



Office of the Attorney General  
State of Texas

April 29, 1994

DAN MORALES  
ATTORNEY GENERAL

Mr. Kevin E. Oliver  
Counsel for the City of Marlin  
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901 Main Street, Suite 4300  
Dallas, Texas 75202

Mr. Wiley Stem  
City Attorney  
City of Marlin  
P.O. Drawer 980  
Marlin, Texas 76661

OR94-193

Dear Mr. Oliver and Mr. Stem:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act (the "act"), Government Code chapter 552 (former V.T.C.S. article 6252-17a).<sup>1</sup> We assigned your request ID# 23782.

The City of Marlin (the "city"), which you represent, has received two requests for information relating to a city employee's termination.<sup>2</sup> Specifically, the requestor seeks "any and all information, investigations and council input in the form of taped council meetings, documents or evidence viewed or heard in my termination grievance hearings." In addition, the requestor seeks additional categories of information, including information relating to the termination of the city employees, allegations of on-the-job consumption of alcohol, employee evaluations, applications for employment, and the use of city police department employees and equipment. You object to release of the requested information, samples of which you have submitted to us for review, under sections 552.101, 552.102, 552.103(a) and 552.108 of the act.

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<sup>1</sup>We note that the Seventy-third Legislature repealed V.T.C.S. article 6252-17a. Acts 1993, 73d Leg., ch. 268, § 46. The Open Records Act is now codified in the Government Code at chapter 552. *Id.* § 1. The codification of the Open Records Act in the Government Code is a nonsubstantive revision. *Id.* § 47.

<sup>2</sup>We do not address in this ruling the numerous open records requests that the requestor at issue submitted to the city and which were included among the documents submitted to us for review.

Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Mr. Stem appears to seek to withhold some of the requested information under section 552.101, stating that it constitutes "[e]valuations and interviews . . . done in executive session." Section 551.103 of the Texas Open Meetings Act, Government Code chapter 551 (formerly V.T.C.S. art. 6252-17),<sup>3</sup> requires governmental bodies to keep a certified agenda of an executive session or to make a tape recording. Section 551.104(c) of the Open Meetings Act provides that "[t]he certified agenda or tape of a closed meeting is available for public inspection and copying only under a court order issued under Subsection (b)(3)." See also Attorney General Opinions JM-1071 (1989) (holding that persons who attended an executive session are not barred from making statements regarding the transactions involved in the meeting); JM-995 (1988); Open Records Decision No. 495 (1988) at 4. The Open Meetings Act, however, does not make any other information confidential. For example, information "is not excepted from required public disclosure simply by virtue of its having been considered in an executive session, and . . . all or part of it may be withheld *only if a section 3(a) [now subchapter C of the Government Code] exception embraces it.*" Open Records Decision No. 485 (1987) at 10 (emphasis added); see also Open Records Decision No. 605 (1992) at 2-3 (concluding that section 551.074 of the Open Meetings Act does not authorize a governmental body to withhold its records of the names of applicants for public employment who were discussed in an executive session). We conclude, therefore, that the city must withhold certified agendas or tape recordings of closed meetings maintained pursuant to section 551.104(c) of the Open Meetings Act. The city may not withhold any other information under the Open Meetings Act.

Mr. Oliver claims that section 552.102 excepts some of the requested information from required public disclosure. Section 552.102 excepts from required public disclosure "information in personnel files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Section 552.102 protects information only if its release would cause an invasion of privacy under the test articulated for section 552.101 of the act by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). See *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.). Under the *Industrial Foundation* case, information may be withheld on common-law privacy grounds only if it is highly intimate or embarrassing and is of no legitimate concern to the public. Generally, the public has a legitimate interest in the job performance of public employees. Open Records Decision Nos. 470, 467 (1987); see also Open Records Decision Nos. 444 (1986); 421 (1984); 405 (1983). We have examined the information submitted to us for review. We conclude that it does

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<sup>3</sup>We note that the Seventy-third Legislature repealed V.T.C.S. article 6252-17. Acts 1993, 73d Leg., ch. 268, § 46, p. 587. The Open Meetings Act is now codified in the Government Code at chapter 551. *Id.* § 1. The codification of the Open Meetings Act in the Government Code is a nonsubstantive revision. *Id.* § 47.

not contain any information that is intimate or embarrassing. Furthermore, the information concerns the job performance of public employees and is of legitimate public interest. Accordingly, the submitted information may not be withheld from required public disclosure under section 552.102 of the act.

Mr. Stem advises us that the city has terminated the requestor and that the requestor has threatened litigation. We assume that he intends to assert section 552.103(a), which exempts from required public disclosure information:

(1) relating to litigation of a civil or criminal nature or settlement negotiations, 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; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

Section 552.103(a) was intended to prevent the use of the act as a method of avoiding the rules of discovery in litigation. Attorney General Opinion JM-1048 (1989) at 4. The litigation exception enables a governmental body to protect its position in litigation by requiring information related to the litigation to be obtained through discovery. Open Records Decision No. 551 (1990) at 3. Information is excepted from public disclosure by section 552.103(a) if litigation is pending or reasonably anticipated and the information relates to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.). Whether litigation may be anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 (1986).

Mr. Stem states that the requestor "has previously been terminated . . . and threatened litigation." This office has concluded that a reasonable likelihood of litigation existed in the following circumstances: Where a person made allegations which indicated that a police officer engaged in actionable conduct and stated in writing that he believed he could seek redress in federal court, Open Records Decision No. 418 (1984); where an attorney made a written demand for disputed payments and promised further legal action if they are not forthcoming, Open Records Decision No. 551 (1990); and where a requestor hired an attorney who asserted an intent to sue, Open Records Decision No. 455 (1987). We have examined the requestor's letters to the city. Nowhere in any of these letters, however, does the requestor evince an intent to seek redress for his alleged wrongs in court. Nor have you provided any other evidence which would suggest he intends to do so. Accordingly, we conclude that in this instance litigation may not be reasonably anticipated and that the city may not withhold the requested information under section 552.103(a) of the act.

Mr. Oliver also claims that section 552.108 excepts the requested information from required public disclosure. Section 552.108 provides as follows:

(a) A record of a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure].

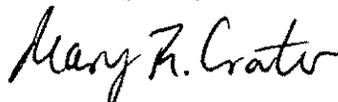
(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from [required public disclosure].

Gov't Code § 552.108. When applying section 552.108, this office distinguishes between cases that are still under active investigation and those that are closed. Open Records Decision No. 611 (1992) at 2. In cases that are still under active investigation, section 552.108 excepts from disclosure all information except that generally found on the first page of the offense report. *See generally* Open Records Decision No. 127 (1976). Otherwise, when the "law enforcement" exception is claimed, the agency must reasonably explain, if the information does not supply the explanation on its face, how release would unduly interfere with law enforcement. Open Records Decision No. 434 (1986) (citing *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977)).

Mr. Oliver does not claim that the information relates to an active investigation. Therefore, we assume that any criminal investigation is closed. Mr. Oliver claims that release of the requested information would unduly interfere with law enforcement and crime prevention. This argument amounts to no more than a restatement of the section 552.108 standard. The city has not demonstrated how release of the requested information would unduly interfere with law enforcement, nor does the submitted information provide an explanation on its face. Accordingly, we conclude that the city may not withhold the submitted information under section 552.108 of the act and must release it in its entirety with the exception noted above.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact this office.

Yours very truly,



Mary R. Crouter  
Assistant Attorney General  
Open Government Section

Enclosures: Submitted documents

Ref.: ID# 23782

cc: Mr. Earl Spruiell  
618 Potomac  
Marlin, Texas 76661  
(w/o enclosures)