



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

December 30, 1994

Mr. Charles Karakashian, Jr.
Assistant General Counsel
Texas Department of Public Safety
P.O. Box 4087
Austin, Texas 78773-0001

OR94-882

Dear Mr. Karakashian:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act (the "act"), Government Code chapter 552. We assigned your request ID# 23964.

The Texas Department of Public Safety (the "department") has received two requests for information relating to the department's employee selection process. The requestor, a rejected applicant, seeks "all information regarding my evaluation for acceptance into the [DPS] Academy," including "a copy of all test scores and any written notes regarding my background investigation and oral interview board, to include any scoring that was involved with the same." In addition, the requestor seeks information concerning candidates accepted into the academy, including age and birth date, sex, racial status, length of military service and rank, length of law enforcement experience, educational qualifications, written examination scores, physical examination scores (including run time), and physical examination scoring references for men and women.¹ You advise us that the department will make some of the requested information available to the requestor. You object to release of the remaining information, however, and claim that sections 552.026, 552.101, 552.103, 552.108, and 552.114 of the Government Code except it from required public disclosure.²

¹The requestor specifically excludes from his request the applicants' names and social security numbers.

²You also contend that the requested information "is not readily accessible" and that the department "would have to research each of approximately 160 applicant files to pull out the information requested." The act does not require a governmental body to create new information, Open Records Decision No. 452 (1986), or to prepare information in a form requested by a member of the public,

You assert that section 552.101 excepts some of the requested information from required public disclosure. Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." You assert section 552.101 in conjunction with the common-law privacy doctrine. Information must be withheld under section 552.101 if its release would cause an invasion of privacy under the test articulated 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). 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 qualifications of public employees. Open Records Decision Nos. 470, 467 (1987). Personnel information not protected by common-law privacy includes, for example, applicants' and employees' educational training, names and addresses of former employers, dates of employment, kind of work, salary, and reasons for leaving, names, occupations, addresses and phone numbers of character references, job performance or ability, birth dates, height, weight, marital status, and social security numbers. See Open Records Decision No. 455 (1987); see also Open Records Decision Nos. 470, 467; 444 (1986); 421 (1984); 405 (1983). We have examined the information submitted to us for review. We conclude that it does not contain any information that is protected by common-law privacy under the *Industrial Foundation* test. Accordingly, the requested information may not be withheld from required public disclosure under section 552.101.

Next, we address your assertion that section 552.103(a) excepts some of the requested information from required public disclosure. Section 552.103(a) excepts 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.

(Footnote continued)

Attorney General Opinion JM-672 (1987); Open Records Decision No. 467 (1987). However, you cannot deny a request for information because of the time and effort required to provide it. Cf. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 687 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977) (holding that a governmental body may not consider the cost or method in determining whether information should be disclosed).

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.). Although section 552.103(a) gives the attorney for a governmental body discretion to determine whether section 552.103(a) should be claimed, that determination is subject to review by the attorney general. Open Records Decision Nos. 551 at 5; 511 (1988) at 3. Whether litigation may be anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 (1986).

You claim that litigation may be reasonably anticipated, stating as follows:

The tenor of Mr. Perry's two letters to the Department, as well as his letter to Governor Ann Richards . . . indicate that there is a reasonable likelihood of litigation. Mr. Perry specifically raises the possibility of age discrimination and discrimination in favor of minorities and women. The information sought by Mr. Perry is the type of information upon which a discrimination law suit would be based.

This office has concluded that a reasonable likelihood of litigation existed 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, and where a requestor hired an attorney who asserted an intent to sue, Open Records Decision No. 555 (1990). We have examined the requestor's letters to the department and the governor. While the requestor in his letter may have "raise[ed] the possibility of age discrimination and discrimination in favor of minorities and women," nowhere in any of these letters does the requestor evince an intent to seek redress in court for any alleged wrongs. Moreover, we do not believe that the mere fact that information could be used in litigation is sufficient proof that litigation may be reasonably anticipated. Accordingly, we conclude that in this instance litigation is not reasonably anticipated and that the department may not withhold the requested information under section 552.103(a).

You also claim that section 552.108 excepts some of the requested information from required public disclosure. Section 552.108 provides that:

(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 claiming it must reasonably explain, if the information does not supply the explanation on its face, how and why release would unduly interfere with law enforcement. Open Records Decision No. 434 (1986) (citing *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977)).

You claim that release of information relating to employee selection "could have a chilling effect on the evaluator's ability to be frank in giving his or her evaluation of a candidate." You argue as follows:

The Department believes that the pre-[*Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ)] analysis as to the necessity for the former 3(a)(11) exception may be engrafted upon the argument that frank and uninhibited assessments of the qualifications for individuals seeking employment as peace officers are of vital concern to law enforcement. The Department therefore, believes that the release of this information would unduly interfere with law enforcement and crime prevention.

This office has never held that section 552.108 incorporates the policy rationale underlying section 552.111. We see no reason for now incorporating into section 552.108 the rationale for section 552.111 that the *Gilbreath* court rejected. We adhere to the test stated above that when the "law enforcement" exception is claimed, the agency claiming it must reasonably explain, if the information does not supply the explanation on its face, how release would unduly interfere with law enforcement. We conclude that you have not met this test. Accordingly, the department may not withhold the submitted information under section 552.108.³

³Section 552.111 excepts an "interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined section 552.111 and concluded that it excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. In addition, this office held that an agency's policymaking functions do not encompass internal administrative or personnel matters because disclosure of information relating to such

Finally, we address your contention that sections 552.114 and 552.026 of the act except the requested information from required public disclosure. Section 552.114 excepts "information in a student record at an educational institution funded wholly or partly by state revenue." Section 552.026 incorporates the requirements of the federal Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g, into the act. Open Records Decision No. 431 (1985). FERPA provides as follows:

No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein . . .) of students without the *written consent* of their parents to any individual, agency, or organization

20 U.S.C. § 1232g(b)(1) (emphasis added). "Education records" are records that

- (i) contain information directly related to a student; and
- (ii) are maintained by an *educational agency or institution or by a person acting for such agency or institution.*

Id. § 1232g(a)(4)(A) (emphasis added); *see also* Open Records Decision Nos. 462 (1987) at 14-15; 447 (1986); 427 (1985) (holding that a city police academy is an "educational institution" within the meaning of section 552.114).⁴

You advise us that the requested information is in the possession of the department's personnel bureau, not the department academy. You do not indicate that the department's personnel bureau is acting on behalf of the department academy in maintaining the requested records. Because the requested records are not maintained by an educational agency or institution or a person acting on their behalf, we conclude that the requested records are not "education records" within the meaning of section 552.114 and section 1232g(a)(4)(A) of FERPA. Accordingly, the requested information may not be withheld from required public disclosure under section 552.114 or FERPA. The department must release the requested information in its entirety.

(Footnote continued)

matters will not inhibit free discussion among agency personnel as to policy issues. *Id.* at 5-6. The requested information relates to an internal administrative and personnel matter, *i.e.*, employee selection.

⁴The phrase "student record" in section 552.114 has generally been construed to be the equivalent of "education records." Thus, our resolution of the availability of this information under FERPA in this instance also resolves the applicability of section 552.114 to the requested information. *See generally* Attorney General Opinion H-447 (1974); Open Records Decision Nos. 539 (1990); 477 (1987); 332 (1982).

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Loretta R. DeHay
Assistant Attorney General
Open Government Section

LRD/GCK/rho

Ref: ID# 23964
ID# 24032
ID# 24147

Enclosures: Submitted documents

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(w/o enclosures)