



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

May 23, 1996

Mr. Mark E. Dempsey
Assistant City Attorney
City of Garland
P.O. Box 469002
Garland, Texas 75046-9002

OR96-0790

Dear Mr. Dempsey:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 39322.

The City of Garland (the "city") received a request for information seeking "the complete deposition of former council member Vernon Gaston in the matter of his lawsuit against the city of Garland." You state that the city has released exhibits 1-12 and 17-22 of the deposition. You claim that the remaining information, the deposition transcription and exhibits 13-16, is excepted from required public disclosure pursuant to sections 552.103 and 552.101 of the Government Code. You have provided this office with a copy of the complete deposition including all exhibits for our review.

In this instance, we understand that Mr. Gaston has filed a motion in District Court to prevent the disclosure of his deposition. As the information at issue is subject to a potential protective order, we note that the court's order may be determinative. Information is excepted from required public disclosure "if a court by order has prohibited disclosure of the information." Gov't Code § 552.107(2). Thus, if the court grants the Motion to Prevent Disclosure and signs an order preventing disclosure of the deposition, the requested information must not be released during the pendency of the current lawsuit. *See Open Records Decision No. 309 (1982) at 5.* As of the date of this letter, however, this office has received no notice that a protective order has been signed by the court. In the event that the court refuses to grant the Motion to Prevent Disclosure or does not sign an order to that effect, we conclude that some of the information must be disclosed. Thus, in the absence of a court order prohibiting public disclosure, we will rule on the stated exceptions that you have raised under the Open Records Act.

Section 552.103(a) excepts from 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.

The city has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *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 (1990) at 4. The city must meet both prongs of this test for information to be excepted under 552.103(a).

In this instance, you claim that the deposition testimony is related to two distinct pending actions. You state, however, that the opposing parties to both sets of litigation have already had access to the requested information. Generally, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a).¹ Therefore, you may not withhold the documents under section 552.103.

You next assert that exhibits 13-16 are excepted by section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Section 552.101 also encompasses common-law privacy and excepts from disclosure private facts about an individual. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Therefore, information may be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 (1992) at 1.

¹You state that the deposition and its exhibits "belong" to Mr. Gaston not the city. However, section 552.001 of the Government Code provides that "public information means information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business by a governmental body." You state that the city is involved in a lawsuit brought by Mr. Gaston, and that the city gained access to the deposition through discovery. You do not assert that the city does not maintain this information or that the information is not in existence.

The constitutional right to privacy protects two interests. Open Records Decision No. 600 (1992) at 4 (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985), *cert. denied*, 474 U.S. 1062 (1986)). The first is the interest in independence in making certain important decisions related to the "zones of privacy" recognized by the United States Supreme Court. Open Records Decision No. 600 (1992) at 4. The zones of privacy recognized by the United States Supreme Court are matters pertaining to marriage, procreation, contraception, family relationships, and child rearing and education. *See id.*

The second interest is the interest in avoiding disclosure of personal matters. The test for whether information may be publicly disclosed without violating constitutional privacy rights involves a balancing of the individual's privacy interests against the public's need to know information of public concern. *See* Open Records Decision No. 455 (1987) at 5-7 (citing *Fadjo v. Coon*, 633 F.2d 1172, 1176 (5th Cir. 1981)). The scope of information considered private under the constitutional doctrine is far narrower than that under the common law; the material must concern the "most intimate aspects of human affairs." *See* Open Records Decision No. 455 (1987) at 5 (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490, 492 (5th Cir. 1985), *cert. denied*, 474 U.S. 1062 (1986)).

You argue that exhibits 14-16 are excepted by section 552.101 by common-law privacy because they concern the prescription drugs a person is taking. After reviewing the documents, we agree. You must withhold exhibits 14, 15, and 16 from disclosure pursuant to section 552.101. Open Records Decision No. 455 (1987).

You also assert that exhibit 13 is excepted by section 552.101. You argue generally that the document as a whole, a draft book manuscript, is a personal writing containing "highly intimate information," and thus, is entirely protected by a right to privacy. We do not believe, however, that the document as a whole is that kind of information which is protected by a right of privacy. Therefore, you may not withhold exhibit 13 as a whole from public disclosure.

Notwithstanding our finding that the manuscript is not protected by a right to privacy in its entirety, there appear to be portions of the document which are protected by privacy and must be withheld. This office has found that the following types of information are excepted from required public disclosure under constitutional or common-law privacy: some facts about an "individual's subjective emotional state" which relate thoughts or feelings, *see* Open Records Decision No. 539 (1990) at 5; some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps), personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990), information concerning the intimate relations between individuals and their family members, *see* Open Records Decision No. 470 (1987), and identities of victims of sexual abuse or the detailed description of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). We have reviewed Exhibit 13 and have marked a sample of the information that must be withheld under constitutional or common-law privacy. For your convenience, we

have also included for your review a sampling of common types of information deemed confidential.

In addition, we note that some of the requested material includes the home address, phone number, social security number or family information of a former city official. You state that Mr. Gaston is a former official of the City of Garland. It is possible that this information may be confidential under section 552.117 of the Government Code, and therefore, this specific information, depending on the specific circumstances, must not be released. Section 552.117 of the Government Code excepts from required public disclosure the home addresses, telephone numbers, social security numbers, or information revealing whether a public official has family members of public employees who request that this information be kept confidential under section 552.024. Therefore, section 552.117 requires you to withhold the information of a current or former official who requested that this information be kept confidential under section 552.024. *See* Open Records Decision Nos. 622 (1994), 455 (1987). You may not, however, withhold the information of a current or former employee or official who made the request for confidentiality under section 552.024 after this request for information was made. Whether a particular piece of information is public must be determined at the time the request for it is made. Open Records Decision No. 530 (1989) at 5. We have marked a sample of that kind of information that must be withheld if the official made the election not to allow public access to the information.

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.

Sincerely,



Don Ballard
Assistant Attorney General
Open Records Division

JDB/ch

Ref.: ID# 39322

Enclosures: Submitted documents
List of Confidential Information

cc: Mr. Lennard L. Pierson
The Garland News
613 State Street
Garland, Texas 75040
(w/o enclosures)