



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

May 23, 1996

Mr. Jonathan A. Gruver
Attorney for City of Mesquite
Haynes and Boone, L.L.P.
3100 NationsBank Plaza
Dallas, Texas 75202-3789

OR96-0777

Dear Mr. Gruver:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 39567.

The City of Mesquite (the "city"), which you represent, received an open records request for 118 categories of information in connection with a pending lawsuit against the city, *Smirl v. City of Mesquite*, No. 36-96 (Dist. Ct. of Johnson County, 18th Judicial Dist. of Texas, filed Feb. 27, 1996). You contend that some of the requested records are excepted from required public disclosure pursuant to sections 552.102, 552.103, 552.107, and 552.117 of the Government Code.¹

Among the categories of requested documents are the personnel files of all employees of the city Health Department as well as the personnel files of certain named individuals.² The only exceptions you raise with regard to the personnel files are sections 552.102 and 552.117. We agree with your contention that the city must withhold pursuant to section 552.117 all information held by the city that reveals the home addresses, home telephone numbers, social security numbers, and any information

¹Because you argue that only certain categories of information are excepted from required public disclosure, *see infra*, this office assumes that the city is making all of the remaining information available to the requestor. This ruling does not authorize the withholding of any information not discussed herein.

²You inform us that the request encompasses the personnel files of 41 individuals.

revealing whether the employees have family members, but only to the extent that the employees had elected to withhold this information from the public prior to the date of the city's receipt of the open records request.³ See Open Records Decision No. 530 (1989) (character of requested information as public under section 552.117 is determined as of time request for information is made).

We also generally agree with your contentions regarding the portions of the requested personnel files that come under the protection of common-law privacy as incorporated into section 552.102.⁴ Specifically, the city must withhold the following types of information pursuant to section 552.102(a): information revealing personal financial information or personal financial decisions, including beneficiary information, federal income tax information, and information pertaining to life and health insurance coverage. See Open Records Decision No. 600 (1992) and authorities cited therein. However, certain information pertaining to the employees' participation in a retirement plan or system is public information, *see id.*, as are any college or high school transcripts. Open Records Decision No. 470 (1987).⁵ We have marked the portions of Exhibits 3 through 10 that the city must withhold under section 552.102. We also note that the annual statements pertaining to participation in the Texas Municipal Retirement System are made confidential under section 855.115 of the Government Code and may not be released in this instance. Other than the information protected by sections 552.102 and 552.117 as discussed above, the city must release the remaining portions of these and similar records to the requestor.⁶

The requestor also asks for records pertaining to the city's investigations of allegations of sexual harassment. You contend that all such records coming within the ambit of the requests relate to the legal issues in the pending litigation and thus come under the protection of the "litigation exception," section 552.103 of the Government

³The "signed writing" required by section 552.024(b) to be submitted by the employees to the city electing disclosure or non-disclosure of personal information does not come under the protection of either section 552.102 or 552.117.

⁴The test for section 552.102(a) protection is the same as that for information protected by common-law privacy under section 552.101: the information must contain highly intimate or embarrassing facts about a person's *private* affairs such that its release would be highly objectionable to a reasonable person *and* the information must be of no legitimate concern to the public. *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 550 (Tex. App.--Austin 1983, writ ref'd n.r.e.).

⁵We note that only the college transcripts of a "professional public school employee" are protected from public disclosure under section 552.102(b).

⁶Additionally, the city must release all other types of records typically contained in personnel files but not submitted to this office, such as applications, resumes, performance evaluations, time sheets, etc.

Code. To secure the protection of section 552.103(a), a governmental body must demonstrate that the requested information relates to pending or reasonably anticipated litigation to which the governmental body is a party. Open Records Decision No. 588 (1991) at 1. We have reviewed the plaintiff's petition in the lawsuit and conclude that you have established the "relatedness" of these records to the litigation. The city therefore may withhold these records at this time pursuant to section 552.103.⁷ You have not demonstrated, however, how other requested records pertaining to other types of employment discrimination claims against the city relate to the pending litigation. Accordingly, to the extent that such records exist, those records must be made available to the requestor.

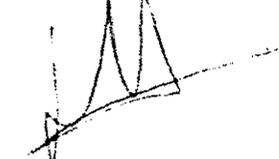
Finally, you argue that the requested attorney billing statements come under the protection of sections 552.103 and 552.107 of the Government Code. You have not explained, nor is it apparent to this office, how the requested billing statements relate to the pending litigation; consequently, these documents may not be withheld under section 552.103. Section 552.107(1) of the Government Code protects information "that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Civil Evidence, the Texas Rules of Criminal Evidence, or the Texas Disciplinary Rules of Professional Conduct." See Open Records Decision No. 574 (1990). In instances where an attorney represents a governmental entity, the attorney-client privilege protects only an attorney's legal advice and confidential attorney-client communications. *Id.* Accordingly, these two classes of information are the only information contained in the records at issue that may be withheld pursuant to the attorney-client privilege. See also Open Records Decision No. 589 (1991) (protected information in attorney billing statements) *overruling to extent of conflict* Open Records Decision No. 304 (1982).

Although the billing statement submitted to this office contains notations that a privileged communication may have taken place, it does not reveal the substance of those communications. None of the information contained in the billing statement submitted to this office consists of the type of information section 552.107(1) was intended to protect. See *id.* Consequently, section 552.107(1) does not act to protect from required public disclosure any of the information contained in the billing statement submitted to this office. Because you submitted the billing statement as being representative of the remaining requested statements, the city must release all of the requested statements at this time.

⁷We assume, however, that none of these records have previously been made available to the plaintiff in the litigation. Absent special circumstances, once information has been obtained by all parties to the litigation, either through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (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 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 'Janet I. Monteros', written over a horizontal line.

Janet I. Monteros
Assistant Attorney General
Open Records Division

JIM/RWP/rho

Ref.: ID# 39567

Enclosures: Marked documents

cc: Mr. Andrew R. Korn
Keller & Korn
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(w/o enclosures)