos. 444 (1986) (information concerning performances of governmental employees is matter of clear public concern), 438 (1986) (information concerning work activities of public employee is subject to legitimate public interest), 423 at 2 (1984) (scope of public employee privacy is narrow). Thus, having considered your arguments and reviewed the submitted information, we determine that the Act is applicable to the portion of the documents covering the period since Mr. Repp was sworn in as mayor. Therefore, the portion of the submitted information dated May 5, 1998 and thereafter must be released to the requestor unless it is excepted from disclosure pursuant to an exception under the Act.

You contend that the information at issue is excepted from disclosure pursuant to section 552.103 of the Government Code. Section 552.103 of the Government Code 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.

A governmental body 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 was pending or reasonably anticipated on the date the governmental body received 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). A governmental body must meet both prongs of this test for information to be excepted under 552.103(a).

You indicate that the information at issue is related to litigation that is currently pending, but to which the city is not a party. Because the city is not a party to the pending litigation, the city may not withhold the information at issue under section 552.103 on that basis. You also state that the information “may bear relevance in litigation which, although not presently involving the City, is reasonably anticipated.”

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.³ Open Records Decision No. 555 (1990); *see* Open

³In 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).

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 state that the city has received correspondence from an attorney threatening litigation if the city does not rezone a specified subdivision within the city back to residential use. Based upon your representation and our review, we find you have established that the city reasonably anticipates litigation regarding the matter of the zoning of this subdivision. We also find that portions of the submitted information are related to the anticipated litigation. Accordingly, we have marked information in the submitted documents that the city may withhold under section 552.103 of the Government Code.⁴ However, you have not demonstrated that the remainder of the information at issue is related to the anticipated litigation. Thus, we determine that the city may not withhold the remainder of the information under section 552.103.

You also contend that the information at issue is excepted from disclosure pursuant to section 552.109 of the Government Code. Section 552.109 protects private correspondence and communications of elected office-holders when release of the information "would constitute an invasion of privacy." See Gov't Code § 552.109. In determining whether information is excepted from disclosure by section 552.109, this office relies on the same common-law privacy test applicable under section 552.101 of the Government Code. See Open Records Decision Nos. 506 (1988), 241 (1980), 212 (1978); see also Open Records Decision No. 40 (1974) (providing that section 552.109 may protect content of information, but not fact of communication).

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. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). We note that information relating to the performance of official duties by public employees and officials is generally subject to a legitimate public interest, and thus not protected by common-law privacy. See Open Records Decision Nos. 444 (1986), 438 (1986), 423 (1984). However, we also note that certain types of information relating to a public employee or official can be protected by common-law privacy.

⁴We note, however, that 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 all opposing parties in litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded or is no longer anticipated. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

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. 540 S.W.2d 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)), personal financial information not relating to a financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990), 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 identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). We have marked portions of the submitted documents that are protected by common-law privacy and must be withheld pursuant to section 552.101 of the Government Code.

We also note that portions of the information at issue may be excepted from disclosure under section 552.117 of the Government Code. Section 552.117(a)(1) excepts 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 timely elect to keep this information confidential pursuant to section 552.024. 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 elected to keep information confidential pursuant to section 552.024 prior to the date on which the request for this information was made. In reviewing the submitted documents, we note that they contain information that reveals whether the mayor has family members. If the city determines that the mayor made a timely election to keep this information confidential, the city must withhold such information under section 552.117(a)(1) of the Government Code.

In summary, we determine that the portion of the information at issue that was created prior to the mayor's incumbency is not public information for purposes of the Act and need not be released. With respect to the remaining submitted information, we have marked information that the city may withhold pursuant to section 552.103 of the Government Code. We have also marked portions of the information that the city must withhold pursuant to section 552.101 of the Government Code in conjunction with common-law privacy. Provided the mayor made a timely election pursuant to section 552.024 of the Government Code, the city must withhold family member information pursuant to section 552.117(a)(1) of the Government Code. The remainder of the information at issue must be released 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 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, appearing to read 'D. Saldivar', with a long horizontal flourish extending to the right.

David R. Saldivar
Assistant Attorney General
Open Records Division

DRS/seg

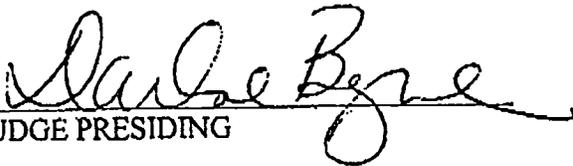
Ref: ID# 194397

Enc: Submitted documents

c: Ms. Joyce Magnum
903 Georgeland Drive
Duncanville, Texas 75116
(w/o enclosures)

IT IS FURTHER ORDERED that this Court's ruling on the Motions for Summary Judgment resolves all pending issues and claims in this cause of action and that this ruling be and is hereby a final judgment on all matters in this cause of action. Any relief not expressly granted herein is hereby denied.

SIGNED this 24 day of Sept., 2004.


JUDGE PRESIDING