



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

December 2, 2005

Mr. David B. Casas  
Assistant City Attorney  
City of San Antonio  
P.O. Box 839966  
San Antonio, Texas 78263

OR2005-10804

Dear Mr. Casas:

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# 237259.

The City of San Antonio (the "city") received a request for information related to a named city Park Police Officer. You claim that the requested information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, we note that a portion of the information you submitted to this office as responsive to the request constitutes information that is subject to section 552.022 of the Government Code. Section 552.022(a) enumerates categories of information that are public information and not excepted from required disclosure under chapter 552 of the Government Code unless they are expressly confidential under other law. *See Gov't Code §§ 552.022(a)(1) ("completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108"), 552.022(a)(17) ("information that is also contained in a public court record").* The information subject to section 552.022 must therefore be released unless the information is expressly made confidential under other law.<sup>1</sup> Section 552.103 of the Government Code is a discretionary exception to disclosure that protects the governmental body's interests and is therefore not other law that makes

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<sup>1</sup>You do not raise section 552.108 as an exception to disclosure.

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); Open Records Decision No. 663 (1999) (governmental body may waive section 552.103). Therefore, the city may not withhold any of the information subject to section 552.022 under section 552.103. However, the records at issue include information that is subject to other exceptions in the Act which constitute other law for purposes of section 552.022. Accordingly, we will address those exceptions for the information subject to section 552.022 along with the remaining information.<sup>2</sup>

We next address your section 552.103 argument for the information not subject to section 552.022. 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). The 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 is pending or reasonably anticipated when the governmental body receives 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). The city must meet both prongs of this test for information to be excepted under 552.103(a).

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

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<sup>2</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

evidence showing that the claim that litigation may ensue is more than mere conjecture.” *Id.* 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>3</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 explain that the requested information pertains to a former employee of the city who has filed an EEOC claim alleging discrimination. After reviewing the submitted documentation and your arguments, we conclude that litigation was reasonably anticipated on the date the city received this request for information. We also find that the remaining information relates to the anticipated litigation. We therefore conclude that the city may generally withhold the information at issue at this time under section 552.103 of the Government Code.

However, 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). We note that some of the submitted information appears to have been previously made available to or otherwise seen by the opposing party to the litigation. We further note that the opposing party only had access to a portion of this information in the usual scope of his employment with the city. Information accessed in the usual scope of employment is not considered to have been obtained by the opposing party to the litigation and may therefore still be withheld under section 552.103. However, there is no section 552.103 interest in withholding the remaining information to which the requestor has had access. Therefore, the information that the opposing party has already seen or to which the opposing party has already had access is not excepted under section 552.103.<sup>4</sup>

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t

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<sup>3</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).

<sup>4</sup>We note that the city may no longer withhold any of the information at issue under section 552.103 once litigation concludes. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Code § 552.101. Section 552.101 encompasses information made confidential by other statutes. The submitted information contains medical records, access to which is governed by the Medical Practice Act (the “MPA”), chapter 159 of the Occupations Code. Section 159.002 of the MPA provides as follows:

(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). Medical records must be released upon 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. *Id.* §§ 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. Open Records Decision No. 565 at 7 (1990). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). We have marked the information that constitutes medical records, and that may only be released in accordance with the MPA.

Chapter 611 of the Health and Safety Code provides for the confidentiality of records created or maintained by a mental health professional. Section 611.002(a) reads as follows:

Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.

Health & Safety Code § 611.002. Section 611.001 defines a “professional” as (1) a person authorized to practice medicine, (2) a person licensed or certified by the state to diagnose, evaluate or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. *Id.* § 611.001(b). Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals. *See* Open Records Decision No. 565 (1990). We have marked the information that constitutes mental health records, and that may only be released in accordance with sections 611.004 and 611.0045 of the Health and Safety Code.

Section 552.101 also encompasses section 1703.306 of the Occupations Code, which governs information obtained in the course of conducting a polygraph examination and provides that “a person for whom a polygraph examination is conducted . . . may not disclose information

acquired from a polygraph examination” except to certain categories of people. Occ. Code § 1703.306(a). The requestor does not fall within any of the enumerated categories; therefore, the city must withhold the marked polygraph information under section 552.101 in conjunction with section 1703.306 of the Occupations Code.

The submitted records also include fingerprint information that is governed by sections 560.001, 560.002, and 560.003 of the Government Code. 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), .002 (prescribing manner in which biometric identifiers must be maintained and circumstances in which they can be released), .003 (providing that biometric identifiers in possession of governmental body are exempt from disclosure under Act). It does not appear that section 560.002 permits the release of the fingerprint information in this instance. Accordingly, the city must withhold the fingerprint information we have marked under section 552.101 and section 560.003 of the Government Code.

The information you submitted also includes federal tax return information. Federal tax return information is confidential under section 6103(a) of title 26 of the United States Code. *See* 26 U.S.C. § 6103(a). The term “return information” includes “the nature, source, or amount of income” of a taxpayer. Our office has specifically held that a governmental body must withhold a W-4 form in its entirety. Open Records Decision No. 600 at 9 (1992). Therefore, the city must withhold the submitted W-4 forms under section 552.101 of the Government Code in conjunction with section 6103 of title 26 of the United States Code.

Section 552.101 also encompasses the doctrine of common law privacy. Common law privacy protects information that is 1) highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and 2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). 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. *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: 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 personal financial information not relating to the financial transaction between an individual and a governmental, *see* Open Records Decision Nos. 600 (1992) (public employee’s withholding allowance certificate, designation of beneficiary of employee’s retirement benefits, direct deposit authorization, and employee’s decisions regarding voluntary benefits programs, among others, are protected under common law privacy), 545 (1990) (deferred compensation information, mortgage

payments, assets, bills, and credit history protected under common law privacy), 373 (1983) (sources of income not related to financial transaction between individual and governmental body protected under common law privacy). Accordingly, we have marked the information that must be withheld under section 552.101 in conjunction with common law privacy.

We note that some of the remaining submitted information may be subject to section 552.117 of the Government Code. Section 552.117(a)(2) of the Government Code excepts from disclosure the current and former home addresses and telephone numbers, social security number, and family member information of a peace officer regardless of whether the officer elected under section 552.024 to keep such information confidential.<sup>5</sup> Pursuant to section 552.117(a)(2), the city must withhold the addresses and telephone numbers, social security number, and family member information of a peace officer in the submitted information. We note that a post office box number is not a “home address” for purposes of section 552.117.<sup>6</sup>

Regardless of whether section 552.117 applies, the submitted social security number is confidential under section 552.147 of the Government Code. Section 552.147 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 social security number under section 552.147.<sup>7</sup>

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[.]” Gov’t Code § 552.130. Accordingly, the city must withhold the marked Texas driver’s license number under section 552.130. *See id.*

Finally, we note that the submitted records contain military discharge information. Section 552.140 of the Government Code provides in relevant part:

(a) This section applies only to a military veteran’s Department of Defense Form DD-214 or other military discharge record that is first recorded with or that otherwise first comes into the possession of a governmental body on or after September 1, 2003.

Gov’t Code § 552.140(a). Section 552.140 provides that a military veteran’s DD-214 form or other military discharge record that is first recorded with or that otherwise first comes into

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<sup>5</sup>“Peace officer” is defined by Article 2.12 of the Texas Code of Criminal Procedure.

<sup>6</sup>See Gov’t Code § 552.117; Open Records Decision No. 622 at 4 (1994) (legislative history makes clear that purpose of section 552.117 is to protect public employees from being harassed at home).

<sup>7</sup>We note that section 552.147(b) of the Government Code authorizes a governmental body to redact a living person’s social security number from public release without the necessity of requesting a decision from this office under the Act.

the possession of a governmental body on or after September 1, 2003, is confidential for a period of seventy-five years and may only be disclosed in accordance with section 552.140 or in accordance with a court order. *See* Gov't Code § 552.140(a), (b). You do not indicate when the city first came into possession of the submitted DD-214 form. Therefore, if this form came into the city's possession on or after September 1, 2003, we conclude that the city must withhold this information under section 552.140. Otherwise, the form must be released, subject to the markings we have made under sections 552.101 and 552.117(a)(2).

In summary, except for information to which the opposing party in the pending litigation has had access outside of the usual scope of his employment with the city, the information not subject to section 552.022 may be withheld under section 552.103 of the Government Code. Medical records may be released only as provided under the MPA. The mental health records we have marked may be released only as provided under sections 611.004 and 611.0045 of the Health and Safety Code. The city must withhold under section 552.101 (1) the marked polygraph information in conjunction with section 1703.306 of the Occupations Code; (2) the marked fingerprint information pursuant to section 560.003 of the Government Code; (3) W-4 forms in conjunction with section 6103 of title 26 of the United States Code; and (4) the information we have marked in conjunction with common law privacy. The peace officer's personal information must be withheld under section 552.117(a)(2). The submitted social security number must be withheld under section 552.147. The city must withhold the information we have marked under section 552.130. To the extent the military veteran's DD-214 form came into the city's possession on or after September 1, 2003, it must be withheld under section 552.140 of the Government Code. The remaining information 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 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. 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,



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Assistant Attorney General  
Open Records Division

CN/jh

Ref: ID# 237259  
Enc. Submitted documents

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(w/o enclosures)