



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 28, 2005

Ms. Jennifer L. Carter
Maris & Lanier
1450 Meadow Park Building, LB 702
10440 North Central Expressway
Dallas, Texas 75231

OR2005-03654

Dear Ms. Carter:

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# 222856.

The City of Sherman (the "city"), which you represent, received 10 requests from the same requestor for personnel information relating to the requestor and nine other current or former employees of the police department.¹ You claim that the requested information is excepted from disclosure under sections 552.101, 552.102, and 552.103 of the Government Code. We have considered the exceptions you claim and have reviewed the information you submitted.²

¹We note that you appear to have redacted information from Exhibit L that does not appear to pertain to the employees who are the subject of these requests for information. This decision does not address the public availability of that information.

²We also note that you have redacted portions of the submitted information that you seek to withhold. A governmental body that submits information to this office for the purpose of requesting an open records ruling must do so in a manner that enables this office to determine whether the information comes within the scope of an exception to disclosure. As we are able in this instance to ascertain the nature of the information that you have redacted, we will determine whether it is excepted from public disclosure. In the future, however, the city should refrain from redacting any information that it submits to this office in seeking an open records ruling. See Gov't Code §§ 552.301(e)(1)(D), .302.

We first note that some of the submitted information is subject to section 552.022 of the Government Code. Under this section, “a completed report, audit, evaluation, or investigation made of, for, or by a governmental body” must be released to the public, unless the information is excepted from disclosure under section 552.108 or expressly confidential under other law. Gov’t Code § 552.022(a)(1). In this instance, some of the submitted information consists of completed reports and evaluations made of, for, or by a governmental body. These reports and evaluations must be released under section 552.022(a)(1) unless they contain information that is excepted from disclosure under section 552.108 or expressly confidential under other law. You do not claim an exception to disclosure under section 552.108. Section 552.103, which you do claim, is a discretionary exception that protects a governmental body’s interests and may be waived. *See* Gov’t Code § 552.007; *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (Gov’t Code § 552.103 may be waived); Open Records Decision Nos. 665 at 2 n.5 (discretionary exceptions generally), 542 at 4 (1990) (statutory predecessor to Gov’t Code § 552.103 subject to waiver). As such, section 552.103 is not other law that makes information confidential for the purposes of section 552.022. Therefore, the city may not withhold any of the information that is subject to section 552.022(a)(1) under section 552.103.

With respect to the remaining information, we next address your claim under section 552.103. This exception 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). A governmental body that claims an exception to disclosure under section 552.103 has the burden of providing relevant facts and documents sufficient to establish the applicability of this exception to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate that: (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information *and* (2) the information at issue is related to the pending or anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.);

Heard v. Houston Post Co., 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be exempted from disclosure under section 552.103. *See* Open Records Decision No. 551 at 4 (1990) *Id.*

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To establish that litigation is reasonably anticipated, a governmental body must provide this office with “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” *Id.* Among other examples, this office has concluded that litigation was reasonably anticipated where the opposing party took the following objective steps toward litigation: (1) filed a complaint with the Equal Employment Opportunity Commission (“EEOC”), *see* Open Records Decision No. 336 (1982); (2) 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 (3) threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

In this instance, you assert that the remaining information relates to anticipated litigation. You inform us that the requestor has informed the department that she plans to hire a lawyer to sue the city if it does not appropriately resolve her complaints against a co-worker. Having considered your arguments, we find that you have not demonstrated that the city reasonably anticipated litigation on the date of its receipt of these requests for information. *See* Gov’t Code § 552.103(c); Open Records Decision No. 361 (1983) (fact that request was made by attorney on behalf of rejected applicant not sufficient to invoke statutory predecessor to Gov’t Code § 552.103), 331 (1982) (reasonable anticipation of litigation not established by requestor’s public statements on more than one occasion of intent to file suit). We therefore conclude that you may not withhold any of the information that is not subject to section 552.022 under section 552.103.

You also raise sections 552.101 and 552.102 of the Government Code.³ Section 552.101 exempts from public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This exception encompasses the common-law right to privacy. Information must be withheld from the public under section 552.101 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 Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976).

³We note that you have submitted no arguments in support of these exceptions. *See* Gov’t Code §§ 552.301(e)(1)(A), .302. Sections 552.101 and 552.102 are mandatory exceptions to disclosure, however, and may not be waived. *See* Gov’t Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions). Accordingly, we address the applicability of sections 552.101 and 552.102.

Section 552.102 excepts from public 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). Section 552.102(a) is applicable to information that relates to public officials and employees. *See* Open Records Decision No. 327 at 2 (1982) (anything relating to employee’s employment and its terms constitutes information relevant to person’s employment relationship and is part of employee’s personnel file). The privacy analysis under section 552.102(a) is the same as the common-law privacy test under section 552.101 and *Industrial Foundation*. *See* *Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref’d n.r.e.) (addressing statutory predecessor). Accordingly, we will determine whether any of the submitted information is private under section 552.101.

Common-law privacy encompasses the specific types of information that are 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 has since determined that other types of information also are private under section 552.101. *See* Open Records Decision Nos. 659 at 4-5 (1999) (summarizing information attorney general has held to be private), 470 at 4 (1987) (illness from severe emotional job-related stress), 455 at 9 (1987) (prescription drugs, illnesses, operations, and physical handicaps), 343 at 1-2 (1982) (references in emergency medical records to drug overdose, acute alcohol intoxication, obstetrical/gynecological illness, convulsions/seizures, or emotional/mental distress), 393 (1983) (information that would identify victim of serious sexual offense). We also have determined that although the fact that an identifiable public employee took a drug test is not protected by common-law privacy, the results of the test are private. *See* Open Records Decision No. 594 at 4-5 (1991).

The common-law right to privacy also encompasses certain types of personal financial information. This office has determined that financial information that relates only to an individual ordinarily satisfies the first element of the common-law privacy test, but the public has a legitimate interest in the essential facts about a financial transaction between an individual and a governmental body. *See* Open Records Decision Nos. 600 at 9-12 (1992) (identifying public and private portions of certain state personnel records), 545 at 4 (1990) (attorney general has found kinds of financial information not excepted from public disclosure by common-law privacy to generally be those regarding receipt of governmental funds or debts owed to governmental entities), 523 at 4 (1989) (noting distinction under common-law privacy between confidential background financial information furnished to public body about individual and basic facts regarding particular financial transaction between individual and public body), 373 at 4 (1983) (determination of whether public’s interest in obtaining personal financial information is sufficient to justify its disclosure must be made on case-by-case basis).

Thus, a public employee's allocation of part of the employee's salary to a voluntary investment program offered by the employer is a personal investment decision, and information about that decision is protected by common-law privacy. *See, e.g.*, Open Records Decision Nos. 600 at 9-12 (1992) (participation in TexFlex), 545 at 3-5 (1990) (deferred compensation plan). Likewise, the details of an employee's enrollment in a group insurance program, the designation of the beneficiary of an employee's retirement benefits, and an employee's authorization of direct deposit of the employee's salary are protected by common-law privacy. *See* Open Records Decision No. 600 at 9-12. But where a transaction is funded in part by a governmental body, it involves the employee in a transaction with the governmental body, and the basic facts about that transaction are not private under section 552.101. *See id.* at 9 (basic facts of group insurance provided by governmental body not protected by common-law privacy).

In this instance, the submitted information pertains almost entirely to city employees. As this office has often explained, information that relates to public employment and public employees is a matter of legitimate public interest. *See, e.g.*, Open Records Decision Nos. 470 at 4 (1987) (public employee's job performance does not generally constitute his or her private affairs), 405 at 2 (1983) (manner in which public employee performed his or her job cannot be said to be of minimal public interest). Thus, for the most part, the submitted information is not protected by common-law privacy. Furthermore, because the requestor has a special right of access to her own private information, such information may not be withheld from the requestor on privacy grounds under section 552.101. *See* Gov't Code § 552.023(a); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning herself). We conclude, however, that the city must withhold a small amount of medical and other information under section 552.101 in conjunction with common-law privacy. We have marked those types of information. We also have marked personal financial information concerning insurance and other employment benefits that may be private under section 552.101. To the extent that the marked information relates to an employee's selection of or monetary contribution to an employment benefit that is not funded in whole or in part by the city, the city must withhold the marked information under section 552.101 in conjunction with common-law privacy. To the extent that the marked information relates to an employment benefit that the city funds, in whole or in part, the information is not private and may not be withheld on that basis under section 552.101.

We next note that section 552.117 of the Government Code is applicable to some of the submitted information.⁴ Section 552.117(a)(1) excepts from public disclosure the home address and telephone number, social security number, and family member information of a current or former employee of a governmental body who requests that this information be

⁴This office will raise section 552.117 on behalf of a governmental body, as it is a mandatory exception to disclosure and may not be waived. *See* Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

kept confidential under section 552.024. The determination of whether a particular item of information is protected by section 552.117(a)(1) must be made at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. A governmental body may not withhold information under section 552.117(a)(1) on behalf of a current or former employee who did not make a timely election under section 552.024 to keep the information confidential. Furthermore, because section 552.117 protects personal privacy, the city may not withhold the requestor's own home address or telephone number, social security number, or family member information in this instance. Gov't Code § 552.023(a); Open Records Decision No. 481 at 4 (1987).

Otherwise, the submitted documents reflect that all of the remaining employees to whom the present requests pertain made timely elections for confidentiality under section 552.024. Therefore, section 552.117(a)(1) excepts from disclosure the other employees' current or former home addresses and home telephone numbers, social security numbers, and family member information. We note that a post office box number is not a "home address" for purposes of section 552.117.⁵ We have marked the types of information that the city must withhold under section 552.117(a)(1).

We note that the submitted documents also contain information about current or former city employees other than those identified by the requestor. The city must withhold the current or former home address and telephone number, social security number, and family member information of any other current or former city employee under section 552.117(a)(1) if the current or former employee timely requested confidentiality for that information under section 552.024.

We also note that some of the submitted information may relate to a peace officer. The city must withhold a peace officer's current or former home address and telephone number, social security number, and family member information under section 552.117(a)(2), regardless of whether the peace officer complies with sections 552.024 or 552.1175.⁶

A social security number may also be confidential under section 552.101 in conjunction with federal law. Section 552.101 also encompasses information that another statute makes confidential. The 1990 amendments to the federal Social Security Act make confidential social security numbers and related records that were obtained or are maintained by a state

⁵*See* Open Records Decision No. 622 at 4 (1994) (legislative history makes clear that purpose of Gov't Code § 552.117 is to protect public employees from being harassed at home).

⁶Section 552.117(a)(2) adopts the definition of peace officer found at article 2.12 of the Code of Criminal Procedure.

agency or political subdivision of the state under any provision of law enacted on or after October 1, 1990. *See* 42 U.S.C. § 405(c)(2)(C)(viii)(I); Open Records Decision No. 622 at 2-4 (1994). We have no basis for concluding that any social security number contained in the submitted documents is confidential under section 405(c)(2)(C)(viii)(I) and therefore excepted from public disclosure under section 552.101 on the basis of the federal law. We also note that the requestor's social security number may not be withheld from her under section 552.101 on the basis of the federal law, which protects privacy interests. Gov't Code § 552.023(a); Open Records Decision No. 481 at 4 (1987). Otherwise, we caution you that the Act prescribes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the city under any provision of law enacted on or after October 1, 1990.

Lastly, we note that section 552.130 of the Government Code is applicable to some of the submitted information.⁷ This section excepts from disclosure information that relates to:

- (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state;
- (2) a motor vehicle title or registration issued by an agency of this state; or
- (3) a personal identification documentation issued by an agency of this state or a local agency authorized to issue an identification document.

Gov't Code § 552.130(a). Information relating to a Texas driver's license, including the license number, type, and expiration date, must be withheld from the public under section 552.130. A personal identification number issued by an agency of the State of Texas or a local agency authorized to issue an identification document must also be withheld under this exception. Section 552.130 also protects privacy interests, however. Thus, the city may not withhold the requestor's Texas driver's license or personal identification information under this exception.

In summary: (1) the city must withhold the medical and other information that is protected by common-law privacy under section 552.101; (2) personal financial information other than the requestor's must be withheld under section 552.101 in conjunction with common-law privacy, to the extent that the information relates to an employee's enrollment in or monetary contribution to an employment benefit that is not funded in whole or in part by the city; (3) the home addresses and telephone numbers, social security numbers, and family member information of the named employees other than the requestor are excepted from disclosure under section 552.117(a)(1); (4) the city may be required to withhold the home addresses and

⁷Section 552.130 also is a mandatory exception that may not be waived. Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001).

telephone numbers, social security numbers, and family member information of other current or former city employees under section 552.117(a)(1); (5) the home address and telephone number, social security number, and family member information of a peace officer must be withheld under section 552.117(a)(2); (6) a social security number other than the requestor's may be excepted from disclosure under section 552.101 in conjunction with section 405(c)(2)(C)(viii)(I) of title 42 of the United States Code; and (7) Texas driver's license and personal identification information other than the requestor's must be withheld under section 552.130. The requestor has a special right of access under section 552.023 to her own private information.⁸ The rest of the submitted information is not excepted from disclosure and 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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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

⁸Should the city receive another request for this information from a person who would not have a right of access to it, you should resubmit this same information and request another ruling. See Gov't Code §§ 552.301(a), .302; Open Records Decision No. 673 (2001).

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 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read 'J. Morris III', with a long horizontal line extending to the right.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 222856

Enc: Submitted documents

c: Ms. Robyn E. Doss
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(w/o enclosures)