



ATTORNEY GENERAL OF TEXAS  
G R E G A B B O T T

November 14, 2005

Mr. Bryan P. Fowler  
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OR2005-10244

Dear Mr. Fowler:

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# 236145.

The City of Montgomery (the "city"), which you represent, received a request for the personnel records of two city employees, a police officer and a municipal clerk, including any reprimands. You state that you will release some of the information, but claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.117, 552.119, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that you have redacted portions of the submitted information that you seek to withhold. Pursuant to section 552.301, a governmental body that seeks to withhold requested information must submit to this office a copy of the information labeled to indicate which exceptions apply to which parts of the copy, unless the governmental body has received a previous determination for the information at issue. *See* Gov't Code §§ 552.301(a), .301(e)(2). Pursuant to section 552.147(b) of the Government Code, all governmental bodies may redact social security numbers without the necessity of requesting a decision from this office. *See* Gov't Code § 552.147(b). Likewise, this office issued a previous determination allowing all governmental bodies to redact certain personal information of peace officers under section 552.117(a)(2) of the Government Code. *See* Open Records Decision No. 670 (2001) (previous determination that governmental body may withhold home address, home telephone number, personal cellular phone number, personal pager number, social security number and information that reveals whether individual has family members, of any individual who meets definition of "peace officer" set forth in article 2.12 of Texas Code of Criminal Procedure without necessity of requesting attorney general decision as to whether exception under section 552.117(a)(2) applies). Accordingly, the city may withhold social security numbers and information subject to

section 552.117(a)(2) without seeking a decision from this office. However, the city has also redacted driver's license information, an account number, a birth date, and personal financial information from the submitted records. This office has not issued the city a previous determination to withhold this type of information. As such, this type of information must be submitted 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, other than the types mentioned above, that it submits to this office in seeking an open records ruling. Failure to comply with section 552.301 will result in the information being presumed public under section 552.302. *See* Gov't Code §§ 552.301(e)(1)(D), .302.

We first address the city's claims that information in Exhibit B regarding the disciplinary files of the two employees at issue is excepted under the Act. The city claims section 552.102 for the disciplinary files of both employees. Section 552.102 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*, 540 S.W.2d 668 (Tex. 1976), for information claimed to be protected under the doctrine of common law privacy as incorporated by section 552.101. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Therefore, information must be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 at 1 (1992).

The disciplinary files of the two individuals at issue relate solely to the work behavior and job performance of city employees, and, as such, cannot be deemed to be outside the realm of public interest. *See* Open Records Decision Nos. 470 (1987) (public employee's job performance does not generally constitute his private affairs), 455 (1987) (public employee's job performances or abilities generally not protected by privacy), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees), 423 at 2 (1984) (statutory predecessor applicable when information would reveal intimate details of highly personal nature), 405 at 2 (1983) (manner in which employee performed his job cannot be said to be of minimal public interest), 400 at 5 (1983) (statutory predecessor protected information only if its release would lead to clearly unwarranted invasion of privacy). Therefore, based on our review of the information, we conclude that the disciplinary files of the two employees are not protected from disclosure under common law privacy, and the city may not withhold the disciplinary information on this basis.

The city also claims section 552.103 for the complaints and disciplinary ledgers pertaining to the police officer. 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 sufficient to establish the applicability of section 552.103 to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate: (1) that litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) that the information at issue is related to that 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.); *see also* Open Records Decision No. 551 at 4 (1990). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *Id.*

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).

You state that the police officer was recently terminated and has hired an attorney who has threatened litigation as a result of the termination. Based on this representation, we conclude that litigation was anticipated at the time the city received the request for information.

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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).

Further, upon review of the complaints and disciplinary ledgers of the police officer, we conclude that they are related to the anticipated litigation.

We note, however, that the police officer at issue, as the opposing party in the anticipated litigation, has seen most of the documents that the city seeks to withhold. Absent special circumstances, 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 and it must be disclosed. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, to the extent that the police officer has seen or had access to the complaints and disciplinary ledgers, the city may not now withhold them from disclosure under section 552.103(a). The city may only withhold the complaints or disciplinary ledgers that the police officer has not seen or had access to. The city may withhold these documents during the pendency of the litigation under section 552.103(a). *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982) (stating that applicability of Gov't Code § 552.103(a) ends once litigation has been concluded).

We now address your exceptions for the remaining portions of the personnel files. 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. Exhibit A contains criminal history record information ("CHRI"), which is encompassed by section 552.101. CHRI generated by the National Crime Information Center ("NCIC") or by the Texas Crime Information Center ("TCIC") is confidential. Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety ("DPS") maintains, except that the DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See* Gov't Code § 411.083. The definition of CHRI does not include driving record information maintained by DPS under chapter 521 of the Transportation Code. *See* Gov't Code § 411.082(2)(B). Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090 - .127. Furthermore, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F. Accordingly, the city must withhold the CHRI in Exhibit A that we have marked under section 552.101 of the Government Code.

Section 552.101 also encompasses section 1324a of title 8 of the United States Code. Section 1324a provides that an Employment Eligibility Verification Form I-9 "may not be used for purposes other than for enforcement of this chapter" and for enforcement of other federal statutes governing crime and criminal investigations. *See* 8 U.S.C. § 1324a(b)(5); *see also* 8 C.F.R. § 274a.2(b)(4). In this instance, the release of the submitted Form I-9 would be "for purposes other than for enforcement" of the referenced federal statutes. A Form I-9 may be released only for purposes of compliance with the federal laws and regulations governing the employment verification system. Therefore, the city must withhold the

submitted Form I-9 in Exhibit A under section 552.101 of the Government Code in conjunction with section 1324a of title 8 of the United States Code.

Exhibit B also contains fingerprint information. Chapter 560 of the Government Code provides that a governmental body may not release fingerprint information except in certain limited circumstances. *See* Gov't Code §§ 560.001 (defining "biometric identifier" to include fingerprints), 560.002 (prescribing manner in which biometric identifiers must be maintained and circumstances in which they can be released), 560.003 (providing that biometric identifiers in possession of governmental body are exempt from disclosure under Act). It does not appear to this office that section 560.002 permits the disclosure of the submitted fingerprint information to the requestor. Therefore, the city must withhold this information, which we have marked, under section 552.101 in conjunction with section 560.003 of the Government Code.

Exhibit B also contains a Report of Separation of License Holder (F-5) which is made confidential by section 1701.454 of the Occupations Code. Section 1701.454 provides in relevant part:

(a) A report or statement submitted to the commission under this subchapter is confidential and is not subject to disclosure under Chapter 552 of the Government Code.

Occ. Code § 1701.454. The city must withhold the F-5 forms, which we have marked, pursuant to section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code.

You claim that some of the submitted information contains medical records, access to which is governed by the MPA, chapter 159 of the Occupations Code. This section encompasses information protected by other statutes. Section 159.002 of the MPA provides:

(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(a)-(c). After reviewing the submitted information, we found no documents subject to the MPA.

We note that the submitted information contains medical and personal financial information. This office has found that the following types of information are excepted from required public disclosure under common law privacy: 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). We have marked medical information that the city must withhold under section 552.101 in conjunction with common law privacy.

Additionally, 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). We cannot determine if some personal financial information involves the employee in a transaction with the governmental body. Thus to the extent that the financial transaction is funded in part by a governmental body, the information is not excepted under common law privacy. However, if the information is a personal investment decision that does not involve the employee in a transaction with the governmental body, the information is confidential pursuant to section 552.101 and common law privacy.

The submitted records also contain information you claim is excepted from disclosure under section 552.117. Section 552.117(a)(2) excepts from disclosure the current and former home addresses and telephone numbers, social security numbers, and family member information regarding a peace officer regardless of whether the officer requested confidentiality under section 552.024 or 552.1175 of the Government Code.<sup>2</sup> The city must withhold the police officer's information pursuant to section 552.117(a)(2). As such, we have marked information, in addition to the information you have already redacted, that must be withheld under section 552.117(a)(2).

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 the municipal clerk's information under section 552.117 if she made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. The

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<sup>2</sup>"Peace officer" is defined by Article 2.12 of the Texas Code of Criminal Procedure.

city may not withhold this information under section 552.117 if the municipal clerk did not make a timely election to keep the information confidential.

If the municipal clerk did not make a timely election under section 552.024, her social security number remains confidential pursuant to section 552.147 of the Government Code<sup>3</sup>, which provides that “[t]he social security number of a living person is excepted from” required public disclosure under the Act. Therefore, the city must withhold the municipal clerk’s social security number under section 552.147.

Section 552.119 of the Government Code provides:

(a) A photograph that depicts a peace officer as defined by Article 2.12, Code of Criminal Procedure, the release of which would endanger the life or physical safety of the officer, is excepted from [required public disclosure] unless:

(1) the officer is under indictment or charged with an offense by information;

(2) the officer is a party in a civil service hearing or a case in arbitration; or

(3) the photograph is introduced as evidence in a judicial proceeding.

(b) A photograph excepted from disclosure under Subsection (a) may be made public only if the peace officer gives written consent to the disclosure.

Gov’t Code § 552.119.<sup>4</sup> In this instance, you have not demonstrated, nor is it apparent from our review of the submitted information, that release of the photographs would endanger the life or physical safety of the officer depicted. We therefore determine that the city may not withhold the submitted photographs in Exhibit B pursuant to section 552.119 of the Government Code.

Section 552.130 of the Government Code 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.” Gov’t Code § 552.130. In accordance with section 552.130 of the Government Code, the city must withhold the Texas motor vehicle record information we have marked.

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<sup>3</sup>Added by Act of May 23, 2005, 79th Leg., R.S., S.B. 1485, ch. 397, 2005 Tex. Sess. Law Serv. 1091 (Vernon) (to be codified at Tex. Gov’t Code § 552.147).

<sup>4</sup>As amended by Act of April 22, 2005, 79th Leg., R.S., S.B. 148, ch. 8, § 1, 2005 Tex. Sess. Law Serv. (Vernon).

The submitted information also contains an insurance policy numbers. Section 552.136 of the Government Code states that “[n]otwithstanding 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 city must, therefore, withhold the insurance policy number you have marked under section 552.136.

In summary: 1) if the police officer has not seen or had access to the complaints and disciplinary ledgers, the city may withhold this information under section 552.103 of the Government Code; 2) the city must withhold the CHRI in Exhibit A that we have marked under section 552.101; 3) the city must withhold the submitted Form I-9 in Exhibit A under section 552.101 of the Government Code in conjunction with section 1324a of title 8 of the United States Code; 4) the city must withhold the fingerprint information we have marked under section 552.101 in conjunction with section 560.003 of the Government Code; 5) the city must withhold the F-5 forms we have marked pursuant to section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code; 6) we have marked medical information that the city must withhold under section 552.101 in conjunction with common law privacy; 7) to the extent that the financial transaction information is funded in part by a governmental body, the information is not excepted under common law privacy. However, if the information is a personal investment decision that does not involve the employee in a transaction with the governmental body, the information is confidential pursuant to section 552.101 and common law privacy; 8) we have marked information pertaining to the police officer, in addition to the information you have already redacted, that must be withheld under section 552.117(a)(2); 9) the city may only withhold the municipal clerk’s information under section 552.117(a)(1) if she made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. If the municipal clerk did not make a timely election under section 552.024, the city must only withhold the municipal clerk’s social security number under section 552.147; 10) the city must withhold the Texas motor vehicle record information we have marked; 11) the city must withhold the insurance policy number you have marked under section 552.136. The 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, 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 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 Office of the Attorney General 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. 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,



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Open Records Division

JV/krl

Ref: ID# 236145

Enc. Submitted documents

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