



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 23, 2012

Mr. John S. Schneider
First Assistant City Attorney
City of Pasadena
P.O. Box 672
Pasadena, Texas 77501-0672

OR2012-01049

Dear Mr. Schneider:

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# 443182 (SL1189).

The City of Pasadena (the "city") received a request for a specified internal affairs investigation and a named officer's civil service file. You claim that the submitted information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note Exhibit B consists of a completed investigation, which is subject to section 552.022 of the Government Code. Section 552.022(a)(1) provides for required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body," unless the information is excepted from disclosure under section 552.108 of the Government Code or made confidential under the Act or other law. *See* Gov't Code § 552.022(a)(1). Although you assert the Exhibit B is excepted from disclosure under section 552.103 of the Government Code, that exception is discretionary and does not make information confidential under the Act. *See 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 Gov't Code § 552.103); Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.103 is not a confidentiality provision for purposes of section 552.022(a)(1), and the city may not withhold the information subject to section 552.022 on that basis. However, you also raise section 552.101 of the Government Code for the information subject to section 552.022.

Additionally, we note portions of Exhibit B are subject to sections 552.102, 552.117, 552.1175, and 552.130 of the Government Code.¹ As these exceptions can make information confidential for purposes of section 552.022, we will address their applicability. We will also consider your arguments under section 552.103 for the information not subject to section 552.022.

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 Code § 552.101. This section encompasses information made confidential by other statutes, such as section 143.089 of the Local Government Code. We understand the city is a civil service city under chapter 143 of the Local Government Code. Section 143.089 contemplates two different types of personnel files for police officers in a civil service city: a civil service file the civil service director is required to maintain and an internal file the police department may maintain for its own use. Local Gov’t Code § 143.089(a), (g). The officer’s civil service file must contain certain specified items, including commendations, periodic evaluations by the police officer’s supervisor, and documents relating to any misconduct in which the department took disciplinary action against the officer under chapter 143 of the Local Government Code. *Id.* § 143.089(a)(1)-(2). Chapter 143 prescribes the following types of disciplinary actions: removal, suspension, demotion, and uncompensated duty. *Id.* §§ 143.051-.055; *see* Attorney General Opinion JC-0257 (written reprimand is not disciplinary action for purposes of chapter 143 of the Local Government Code).

In cases in which a police department investigates a police officer’s misconduct and takes disciplinary action against an officer, it is required by section 143.089(a)(2) to place all investigatory records relating to the investigation and disciplinary action, including background documents such as complaints, witness statements, and documents of like nature from individuals who were not in a supervisory capacity, in the police officer’s civil service file maintained under section 143.089(a). *See Abbott v. City of Corpus Christi*, 109 S.W.3d 113, 122 (Tex. App.—Austin 2003, no pet.). All investigatory materials in a case resulting in disciplinary action are “from the employing department” when they are held by or in possession of the department because of its investigation into a police officer’s misconduct, and the department must forward them to the civil service commission for placement in the civil service personnel file. *Id.* Such records are subject to release under the Act. *See* Local Gov’t Code § 143.089(f); Open Records Decision No. 562 at 6 (1990). However, information maintained in a police department’s internal file pursuant to section 143.089(g) is confidential and must not be released. *City of San Antonio v. Tex. Attorney Gen.*, 851 S.W.2d 946, 949 (Tex. App.—Austin 1993, writ denied).

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

We note the information in Exhibit B relates to misconduct that resulted in the suspension of the police officer named in the request, and you inform us the officer is now appealing her suspension. Although you contend this information must be maintained in the police department's confidential internal file created under section 143.089(g) because of the pending appeal, we note that an officer's civil service file must contain documents relating to any misconduct in those cases where the police department took disciplinary action against the officer. *See* Local Gov't Code § 143.089(a)(2); *see also id.* §§ 143.051-.055 (describing "disciplinary action" for purposes of section 143.089(a)(2)); Attorney General Opinion JC-0257 (2000). We note section 143.089(c) provides that information that must be placed in a civil service file under section 143.089(a)(2) may be removed if the civil service commission determines that (1) the disciplinary action was taken without just cause or (2) the charge of misconduct was not supported by sufficient evidence. *See* Local Gov't Code § 143.089(c). Section 143.089(c), therefore, signifies that complaint files resulting in disciplinary action must be placed in the civil service file during the pendency of the appeal. We find Exhibit B relates to misconduct that resulted in disciplinary action against the officer at issue. Therefore, the information at issue must be maintained in the officer's civil service file pursuant to section 143.089(a)(2), and it may not be withheld under section 552.101 in conjunction with section 143.089(g) of the Local Government Code.

Next, we address your arguments under section 552.103 for the information not subject to section 552.022. Section 552.103 of the Government Code provides, in relevant 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 has the burden of providing relevant facts and documents to show that the section 552.103(a) exception applies in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the requested information is related to that litigation. *See 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 governmental body must meet both parts of this test for information to be excepted under section 552.103(a). *See* ORD 551 at 4.

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 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.* 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.² 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. Open Records Decision No. 331 (1982). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983).

In this instance, you inform us that Exhibit C pertains to the appeal filed by the officer at issue. You state municipal civil service appeals, such as the one requested by the officer at issue, are governed by chapter 143 of the Local Government Code. *See* Local Gov't Code §§ 143.057, .127-.131. You contend that the civil service appeal in this instance constitutes "litigation," and you contend that the document at issue is related to the pending litigation for purposes of section 552.103. This office has determined that such appeal proceedings constitute litigation for purposes of section 552.103. *Cf.* Open Records Decision No. 588 (1991) (discussing factors used by attorney general in determining whether administrative proceeding not subject to Administrative Procedure Act may be considered to be litigation). The officer whose information is at issue filed her appeal before the date the city received the request. Therefore, we find litigation was pending on the date of the request, and we agree the information at issue relates to the litigation. Accordingly, we find section 552.103 generally applies to Exhibit C. We note, however, the opposing party has seen or had access to some of the information at issue. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to the litigation to obtain such information through discovery procedures. *See* ORD 551 at 4-5. Thus, once the opposing party in pending litigation has seen or had access

²In 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).

to information that is related to the litigation, there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Accordingly, the portions of the information in Exhibit C that the opposing party to the litigation has seen or had access to, which we have marked, and any other submitted information the opposing party has already seen or had access to, may not be withheld under section 552.103. However, the remaining information in Exhibit C, which we have also marked, may be withheld under section 552.103 of the Government Code. We note the applicability of section 552.103 ends once the related litigation concludes. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982). We note portions of the remaining information in Exhibit C, as well as portions of Exhibit B, are subject to sections 525.101, 552.102, 552.117, 552.1175, 552.130, and 552.136 of the Government Code. Therefore, we will address the applicability of these exceptions.

Section 552.101 of the Government Code also encompasses section 1324a of title 8 of the United States Code. Section 1324a governs I-9 forms and their attachments. This section provides an I-9 form and “any information contained in or appended to such form, 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). Release of the submitted I-9 form and its attachments in this instance would be “for purposes other than enforcement” of the referenced federal statutes. Accordingly, we conclude the submitted I-9 form and its attachments, which we have marked, are confidential pursuant to section 1324a of title 8 of the United States Code and must be withheld under section 552.101 of the Government Code.

Section 552.101 of the Government Code also encompasses section 1703.306 of the Occupations Code, which provides in relevant part:

(a) 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 other than:

- (1) the examinee or any other person specifically designated in writing by the examinee;
- (2) the person that requested the examination;
- (3) a member, or the member’s agent, of a governmental agency that licenses a polygraph examiner or supervises or controls a polygraph examiner’s activities;
- (4) another polygraph examiner in private consultation; or

(5) any other person required by due process of law.

(b) The [Texas Department of Licensing and Regulation] or any other governmental agency that acquires information from a polygraph examination under this section shall maintain the confidentiality of the information.

Occ. Code § 1703.306(a)-(b). We have marked polygraph information in Exhibit B. It does not appear the requestor falls into any of the categories of individuals authorized to receive the polygraph information under section 1703.306(a). Thus, the marked information is confidential under section 1703.306 and must be withheld under section 552.101 of the Government Code.

Section 552.101 of the Government Code also encompasses common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which 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, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be demonstrated. *See id.* at 681-82. The types of information considered intimate or 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. *See id.* at 683. This office has found that some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). This office has also found personal financial information not relating to the financial transaction between an individual and a governmental body is excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 600 (1992), 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history). Upon review, we find portions of the submitted information, which we have marked, are highly intimate or embarrassing and not of legitimate public concern. Thus, the information we have marked must be withheld under section 552.101 of the Government Code in conjunction with 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.” Gov’t Code § 552.102(a). The Texas Supreme Court recently held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, No. 08-0172, 2010 WL 4910163 (Tex. Dec. 3, 2010). Having

carefully reviewed the information at issue, we have marked the dates of birth that must be withheld under section 552.102(a) of the Government Code.

We note some of the remaining information pertaining to two city police officers may be subject to section 552.117 of the Government Code, which applies only to records a governmental body holds in an employment capacity. Section 552.117(a)(2) of the Government Code excepts from public disclosure the home addresses, home telephone numbers, emergency contact information, and social security number of a peace officer, as well as information that reveals whether the peace officer has family members, regardless of whether the peace officer complies with section 552.024 or section 552.1175 of the Government Code.³ Gov't Code § 552.117(a)(2). Additionally, section 552.117(a)(2) encompasses a peace officer's personal cellular telephone number, provided the cellular telephone service is paid for by the officer with his or her own funds. *See* Open Records Decision No. 670 at 6 (2001) (extending section 552.117 exception to personal cellular telephone number and personal pager number of employee who elects to withhold home telephone number in accordance with section 552.024).

We have marked personal information, including a cellular telephone number, pertaining to the officer named in the request and another city officer. It is unclear, however, whether or not the officers are currently licensed peace officers as defined by article 2.12. Thus, if the officers are currently licensed peace officers as defined by article 2.12, the city must withhold the information we have marked under section 552.117(a)(2) of the Government Code. Likewise, if the officers paid for their cellular service, the city must withhold the cellular telephone numbers we have marked under section 552.117(a)(2) of the Government Code. If, however, the officers at issue are not currently licensed peace officers, their personal information may not be withheld under section 552.117(a)(2) of the Government Code.

If the officers at issue are no longer licensed peace officers, then their personal information may be subject to section 552.117(a)(1) of the Government Code, which excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who request this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). Whether a particular item of information is protected by section 552.117(a)(1) must be determined 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. Therefore, if the officers are no longer licensed peace officers as defined by article 2.12, then to the extent they timely elected confidentiality under

³"Peace officer" is defined by Article 2.12 of the Texas Code of Criminal Procedure.

section 552.024, the city must withhold their personal information, which we have marked, under section 552.117(a)(1) of the Government Code. Similarly, if the officers paid for their cellular service, the city must withhold the marked cellular telephone numbers under section 552.117(a)(1) of the Government Code. If, however, the officers at issue are no longer licensed peace officers and did not timely elect to keep their personal information confidential, their marked personal information, including the marked cellular telephone numbers, must be released.⁴

We note that the remaining information may include information subject to section 552.1175 of the Government Code, which applies to information pertaining to peace officers that the city does not hold in an employment context and 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, emergency contact information, 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.

Gov't Code § 552.1175(a)(1), (b). We have marked the personal information of a licensed peace officer not employed by the city. The city must only withhold the information we marked if the licensed peace officer elected to restrict access to his personal information in accordance with section 552.1175(b).

Section 552.130 of the Government Code provides information relating to a motor vehicle operator's license, driver's license, motor vehicle title, or registration issued by an agency of this state or another state or country is exempted from public release. *See id.*

⁴Regardless of the applicability of section 552.117, 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(b).

§ 552.130(a)(1), (2). Upon review, we find portions of the remaining information consist of motor vehicle record information. Accordingly, the city must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code.

Section 552.136(b) of the Government Code states that “[n]otwithstanding any other provision of [the Act], 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.” *Id.* § 552.136(b). Accordingly, the city must withhold the bank account and bank routing numbers we have marked pursuant to section 552.136 of the Government Code.

In summary, the city may withhold the information in Exhibit C that we have marked under section 552.103 of the Government Code. The city must withhold the I-9 form and its attachments we have marked under section 552.101 of the Government Code in conjunction with section 1324a of title 8 of the United States 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 information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The city must withhold the dates of birth we have marked under section 552.102 of the Government Code. If the officers whose information we have marked are currently licensed peace officers, the city must withhold the information we have marked under section 552.117(a)(2) of the Government Code. Likewise, if these officers paid for their cellular service, the city must withhold the cellular telephone numbers we have marked under section 552.117(a)(2) of the Government Code. If, however, the officers at issue are not currently licensed peace officers, their personal information may not be withheld under section 552.117(a)(2) of the Government Code. If the officers are no longer licensed peace officers, then to the extent they timely elected confidentiality under section 552.024, the city must withhold their personal information we have marked under section 552.117(a)(1) of the Government Code. Similarly, if the officers paid for their cellular service, the city must withhold the marked cellular telephone numbers under section 552.117(a)(1) of the Government Code. If, however, the officers at issue are no longer licensed peace officers and did not timely elect to keep their personal information confidential, their marked personal information, including the marked cellular telephone numbers, must be released. The city must only withhold the information we marked under section 552.1175 if the licensed peace officer at issue elected to restrict access to his personal information in accordance with section 552.1175(b). The city must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code, as well as the bank account and bank routing numbers we have marked under section 552.136 of the Government Code. The remaining information must be released.

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 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 'VB', with a long horizontal line extending to the right.

Vanessa Burgess
Assistant Attorney General
Open Records Division

VB/dls

Ref: ID# 443182

Enc. Submitted documents

c: Requestor
(w/o enclosures)