



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

November 13, 1996

Mr. Jerry E. Drake, Jr.
Assistant City Attorney
City of Denton
215 East McKinney
Denton, Texas 76201

OR96-2074

Dear Mr. Drake:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 102293.

The City of Denton (the "city") received three requests for information. You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.117, 552.119, and the informer's privilege as it is incorporated by section 552.101 of the Government Code. You also state that some of the requested information does not exist. Finally, you claim that the requested information is excepted from required public disclosure because the requestor has not "delivered a specific request to the custodian of the records sought."¹

We address this last argument first. A request for public information under the Open Records Act is not required to be addressed to the officer of public information. The Open Records Act does not require "that a requestor use any 'magic' words such as naming the chief administrative officer, so long as the request reasonably can be identified as a request for public records." Open Records Decision No. 497 (1988) at 3; *see* Open Records Decision No. 44 (1974) at 2 ("If a written communication to an agency can be reasonably judged a request for public information, it is a request within the terms of the Open Records Act"). This office has recognized that chief administrative officers would not be personally handling all requests for records and would delegate that responsibility to agents. Open Records Decision No. 497 (1988); *see* Open Records Decision Nos. 576 (1990), 44 (1974). Therefore, as the requestor here addressed his requests to the "Texas

¹We note that the city submitted its request for a ruling more than ten days after it received the requests for information. *See* Gov't Code § 552.301(a). However, the city has provided this office with "satisfactory proof that it was deposited in the mail within the period" as provided by section 552.308(2). Therefore, we consider the city's arguments.

Open Records Official," we believe that he has complied with the Open Records Act.

The first request seeks photographs and the residence address of certain named city employees. You state that each of the employees has made the election under section 552.024 of the Government Code to keep their home addresses confidential. Section 552.117 of the Government Code excepts from public disclosure information relating to the home address, home telephone number, and social security number of a current or former government employee or official, as well as information revealing whether that employee or official has family members. Section 552.117 requires you to withhold this information for these employees, as they have 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 this information if the employees had not made requests for confidentiality under section 552.024 at the time this request for the documents 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.

As for the photographs, you claim that the city does not have photographs of these employees. You do state that the city makes photo identification cards for its employees upon hiring but does not keep duplicates of those cards. We note that information is subject to the provisions of chapter 552 of the Government Code if it is "collected, assembled, or maintained . . . by a governmental body; or for a governmental body and the governmental body owns the information or has a right of access to it." Gov't Code § 552.002(a). This office has previously concluded that where information is furnished to a public employee, even in his private capacity, it is not "made solely for the use" of that employee and that information is subject to the provisions of chapter 552. Open Records Decision Nos. 332 (1982), 327 (1982). We believe that the photo identification cards are provided to the employees as part of their employment by the city and we assume that they remain the property of the city. Therefore, we conclude that the city has access to these cards and must provide copies of the pictures to the requestor.

However, we note that the requestor is not entitled to the photographs in the form that he requests. Open Records Decision No. 467 (1987) (Gov't Code, chapter 552, does not require preparation of information in form requested by public); cf. Gov't Code § 552.231 (requiring manipulation of data in certain circumstances). The city need only produce copies of the photographs in the form in which they are available.

The city claims that the requested photographs are excepted from disclosure under section 552.119 of the Government Code. Section 552.119 prohibits the release of a photograph that depicts a peace officer as defined by article 2.12 of the Code of Criminal Procedure except in certain circumstances. If any of the named employees are certified peace officers under article 2.12 of the Code of Criminal Procedure, the city must withhold their photographs. Otherwise, section 552.119 does not apply and the city may not withhold the requested photographs.

Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses both common-law and constitutional privacy. For information to be protected from public disclosure under the common-law right of privacy, the information must meet the criteria set out in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The court stated that

information . . . is excepted from mandatory disclosure under Section 3(a)(1) as information deemed confidential by law if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public.

540 S.W.2d at 685; Open Records Decision No. 142 (1976) at 4 (construing statutory predecessor to Gov't Code § 552.101). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683. The constitutional right of privacy is narrower than that under the common-law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." Open Records Decision No. 455 (1987) at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)). We do not believe that the named employees photographs are intimate and embarrassing; therefore, the city may not withhold them under section 552.101.

You further claim that the informer's privilege as incorporated by section 552.101 of the Government Code excepts the requested photographs from disclosure. Texas courts have recognized the informer's privilege. See *Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969). It protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided that the subject of the information does not already know the informer's identity. Open Records Decision Nos. 515 (1988) at 3, 208 (1978) at 1-2. The informer's privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." Open Records Decision No. 279 (1981) at 2 (citing Wigmore, Evidence, § 2374, at 767 (McNaughton rev. ed. 1961)). The report must be of a violation of a criminal or civil statute. See Open Records Decision Nos. 582 (1990) at 2, 515 (1988) at 4-5.

The city has not established that any of the named employees is an informer within the meaning of the informer's privilege. Further, the requestor clearly knows the identity of the alleged informers. Therefore, the city may not withhold the requested photographs under the informer's privilege.

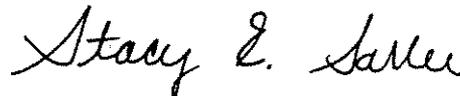
You claim that section 552.103 of the Government Code excepts from disclosure the photographs and a previous request for an open record ruling from the city to this office. Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state is or may be a party. 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 section 552.103(a).

Although the city has established that litigation is pending, the city has not established how either the photographs or the request letter is related to issues in the litigation. Therefore, the city may not withhold this requested information under section 552.103 with the following exception. The city's July 16, 1996, request letter sought a ruling on documents requested by this same requestor. The city claimed that section 552.103 excepted the documents from disclosure and we agreed in Open Records Letter No. 96-1865 (1996). Therefore, the city may withhold those portions of the request letter that reveal the contents of the documents that we ruled the city could withhold under section 552.103. The city may not withhold the remainder of the July 16, 1996, request letter.

In response to the final request for policies, the city states that no such policies exist. Chapter 552 of the Government Code does not require a governmental body to disclose information that did not exist at the time the request was received. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.--San Antonio 1978, writ dism'd); Open Records Decision No. 452 (1986) at 3. Therefore, the city need not respond to this request.

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 on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,



Stacy E. Sallee
Assistant Attorney General
Open Records Division

Ref.: ID# 102293

cc: Mr. R. B. Melton, Jr.
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(w/o enclosures)