



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 5, 2010

Ms. Molly Shortall
Assistant City Attorney
City of Arlington
P.O. Box 90231
Arlington, Texas

OR2010-11847

Dear Ms. Shortall:

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# 389436.

The City of Arlington (the "city") received a request for twenty-seven categories of information pertaining to an incident involving the requestor's client. You state you have released some information to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.102, 552.103, 552.107, 552.111, 552.1175, and 552.129 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note some of the submitted information was created after the request was received. This information, which we have marked, is not responsive to the request. This decision does not address the public availability of the non-responsive information, and that information need not be released.

Next, we note that some of the submitted information, which we have marked, consists of completed investigations, reports, and evaluations subject to section 552.022(a)(1) of the Government Code. Section 552.022(a)(1) provides for the required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108." Gov't Code § 552.022(a)(1). Pursuant to section 552.022(a)(1), completed investigations, reports, and evaluations are expressly public unless they are either excepted under 552.108 of the Government Code or are expressly confidential under other law. Although you raise section 552.103 of the

Government Code for this information, section 552.103 is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See id.* § 552.007; *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 665 at 2 n.5 (discretionary exceptions generally), 663 (1999) (governmental body may waive section 552.103). 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 the marked completed investigations, reports, and evaluations under section 552.103 of the Government Code. However, because information subject to section 552.022(a)(1) may be withheld under sections 552.101, 552.102, 552.117, 552.1175, 552.129, and 552.130 we will consider the applicability of these exceptions to the information that is subject to section 552.022(a)(1), as well as the remaining information.¹ We will also consider the city's claim under section 552.103 with respect to the remaining information that is not subject to section 552.022(a)(1).

We first address your arguments under section 552.103 of the Government Code for the information not subject to section 552.022(a)(1). Section 552.103 of the Government Code provides in relevant part 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 on the date that the department 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

¹The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

n.r.e.); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both prongs of this test for information to be excepted under section 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 demonstrate that litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* This office has concluded that a governmental body's receipt of a claim letter that it represents to be in compliance with the notice requirements of the Texas Tort Claims Act ("TTCA"), chapter 101 of the Civil Practice and Remedies Code, is sufficient to establish that litigation is reasonably anticipated. *See* Open Records Decision No. 638 at 4 (1996). If that representation is not made, the receipt of the claim letter is a factor that we will consider in determining, from the totality of the circumstances presented, whether the governmental body has established that litigation is reasonably anticipated. *Id.*

You state, and provide documentation showing, that prior to the receipt of the instant request, the requestor submitted a notice of claim letter to the city on behalf of his client. You state this letter is in compliance with the TTCA. You inform us that the submitted information is related to an incident involving the city police department and the requestor's client. Based on your representations and our review, we find the city reasonably anticipated litigation on the date this request was received, and the information at issue is related to the anticipated litigation. Therefore, with the exception of the marked information that is subject to section 552.022, the city may generally withhold the remaining information under section 552.103 of the Government Code.²

We note, however, that once information has been obtained by all parties to the pending 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). Thus, information that has either been obtained from or provided to the opposing party in the pending litigation is not excepted from disclosure under section 552.103(a) and it must be disclosed. Further, the applicability of section 552.103(a) ends when the litigation has concluded. Attorney General Opinion MW-575 at 2 (1982); Open Records Decision Nos. 350 at 3 (1982), 349 at 2.

Next, we address the information subject to section 552.022(a)(1) of the Government Code. We note that the submitted information contains an accident report form that was completed pursuant to chapter 550 of the Transportation Code. *See* Transp. Code § 550.064 (officer's accident report). Section 550.065(b) states that except as provided by subsection (c), accident reports are privileged and confidential. Section 550.065(c)(4) provides for the release of accident reports to a person who provides two of the following three pieces of information: (1) date of the accident; (2) name of any person involved in the accident; and (3) specific location of the accident. *Id.* § 550.065(c)(4). Under this provision, the Texas

²As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

Department of Transportation or another governmental entity is required to release a copy of an accident report to a person who provides the agency with two or more pieces of information specified by the statute.³ *Id.* The requestor has not provided the city with two of the three pieces of information; thus, the city must withhold the accident report, which we have marked, under section 550.065(b) of the Transportation Code.

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses information protected by other statutes, such as section 1703.306(a) of the Occupations Code, which provides, "[a] polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person[.]" Occ. Code § 1703.306(a). The information subject to section 552.022(a)(1) includes polygraph information subject to section 1703.306. The requestor does not fall into any of the categories of individuals who are authorized to receive the submitted polygraph information under section 1703.306(a). Accordingly, we conclude the city must withhold the polygraph information we have marked under section 552.101 in conjunction with section 1703.306 of the Occupations Code.

We note the remaining information subject to section 552.022(a)(1) contains criminal history record information ("CHRI") which is confidential by statute. Section 552.101 encompasses information protected by chapter 411 of the Government Code, which deems confidential CHRI. CHRI is defined as "information collected about a person by a criminal justice agency that consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions." Gov't Code § 411.082(2). Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. *See* Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* at 10-12. 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. *See* Gov't Code § 411.089(b)(1). Upon review, we find the Federal Bureau of Investigation ("FBI") number we marked constitutes CHRI generated by the FBI which must be withheld pursuant to section 552.101 in conjunction with section 411.083 of the Government Code.

Section 552.101 also encompasses section 611.002(a) of the Health and Safety Code, which provides "[c]ommunications 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(a). 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

³Transp. Code § 550.0601 ("department" means Texas Department of Transportation).

certified. *See id.* § 611.001(2). Upon review, we find portions of the remaining information consists of mental health records. Accordingly, the city must withhold the mental health records, which we have marked, pursuant to section 552.101 of the Government Code in conjunction with section 611.002(a) of the Health and Safety Code.

Section 552.101 also encompasses the doctrine of common-law privacy. Section 552.102(a) of the Government Code excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." *Id.* § 552.102(a). Section 552.102 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). 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(a) is the same as the common-law privacy test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976) for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101. Accordingly, we will address common-law privacy under sections 552.101 and 552.102 (a) of the Government Code together.

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. To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. The types of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. 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 body, *see* Open Records Decision Nos. 600 (1992), 545 (1990). We have marked the information that is confidential under common-law privacy and that the city must withhold under sections 552.101 and 552.102(a) of the Government Code. However, no portion of the remaining information is confidential under common-law privacy. Accordingly, the city may not withhold any portion of the remaining information on that basis.

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.⁴ Gov't Code § 552.117(a)(2). We note the protection afforded by section 552.117 does not extend to information relating to a deceased family member. *Cf.* Attorney General Opinions JM-229, H-917 (1976) (stating court's opinion that Texas courts would follow the almost uniform rule of other jurisdictions that the right of privacy lapses upon death); Open Records Decision No. 272 (1981). Accordingly, the city must withhold the information we have marked pursuant to section 552.117(a)(2).

Section 552.1175 provides in part:

(a) This section applies only to:

(1) peace officers as defined by Article 2.12, Code of Criminal Procedure[.]

...

(b) Information that relates to the home address, home telephone number, or social security number of an individual to whom this section applies, or that reveals whether the individual has family members is confidential and may not be disclosed to the public under this chapter if the individual to whom the information relates:

(1) chooses to restrict public access to the information; and

(2) notifies the governmental body of the individual's choice on a form provided by the governmental body, accompanied by evidence of the individual's status.

Id. § 552.1175(a)(1), (b). The information we have marked under section 552.1175 is related to an individual employed by a governmental entity other than the city. The city must withhold the information we have marked under section 552.1175 to the extent that the individual involved falls within the scope of section 552.1175(a) and elects to restrict access to the marked information in accordance with section 552.1175(b).

Section 552.129 of the Government Code provides as follows:

A record created during a motor vehicle emissions inspection under Subchapter F, Chapter 548, Transportation Code, that relates to an individual vehicle or owner of an individual vehicle is excepted from [required public disclosure].

⁴"Peace officer" is defined by Article 2.12 of the Texas Code of Criminal Procedure.

Id. § 552.129. Upon review, we find that no portion of the submitted information constitutes a record created during a motor vehicle emissions inspection. Therefore, the city may not withhold any portion of the submitted information on this basis.

Section 552.130 of the Government Code exempts from disclosure information that relates to a motor vehicle operator's or driver's license or permit or a motor vehicle title or registration issued by an agency of this state. *See id.* § 552.130(a)(1), (2). The city must withhold the Texas motor vehicle information we have marked under section 552.130 of the Government Code.⁵

In summary, with the exception of the marked completed investigations, reports, and evaluations that are subject to section 552.022(a)(1) of the Government Code, the city may withhold the submitted information under section 552.103 of the Government Code. In releasing the information that is subject to section 552.022(a)(1), the city must withhold the accident report, which we have marked, under section 550.065(b) of the Transportation Code. The city must withhold the polygraph information we have marked under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code. The city must withhold the FBI number we have marked under section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code. The city must withhold the mental health records we have marked pursuant to section 552.101 of the Government Code in conjunction with section 611.002(a) of the Health and Safety Code. The city must withhold the information we have marked under common-law privacy. The city must withhold the information we have marked under section 552.117(a)(2) of the Government Code. The city must withhold the information we have marked under section 552.1175 of the Government Code, to the extent that the individual at issue falls within the scope of section 552.1175(a) and elects to restrict access to the marked information in accordance with section 552.1175(b). The city must withhold the Texas motor vehicle information we have marked under section 552.130 of the Government Code. The remaining information subject to section 552.022(a)(1) of the Government Code must be released.⁶

This letter ruling is limited to the particular information 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 information or any other circumstances.

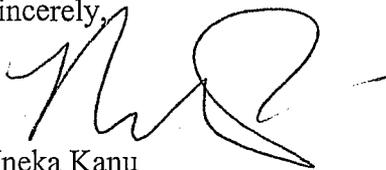
This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and

⁵We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including Texas driver's license and license plate numbers under section 552.130 of the Government Code, without the necessity of requesting an attorney general decision.

⁶The remaining information contains social security numbers. 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. Gov't Code § 552.147.

responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, appearing to read 'Nneka Kanu', with a horizontal line extending to the right.

Nneka Kanu
Assistant Attorney General
Open Records Division

NK/em

Ref: ID# 389436

Enc. Submitted documents

cc: Requestor
(w/o enclosures)