



ATTORNEY GENERAL OF TEXAS  
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December 21, 2004

Mr. Laurence E. Boyd  
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OR2004-10794

Dear Mr. Boyd:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 215603.

The City of Danbury (the "city"), which you represent, received a request for information concerning the termination of a named former city police officer, as well as records of complaints filed or disciplinary action taken against the former officer. You claim that the requested information is excepted from disclosure under sections 552.101, 552.102, 552.103, and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Because your claim under section 552.103 of the Government Code is potentially the broadest, we will address it first. 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.

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. *Univ. of Tex. Law Sch. v. Tex. 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 section 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). 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.<sup>1</sup> Open Records Decision No. 555 (1990); *see* Open 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). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983).

In this case, you state that the city anticipates litigation against the city by the terminated officer, or by third parties involved in incidents involving the officer. While you indicate that the officer has consulted an attorney, you have not demonstrated that any party has taken any objective steps toward litigation against the city. Having considered your arguments and representations and reviewed the submitted information, we find that you have failed establish that litigation was reasonably anticipated when the city received the present request. We therefore determine that none of the submitted information may be withheld on the basis of section 552.103.

Next, you contend that the submitted documents are excepted from disclosure under section 552.108 of the Government Code. Section 552.108 provides in pertinent part:

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<sup>1</sup>In 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).

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:

(1) release of the information would interfere with the detection, investigation or prosecution of crime[.]

...

(b) 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 [required public disclosure] if:

(1) release of the internal record or notation would interfere with law enforcement or prosecution[.]

Gov't Code § 552.108(a), (b). A governmental body claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See* Gov't Code §§ 552.108(a)(1), (b)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). Release of information relating to a pending criminal investigation can interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), writ ref'd n.r.e. per curiam, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases). Section 552.108(b) may be applicable to internal records of a law enforcement agency, provided the law enforcement agency reasonably explains how and why release of the information at issue would interfere with law enforcement or prosecution. *See City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet.) (section 552.108(b)(1) exception intended to protect information which, if released, would permit private citizens to anticipate weaknesses in a police department, avoid detection, jeopardize officer safety, and generally undermine law enforcement efforts). In all cases, a governmental body seeking to withhold information pursuant to section 552.108 must meet its burden of explaining how and why release of the requested information would interfere with law enforcement and crime prevention. *See* Open Records Decision No. 562 at 10 (1990) (construing statutory predecessor).

In this case, while you state that the submitted documents are held by the Danbury Police Department and “deal with the detection, investigation, or prosecution of crime,” you do not inform us that the information relates to a pending criminal investigation. Further, while you also state that the documents “include internal records and notations . . . maintained for internal use in matters relating to law enforcement,” we find you have not explained how and why release of such records would interfere with law enforcement. Upon review, we determine the city has not reasonably explained how release of the submitted information would interfere with the detection, investigation, or prosecution of crime or with law

enforcement or prosecution in general. We therefore find you have failed to establish that section 552.108 is applicable to the submitted information, and we determine that the department may not withhold any of the submitted information pursuant to section 552.108. See Gov't Code § 552.301(e)(1)(A); *Ex parte Pruitt*, 551S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986).

Next, you contend that the submitted documents include information from the officer's personnel file that is excepted under section 552.102 of the Government Code. You also contend that portions of the submitted information are excepted from disclosure under section 552.101 in conjunction with common-law privacy. Section 552.102(a) excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board* for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the Government Code. See *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976). Accordingly, we will consider your claim under section 552.102 together with your claims under section 552.101 and common-law privacy.

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. *Indus. Found.*, 540 S.W.2d at 685. The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683.

Upon review, we note the personnel information you seek to withhold relates solely to the work conduct and job performance of the former police officer, and is therefore a matter of legitimate public interest. See Open Records Decision Nos. 470 (1987) (public employee's job performance does not generally constitute employee's private affairs), 455 (1987) (public employee's job performance or abilities generally not protected by privacy), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employee), 423 at 2 (1984) (scope of public employee privacy is narrow); see also Open Records Decision No. 562 at 9, n.2 (1990) (public has interest in preserving the credibility and effectiveness of the police force). Accordingly, we find that none of this information is excepted from disclosure under section 552.102(a) of the Government Code pursuant to common-law privacy. You also seek to withhold information in the submitted documents pertaining to an alleged domestic violence incident pursuant to section 552.101 in conjunction with common-law privacy. We emphasize, however, that information concerning domestic violence generally does not come within the scope of

common-law privacy. Open Records Decision No. 611 (1992) ("An assault by one family member on another is a crime, not a family matter normally considered private"). Furthermore, although you indicate that copies of citations issued by the former officer are protected by privacy, we note that this information is not highly intimate or embarrassing and is subject to a legitimate public interest. We therefore determine that none of this information is protected by common-law privacy, and we determine the city may not withhold the information under section 552.101 on that basis.

You also contend that social security numbers in the submitted documents are excepted under section 552.101 in conjunction with common-law privacy. However, this office has long held that social security numbers are not the type of intimate and embarrassing information protected under common-law privacy. *See* Open Records Decision Nos. 622 (1994), 455 (1987), 254 (1980), 169 (1977). Therefore, the city may not withhold social security numbers in the submitted documents under section 552.101 in conjunction with common-law privacy.

Section 552.101 also encompasses information protected by other statutes. In this regard, you further argue that social security numbers found in the submitted documents must be withheld under section 552.101. A social security number or "related record" may be excepted from disclosure in some circumstances under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, section 405(c)(2)(C)(viii)(I) of title 42 of the United States Code. *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and 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.* You state that pursuant to section 411.086 of the Government Code, "[s]ocial security numbers are part of the information collected for criminal history records." Section 411.086 contemplates rules that the Department of Public Safety ("DPS") shall adopt in regard to requests for criminal history information. Section 411.086(b)(2) states that such rules "may require a person requesting criminal history information about an individual to submit to [DPS] one or more of the following: . . . (E) any known identifying number of the individual, including social security number . . ." Gov't Code § 411.086(b)(2). Here, you do not specifically state whether the city obtained or maintained the social security numbers in the submitted documents in order to request criminal history information from DPS. Moreover, you do not inform us as to whether DPS actually requires or required the city to submit the social security numbers at issue in order to request criminal history information. We find that if the city obtained or maintains the social security numbers in order to request criminal history information from DPS, and if DPS actually requires or required the city to submit the social security numbers to request criminal history information, then the social security numbers are excepted under section 552.101 in conjunction with federal law. However, if this is not in fact the case, the submitted social security numbers must be released.

You also raise section 552.101 in conjunction with state and federal law governing the public availability of criminal history record information ("CHRI"). 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.”). Section 411.083 provides that any CHRI maintained by DPS is confidential. Gov’t Code § 411.083(a). Similarly, CHRI obtained from DPS pursuant to statute is also confidential and may only be disclosed in very limited instances. *Id.* § 411.084; *see also id.* § 411.087 (restrictions on disclosure of CHRI obtained from DPS also apply to CHRI obtained from other criminal justice agencies). We note, however, that the information you seek to withhold pursuant to these provisions does not consist of confidential CHRI. *See* Gov’t Code §§ 411.081(a)(1), (b) (chapter 411 does not apply to information related to offense for which a person is involved in criminal justice system), .082(2)(B) (definition of CHRI does not include driving record information). Accordingly, the city may not withhold any of the information at issue under section 552.101 on that basis.

Finally, you contend that the submitted documents contain information excepted from disclosure under section 552.130 of the Government Code. Section 552.130 excepts from public disclosure information relating to a motor vehicle driver’s license, title, or registration issued by an agency of this state. We have marked information in the submitted documents that the city must withhold under section 552.130 of the Government Code.

In summary, we have marked information in the submitted documents that the city must withhold under section 552.130 of the Government Code. The remainder of the submitted information is not excepted from disclosure and 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 thirty calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within ten 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 ten 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 ten 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); *Tex. 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 ten calendar days of the date of this ruling.

Sincerely,



David R. Saldivar  
Assistant Attorney General  
Open Records Division

DRS/seg

Ref: ID# 215603

Enc: Submitted documents

c: Ms. Velda Hunter  
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