



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

March 16, 1995

Mr. Mario Aguilar  
Senior Attorney  
Texas Department of Housing  
and Community Affairs  
P.O. Box 13941  
Austin, Texas 78711-3941

OR95-124

Dear Mr. Aguilar:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, Government Code chapter 552. We assigned your request ID# 30117.

The Texas Department of Housing and Community Affairs (the "department") has received a request for information relating to the Multi-Family and Low Income Housing Tax Credit Program. Specifically, the requestor seeks:

1. All personnel records, data information or files, whether written or computer generated, for Robert Johnston . . . [including]: all memorandums, summaries, letters, correspondence or other internal or external Agency communication relating to any "ethics review," resignation or termination of the said Robert Johnston.
2. Any correspondence, memorandums, evaluations, notices, either from or to Robert Johnston, by or on behalf of [the department], relating to his personnel status, performance evaluation, ethical conduct, work performance or any related personnel matter based on conduct while an employee with the Agency.
3. Any discipline report, reprimand or personnel action, evaluative of conduct or performance, for the said Robert Johnston.

You advise us that the department has made some of the requested information available to the requestor. You object, however, to release of some of the requested information, which you have submitted to us for review, and claim that sections 552.101, 552.102, 552.103, 552.107, and 552.111 of the Government Code except it from required public disclosure.

We first address whether the department may withhold exhibit 1, an employee's W-4 form. Tax return information is made confidential by law. See 26 U.S.C. § 6103(a). Accordingly, the department must withhold the W-4 form from required public disclosure. See Gov't Code § 552.101; Open Records Decision No. 600 (1992).

We next address your assertion of sections 552.101 and 552.102 of the Government Code. You claim that sections 552.101 and 552.102 except exhibits 2, 4, and 5 from required public disclosure. Exhibit 2 is a department employee's performance evaluation. Exhibits 4 and 5 are intra-agency memorandums relating to a department employee's job performance. Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.102 excepts "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Section 552.102 of the Government Code protects personnel file information only if its release would cause an invasion of privacy under the test articulated for section 552.101 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 Tex. Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.). Under the *Industrial Foundation* case, information must 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 and performance of public employees. See Open Records Decision No. 470 (1987) at 5.

We have examined the information that you seek to withhold under sections 552.101 and 552.102. We conclude that this information is not intimate or embarrassing. Accordingly, the department may not withhold exhibits 2, 4, and 5 under sections 552.101 and 552.102 of the Government Code.

We consider whether section 552.103 of the Government Code, the "litigation exception," applies to exhibit 4.<sup>1</sup> Section 552.103(a) excepts from required public disclosure information:

---

<sup>1</sup>Without expressly raising section 552.103 in regard to exhibits 2, 3, and 5, you assert that "the Department believes there is potential litigation involving these records." However, in making these claims, you cite section 552.101 and section 552.111 of the Government Code. Section 552.103, rather than section 552.111 or section 552.101, may apply when requested information relates to pending or reasonably anticipated litigation.

(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.

For information to be excepted from public disclosure by section 552.103(a), litigation must be pending or reasonably anticipated and the information must relate 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.); *see also* Open Records Decision No. 551 (1990) at 5. 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. A surmise that litigation will occur is not enough; there must be some concrete evidence pointing to litigation. Attorney General Opinion JM-266 (1984) at 4; Open Records Decision Nos. 518 (1989) at 5; 328 (1982). This office has concluded that a reasonable likelihood of litigation exists when an attorney makes a written demand for disputed payments and promises further legal action if they are not forthcoming, *see* Open Records Decision No. 551, and when a requestor hires an attorney who then asserts an intent to sue, *see* Open Records Decision No. 555 (1990).

Your assertion that section 552.103 applies to the requested information is conclusory. We remind you that you are responsible for submitting in writing the reasons you believe the requested information is excepted from disclosure. Under the Open Records Act, all information held by governmental bodies is open to the public unless it is within a specific exception to disclosure. The custodian of records has the burden of proving that records are excepted from public disclosure. Attorney General Opinion H-436 (1974). If a governmental body does not claim an exception or fails to show how it applies to the records, it will ordinarily waive the exception unless the information is deemed confidential by law. *See* Attorney General Opinion JM-672 (1987). We conclude that, in this instance, you have waived section 552.103 because you have failed to explain how it applies to the records. Accordingly, the department may not withhold the requested information under section 552.103(a) of the Government Code.

Next, we address your assertion that section 552.107 of the Government Code, the "attorney-client privilege exception," excepts some of the requested information from required public disclosure. You assert section 552.107 with respect to exhibits 3 and 4. Section 552.107 excepts information if:

(1) it is information that . . . an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Rules of the State Bar of Texas.

Section 552.107(1) protects information that reveals client confidences to an attorney, including facts and requests for legal advice, or that reveals the attorney's legal advice. *See Open Records Decision No. 574 (1990).*

We have examined the information for which you seek section 552.107(1) protection. We conclude that portions of exhibits 3 and 4 contain client confidences to an attorney or an attorney's legal advice. The department may withhold those portions under section 552.107(1) of the Government Code. We have marked the documents accordingly.

Finally, we address your assertion that section 552.111 of the Government Code, the "interagency memorandum exception," excepts some of the requested information from required public disclosure. You claim that section 552.111 excepts exhibits 2, 3, 4, and 5 from required public disclosure. Having concluded that section 552.107(1) applies to exhibits 3 and 4, we need not address the application of section 552.111 to those exhibits.

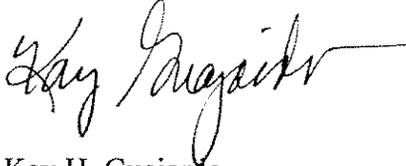
Section 552.111 excepts an "interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined section 552.111 and held that it excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body at issue. 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 matters will not inhibit free discussion among agency personnel as to policy issues. Open Records Decision No. 615, at 5-6.

Exhibit 2 is a performance evaluation. Exhibit 5 is an internal memorandum that relates to a conflict of interest problem involving a particular department employee. Both exhibits relate to internal administrative and personnel matters. Accordingly, we conclude that section 552.111 does not except exhibits 2 and 5 from required public disclosure. *See Open Records Decision No. 631 (1995).*

*Except for portions of exhibits 3 and 4 that may be withheld under section 552.107(1), the department must release the requested information in its entirety. 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,

A handwritten signature in black ink, appearing to read "Kay Guajardo", with a long horizontal flourish extending to the right.

Kay H. Guajardo  
Assistant Attorney General  
Open Government Section

KHG/GCK/rho

Ref.: ID# 30117

Enclosures: Marked documents

cc: Mr. Rider Scott  
David A. Dean & Associates, P.C.  
325 North St. Paul Street  
4400 Republic Tower II  
Dallas, Texas 75201  
(w/o enclosures)