



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

March 25, 2004

Mr. James L. Dougherty, Jr.
Attorney at Law
5120 Bayard
Houston, Texas 77006

OR2004-2253

Dear Mr. Dougherty:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 198149.

The City of West University Place (the "city"), which you represent, received a request for eighteen categories of information pertaining to the requestor's client. You state that you do not have any documents responsive to categories 8, 13, and 16-18 of the request.¹ You claim that the submitted information, or portions thereof, is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.108, 552.111, 552.117, 552.1175, 552.119, 552.130, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information, some of which consists of representative sample information.²

¹The Act does not ordinarily require a governmental body to obtain information not in its possession, to release information that did not exist when a request for information was received, or to prepare new information in response to a request. See *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App. – San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 558 (1990), 499 (1988), 452 at 3 (1986), 362 at 2 (1983).

²We 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). 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.

Initially, we note that the city states, and provides documentation showing, that it sought clarification of categories 3-7 and 9 of the request from the requestor. *See* Gov't Code § 552.222(b) (stating that if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used). Based on our review of all of the information that has been submitted to us, it does not appear that the city had received the requested clarification from the requestor as of the date that it requested a ruling from us. Accordingly, we conclude that the city need not respond to this request for information regarding any requested information, other than that submitted to us for our review, until it receives the requestor's clarification. We note, however, that when the city does receive the clarification, it must seek a ruling from this office before withholding from the requestor any information that may be responsive to the request. *See* Open Records Decision No. 663 (1999) (providing for tolling of ten business day deadline for requesting attorney general decision while governmental body awaits clarification).

Next, we note that a portion of the submitted information constitutes medical record information, access to which is governed by the Medical Practice Act ("MPA"), chapter 159 of the Occupations Code. Section 159.002 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.

Occ. Code § 159.002(b), (c). This office has concluded that the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). Further, information that is subject to the MPA also includes information that was obtained from medical records. *See* Occ. Code § 159.002(a), (b), (c); *see also* Open Records Decision No. 598 (1991). Medical records must be released upon the governmental body's receipt of 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. *See* 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. *See* Open Records Decision No. 565 at 7 (1990). We have marked the medical record information that is

subject to the MPA. Absent the applicability of an MPA access provision, the city must withhold this information pursuant to the MPA.³

We next note that the remaining submitted information includes information that is subject to section 552.022. The information that you submitted to us for review contains completed reports, which fall into one of the categories of information made expressly public by section 552.022. *See* Gov't Code section 552.022(a)(1). Section 552.022(a)(1) states that a completed report, audit, evaluation, or investigation made of, for, or by a governmental body is expressly public unless it is excepted under section 552.108 of the Government Code or is expressly confidential under other law. You do not claim that section 552.108 excepts this information from public disclosure. You assert that the information subject to section 552.022 is excepted under sections 552.101, 552.102, 552.103, 552.117, and 552.1175 of the Government Code. Section 552.103 is a discretionary exception to disclosure that protects the governmental body's interests and is therefore not other law that makes information expressly confidential for purposes of section 552.022(a). *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); *see also* Open Records Decision Nos. 663 (1999) (governmental body may waive section 552.103), 522 at 4 (1989) (discretionary exceptions in general). However, as sections 552.101, 552.102, 552.117, and 552.1175 are considered confidentiality provisions for the purpose of section 552.022, we will consider whether these exceptions apply to the completed reports along with the remaining submitted information that is not subject to section 552.022.

We next address section 552.007 of the Government Code. This section provides that if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law. *See* Gov't Code 552.007; Open Records Decision No. 518 at 3 (1989). Category 15 of the request references “[d]ocuments provided for inspection or copying or retention to [a named individual] or to the ‘West U Examiner’” The wording of the request indicates that a portion of the information at issue may have previously been released to a member of the public. If the city voluntarily disclosed this information to a member of the public, the city may not now withhold such information unless its release is expressly prohibited by law. *See* Gov't Code § 552.007. You assert that the information submitted as responsive to category 15 of the request is excepted under section 552.103 of the Government Code. This section is a discretionary exception and does not constitute law prohibiting the release of this information. *See* 4 S.W.3d 469; *see also* Open Records Decision No. 522 at 4 (1989). To the extent the information at issue was previously released, it may not now be withheld under section 552.103. We note, however, that sections 552.117, 552.1175, and 552.130 of the Government Code may be applicable to some of this information. Accordingly, we will

³As the MPA is dispositive, we do not address your other claims regarding this information.

address the applicability of those exceptions to the information at issue along with the remaining submitted information.

To the extent the information at issue is not subject to section 552.022 and has not previously been released, we consider your claim under section 552.103 of the Government Code. 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.

Gov't Code § 552.103(a), (c). 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).

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). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986). In Open Records Decision No. 638 (1996), this office stated that a governmental body has met its burden of showing that litigation is reasonably anticipated when it received a notice of claim letter and the governmental body represents that the notice of claim letter is in compliance with the requirements of the Texas Tort Claims Act ("TTCA"), chapter 101 of the Civil Practice and Remedies Code, or an applicable municipal ordinance.

You state that the city reasonably anticipates litigation related to the information at issue in the present request. In support of this contention, you state that the requestor has filed notice

with the city in compliance with the TTCA, and you have submitted a copy of the notice. Based on your arguments and our review of the submitted information, we agree that litigation against the city was reasonably anticipated when the city received this request and that some of the information at issue relates to that litigation. Thus, we conclude that the city may withhold from disclosure under section 552.103 the portions of the remaining submitted information that we have marked. You fail to explain, however, how the information marked as Items 9, 11, 12, and 14 is related to the anticipated litigation. Therefore, the city may not withhold the information marked as Items 9, 11, 12, and 14 under section 552.103.

Furthermore, 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 potential opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Additionally, 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).

You assert that the submitted records marked as Items 7 and 11 are excepted from disclosure under section 552.108. Section 552.108(a)(1) provides in pertinent part that information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from disclosure if "release of the information would interfere with the detection, investigation, or prosecution of crime[.]" Section 552.108(b) provides in pertinent part that 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 disclosure if "release of the internal record or notation would interfere with law enforcement or prosecution[.]" Gov't Code § 552.108(b)(1). Generally, a governmental body claiming section 552.108 as an exception to disclosure of requested information must demonstrate how and why the release of the requested information would interfere with law enforcement or prosecution. *See* Gov't Code §§ 552.108(a), (b), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977).

This office has on numerous occasions concluded that section 552.108 excepts from public disclosure information relating to the security or operation of a law enforcement agency. *See, e.g.*, Open Records Decision Nos. 531 (1989) (holding that section 552.108 excepts detailed guidelines regarding a police department's use of force policy), 508 (1988) (holding that release of dates of prison transfer could impair security), 413 (1984) (holding that section 552.108 excepts sketch showing security measures for execution). You state that the submitted records marked as Items 7 and 11 show the daily patrol routes and routines of certain officers, as well as the placement of radar units. You also contend that this information, if released, could provide a burglar or armed robber with information to plan a crime. Having reviewed your arguments and the information at issue, we agree that the release of this information would interfere with law enforcement. Accordingly, the city may

withhold the records marked as Items 7 and 11 from disclosure under section 552.108(b)(1) 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 other statutes, such as Family Code section 58.007. Juvenile law enforcement records relating to conduct that occurred on or after September 1, 1997 are confidential under section 58.007. The relevant language of section 58.007(c) reads as follows:

(c) Except as provided by Subsection (d), law enforcement records and files concerning a child and information stored, by electronic means or otherwise, concerning the child from which a record or file could be generated may not be disclosed to the public and shall be:

(1) if maintained on paper or microfilm, kept separate from adult files and records;

(2) if maintained electronically in the same computer system as records or files relating to adults, be accessible under controls that are separate and distinct from controls to access electronic data concerning adults; and

(3) maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subchapter B.

A portion of the submitted information involves juvenile conduct that occurred after September 1, 1997. It does not appear that any of the exceptions in section 58.007 apply; therefore, the information that we have marked is confidential pursuant to section 58.007(c) of the Family Code. You must withhold the marked information from disclosure under section 552.101 of the Government Code in conjunction with section 58.007 of the Family Code.

Criminal history report information ("CHRI") is confidential and not subject to disclosure. CHRI "means information collected about a person by a criminal justice agency that consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions" but does not include "driving record information maintained by [the Department of Public Safety ("DPS")] under Subchapter C, Chapter 521, Transportation Code." Gov't Code § 411.082(2).

Federal regulations prohibit the release of CHRI maintained in state and local CHRI systems to the general public. See 28 C.F.R. § 20.21(c)(1) ("Use of criminal history record information disseminated to noncriminal justice agencies shall be limited to the purpose for

which it was given.”), (2) (“No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself.”). Under chapter 411 of the Government Code, a criminal justice agency may obtain CHRI from DPS or from another criminal justice agency. Gov’t Code §§ 411.083(b)(1), .087(a)(2), .089(a). However, CHRI so obtained is confidential and may only be disclosed in very limited instances. Gov’t Code § 411.084; *see also* Gov’t Code § 411.087 (restrictions on disclosure of CHRI obtained from DPS also apply to CHRI obtained from other criminal justice agencies). Therefore, to the extent that the submitted records contain CHRI that was obtained pursuant to these state and federal regulations, it must be withheld under section 552.101 as information made confidential by law.

Next, we address your privacy claims under sections 552.101 and 552.102. Section 552.101 also encompasses constitutional and common-law rights of privacy. Constitutional privacy under section 552.101 protects two kinds of interests. *See* Open Records Decision Nos. 600 at 3-5 (1992), 478 at 4 (1987), 455 at 3-7 (1987); *see also Whalen v. Roe*, 429 U.S. 589, 599-600 (1977). The first is the interest in independence in making certain important decisions related to the “zones of privacy,” pertaining to marriage, procreation, contraception, family relationships, and child rearing and education, that have been recognized by the United States Supreme Court. *See* Open Records Decision No. 455 at 3-7 (1987); *see also Fajjo v. Coon*, 633 F.2d 1172 (5th Cir. 1981). The second constitutionally protected privacy interest is in freedom from public disclosure of certain personal matters. *See* Open Records Decision No. 455 at 6-7 (1987); *see also Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5th Cir. 1985), *reh’g denied*, 770 F.2d 1081 (1985), *cert. denied*, 474 U.S. 1062 (1986). This aspect of constitutional privacy balances the individual’s privacy interest against the public’s interest in the information. *See* Open Records Decision No. 455 at 7 (1987). Constitutional privacy under section 552.101 is reserved for “the most intimate aspects of human affairs.” *Id.* at 8 (quoting *Ramie v. City of Hedwig Village*, 765 F.2d at 492).

Information must be withheld from disclosure under section 552.101 and section 552.102 in conjunction with common-law privacy when the information is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) of no legitimate public interest. *See Industrial Found. v. Texas Ind. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977); *see also Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref’d n.r.e.) (test for privacy under predecessor of section 552.102 is same as test of common-law privacy under section 552.101). Common-law privacy protects the specific types of information that the Texas Supreme Court held to be intimate or embarrassing in *Industrial Foundation*. *See* 540 S.W.2d at 683 (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). This office also has determined that other types of information also are private under section 552.101.

See Open Records Decision No. 659 at 4-5 (1999) (summarizing information attorney general has determined to be private).

You assert that Item 10 contains private information. We note, however, that the information at issue pertains directly to employees or former employees of the city. As this office has often noted, the public has a legitimate interest in information that relates to public employees and their conduct in the workplace. Thus, such information is not protected by privacy under sections 552.101 or 552.102, and may not be withheld from disclosure on that basis. *See also* Open Records Decision Nos. 405 at 2 (1983) (manner in which public employee performed his or her job cannot be said to be of minimal public interest), 444 at 4 (1986) (public employee's personnel file information will generally be available to public regardless of whether it is highly intimate or embarrassing), 470 at 4 (1987) (public employee's job performance does not generally constitute private affairs), 473 at 3 (1987) (fact that public employee receives less than perfect or even very bad evaluation not protected by common-law privacy), 542 at 5 (1990) (information regarding public employee's qualifications is of legitimate concern to public).

You next claim that sections 552.117 and 552.1175 of the Government Code are applicable to some of the submitted information. Section 552.117(a)(2) makes confidential all information that relates to the home address, home telephone number, social security number and family information of a peace officer.⁴ Whether a particular item of information is protected under this section must be determined at the time that the request for the information is received by the governmental body. *See* Open Records Decision No. 530 at 5 (1989). Section 552.117(a)(2) applies to "peace officers" as defined by article 2.12 of the Code of Criminal Procedure. We have marked the types of information that are confidential under section 552.117(a)(2).

Finally, we note that portions of the remaining submitted information are subject to section 552.130 of the Government Code. Section 552.130 excepts from disclosure information that relates to a motor vehicle operator's or driver's license or permit issued by an agency of this state or a motor vehicle title or registration issued by an agency of this state. *See* Gov't Code § 552.130. Accordingly, we conclude that the city must withhold the types of Texas driver's license and motor vehicle information that we have marked pursuant to section 552.130 of the Government Code.

In summary, absent the applicability of an MPA access provision, the city must withhold the information that we have marked pursuant to the MPA. Information that is confidential under section 58.007 of the Family Code and CHRI must be withheld from disclosure under section 552.101 of the Government Code. We have marked the types of information that the city must withhold under section 552.117(a)(2). The city must withhold the types of Texas

⁴We note that section 552.117(a)(2) is not applicable to a peace officer's date of birth.

driver's license and motor vehicle information that we have marked pursuant to section 552.130 of the Government Code. The city may withhold the information that we have marked under sections 552.103 and 552.108 of the Government Code. The remaining submitted information must be released to the requestor.⁵

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

⁵As our ruling is dispositive, we do not address your remaining arguments.

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,



Cindy Nettles
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Open Records Division

CN/jh

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Enc. Submitted documents

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