



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

November 30, 2004

Mr. Charles R. Anderson  
Deputy City Attorney  
City of Irving  
825 West Irving Boulevard  
Irving, Texas 75060

OR2004-10060

Dear Mr. Anderson:

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# 213893.

The City of Irving (the "city") received a request for "any and/or all records, evidence, tapes and electronic messages regarding" the termination of a named employee. The city informs this office that it previously asked for a decision about the documents included as Attachment C in response to an earlier request for information. In Open Records Letter No. 2004-3869 (2004), we concluded that several documents within Attachment C were excepted from public disclosure under section 552.107 of the Government Code. In addition, this office found that portions of Attachment C were excepted from public disclosure under section 552.101 in conjunction with the common law right of privacy. As the four criteria for a "previous determination" established by this office in Open Records Decision No. 673 (2001) have been met, the city may continue to withhold information in Attachment C in accordance with Open Records Letter No. 2004-3869.<sup>1</sup> The city asserts that the submitted

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<sup>1</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).

information in Attachments D, E, and F is excepted from disclosure under sections 552.101, 552.103, and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered comments submitted by the named former employee. *See* § 552.304 (providing that member of public may submit comments stating why information should or should not be released).

Section 552.103 of the Government Code provides in part:

(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). The city maintains the burden of providing relevant facts and documents to show that section 552.103 is applicable in this situation. The test for meeting this burden is a showing by the city that (1) litigation was pending or reasonably anticipated on the date that it received this request, and (2) the information at issue is related to that pending or anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *see also 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 the information at issue to be excepted from disclosure pursuant to section 552.103.

We note that the mere chance of litigation will not trigger section 552.103. *See* Open Records Decision No. 452 at 4 (1986). In order to adequately demonstrate that litigation is reasonably anticipated, the city must furnish us with concrete evidence showing that litigation is realistically contemplated and is more than mere conjecture. *See id.* Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). This office has stated that a pending Equal Employment Opportunity Commission (the "EEOC") complaint indicates that litigation is reasonably anticipated. *See* Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982). Among the documents that you have submitted to us for our review is a "Dismissal and Notice of Rights" from the EEOC, dated August 10, 2004. 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 instant request for information on September 9, 2004, which is less than ninety days from the date of the notice. Thus, we find that the city reasonably anticipated litigation on the date that it received the instant request for information. We also find that Attachments D and E are related to that anticipated litigation for purposes of section 552.103(a).

We note, however, that once information has been obtained by all parties to the anticipated litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. *See* 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 generally not excepted from disclosure under section 552.103(a) and must be disclosed.<sup>2</sup> *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982). In this regard, we note that the potential opposing party in this matter has previously had access to much of the information in Attachments D and E. Therefore, this information may not be withheld under section 552.103. The remaining information in Attachments D and E, which we have marked, may be withheld pursuant to section 552.103 of the Government Code.

You also assert that portions of Attachment F are excepted under section 552.101 of the Government Code. We will also consider whether the remaining information in Attachments D and E is excepted from public disclosure under section 552.101. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses the common law right of privacy, which 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. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The types 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)); 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

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<sup>2</sup> We further note that the applicability of section 552.103(a) ends once the litigation has been concluded.

Decision Nos. 440 (1986), 393 (1983), 339 (1982). We have reviewed the submitted records and find that certain information in Attachment F and the remaining portions of Attachments D and E is excepted from public disclosure pursuant to section 552.101 in conjunction with the common law right of privacy. We have marked the information that must be withheld accordingly.

Section 552.117 may also be applicable to some of the submitted information. Section 552.117(a)(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 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(a)(1) 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 the employees' home addresses and telephone numbers, social security numbers, and 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. To the extent that the marked information in Exhibits D, E, and F pertains to current or former employees who timely elected confidentiality under section 552.024, it must be withheld.

We note that the submitted information contains a checking account number that is subject to section 552.136 of the Government Code.<sup>3</sup> Section 552.136 provides:

(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; or
- (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

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<sup>3</sup>The Office of the Attorney General will raise mandatory exceptions like sections 552.136 and 552.137 on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

(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. The checking account number that we have marked must be withheld under section 552.136.

The submitted information also contains e-mail addresses obtained from the public. Section 552.137 makes certain e-mail addresses confidential. Section 552.137 provides:

(a) Except as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

(c) Subsection (a) does not apply to an e-mail address:

(1) provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent;

(2) provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor's agent;

(3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract; or

(4) provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public.

(d) Subsection (a) does not prevent a governmental body from disclosing an e-mail address for any reason to another governmental body or to a federal agency.

Gov't Code § 552.137. Under section 552.137, a governmental body must withhold the e-mail address of a member of the general public, unless the individual to whom the e-mail

address belongs has affirmatively consented to its public disclosure. *See id.* § 552.137(b). You do not inform us that a member of the public has affirmatively consented to the release of any e-mail address contained in the submitted materials. The city must, therefore, withhold the marked e-mail addresses of members of the public under section 552.137.

In summary, pursuant to section 552.103, the city may withhold the marked portions of Attachments D and E to the extent this information has not been made available to the potential opposing party in the anticipated litigation. The city must withhold the marked portions of Attachments D, E, and F pursuant to section 552.101 in conjunction with the common law right of privacy. Pursuant to section 552.117(a)(1), the city is required to withhold the home address, home telephone number, and social security number of any current or former employee who made a timely request for confidentiality under section 552.024. The city must withhold the marked checking account number pursuant to section 552.136 and the marked e-mail addresses pursuant to section 552.137. All 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,



L. Joseph James  
Assistant Attorney General  
Open Records Division

LJJ/seg

Ref: ID# 213893

Enc. Submitted documents

c: Ms. Kay Sheets  
Texas Public Workers Association  
209A East Main  
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(w/o enclosures)