



Office of the Attorney General
State of Texas

May 8, 1997

DAN MORALES
ATTORNEY GENERAL

Mr. James L. Dougherty, Jr.
Cole & Dougherty
5300 Memorial, Suite 1070
Houston, Texas 77007

OR97-1058

Dear Mr. Dougherty:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 105496.

The West University Police Department (the "department"), which you represent, received a request for the following information:

I hereby request that a complete copy of my personnel file, including all documents containing any reference to me or to my employment with the City of West University, be provided to me upon my last day at work with the City.

You state that the request is overbroad, open-ended, vague, and unclear. You explain that you have attempted to clarify the request with the requestor. Gov't Code § 552.222. You have informed this office that the requestor continues to want all information that makes reference to her. You have, therefore, identified 16 categories of information that are responsive to the request. You state that you will release the requestor's personnel file, category 9. You claim, however, that the remaining information is excepted from required public disclosure by sections 552.101, 552.102, 552.103, 552.104, 552.106, 552.108, and 552.111 of the Government Code. We have considered the exception you claim and have reviewed the representative sample of documents you have submitted.¹

¹In reaching our conclusion here, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Initially, we address your concerns regarding the scope of the request for information. Numerous opinions of this office have addressed situations in which a governmental body has received either an "overbroad" written request for information or a written request for information that the governmental body is unable to identify. Open Records Decision No. 561 (1990) at 8-9 states:

We have stated that a governmental body must make a good faith effort to relate a request to information held by it. Open Records Decision No. 87 (1975). It is nevertheless proper for a governmental body to require a requestor to identify the records sought. Open Records Decision Nos. 304 (1982); 23 (1974). For example, where governmental bodies have been presented with broad requests for information rather than specific records we have stated that the governmental body may advise the requestor of the types of information available so that he may properly narrow his request. Open Records Decision No. 31 (1974).

In response to the request at issue here, the department must make a good-faith effort to relate the request to information in the department's possession and must help the requestor to clarify her request by advising her of the types of information available. We note that if a request for information is unclear, a governmental body may ask the requestor to clarify the request, which you have done. Gov't Code § 552.222(b); *see also* Open Records Decision No. 561 (1990) at 8. Based on the requestor's response to your attempt of clarification, we believe the request to be effective and to be a request for all information which makes reference to her. We also believe that the department has already made a good-faith effort in this case to respond to the request. By identifying the 16 categories of documents which are responsive to the request, you have satisfied the requirements of the Open Records Act. We will, therefore, consider your arguments against disclosure.

First, you claim that you may withhold categories 1, 2, 3, and 4 based upon section 552.108. Categories 1, 2, 3, and 4 include police incident reports, arrest reports, criminal history record information, and department staff meeting minutes and records. Section 552.108 excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime," and "[a]n 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." Gov't Code § 552.108; *see Holmes v. Morales*, 924 S.W.2d 920 (Tex. 1996). We note, however, that information normally found on the front page of an offense report is generally considered public. *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.--Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976); Open Records Decision No. 127 (1976). Thus, you must release the type of information that is considered to be front page offense report information, even if this information is not actually located on the front page of the offense report. *See* Open Records Decision No. 127

(1976) (summarizing the types of information deemed public by *Houston Chronicle*). The documents at issue deal with the detection, investigation, or prosecution of crime. We therefore conclude that, except for front page offense report information, section 552.108 of the Government Code excepts the documents within categories 1, 2, and 4 from required public disclosure.²

As for category 3, we believe that this information is confidential by law and must not be released. Section 552.101 excepts from disclosure “information deemed confidential by law, either constitutional, statutory, or by judicial decision.” This section encompasses information protected by other statutes. Federal regulations prohibit the release of criminal history record information (“CHRI”) maintained in state and local CHRI systems to the general public. *See* 28 C.F.R. § 20.21(c)(1) (“Use of criminal history record information disseminated to noncriminal justice agencies shall be limited to the purpose for which it was given.”), (2) (“No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself.”). Section 411.083 provides that any CHRI maintained by the Department of Public Safety (“DPS”) is confidential. Gov’t Code § 411.083(a). Similarly, CHRI obtained from the DPS pursuant to statute is also confidential and may only be disclosed in very limited instances. *Id.* § 411.084; *see also id.* § 411.087 (restrictions on disclosure of CHRI obtained from DPS also apply to CHRI obtained from other criminal justice agencies). Therefore, any CHRI that falls within the ambit of these state and federal regulations must be withheld from the requestor.

You next claim that several categories of the responsive information, 5, 6, 8, 10, 11, 13, 14, and 15 are excepted from disclosure by section 552.103 of the Government Code. These categories include department memoranda, computer records, purchase orders, investigation files and attorney reports. 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.

²We note, however, that some of the information may be otherwise confidential by law and should not be released. We have included a sampling of those kinds of information that must be withheld.

The department 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 department must meet both prongs of this test for information to be excepted under 552.103(a).

In this case, you explain that the city's former records secretary resigned after several allegations of discrimination, sexual harassment, and retaliation. You state that the department conducted several investigations regarding the secretary's employment. The former employee has also hired an attorney who has made several threats of litigation. The attorney has also made a demand for payment based on specific damages allegedly suffered by his client. We find that you have demonstrated that litigation is reasonably anticipated. After reviewing your arguments and the documents you seek to withhold, we find that they are related to the anticipated litigation. You may withhold categories 5, 6, 8, 10, 11, 13, 14, and 15 under section 552.103.

Generally, however, 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), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982). We note, however, that some of the information may be confidential and may not be released even after litigation has concluded. *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied) (addressing applicability of common-law privacy doctrine to files of investigation of allegations of sexual harassment).

You also argue that the information contained within category 7 is protected from disclosure by sections 552.101 and 552.102. Category 7 information includes payroll and employee attendance records and other compensation records. Section 552.102 of the Government Code exempts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the act. Section 552.101 encompasses information protected by constitutional or common-law privacy and exempts 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.

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)).

This office has found that the following types of information are excepted from required public disclosure under constitutional or common-law privacy: 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), and 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), and information concerning the intimate relations between individuals and their family members. *See* Open Records Decision No. 470 (1987). After reviewing the submitted samples in category 7, we do not believe that they may be withheld in their entirety based on a right of privacy. *See* Open Records Decision Nos. 473 (1987) at 3 (even highly subjective evaluations of public employees may not ordinarily be withheld under Gov't Code § 552.102), 470 (1987) at 4 (public employee's job performance does not generally constitute his private affairs).

We note, however, that some information within these records may be withheld pursuant to other sources of law. 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 employee 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 home telephone number or social security number of a current or former employee or 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 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. Therefore, if the employee or official has elected to prohibit public access to this information in accordance with the procedures of section 552.024 of the Government Code, we believe that the city must withhold this information from required public disclosure pursuant to section 552.117. Section 552.117 also provides that information may be withheld if it is

information that relates to the home address, home telephone number, social security number, or that reveals whether the following person has family members:

* * * *

(2) a peace officer as defined by Article 2.12, Code of Criminal Procedure, or a security officer commissioned under Section 51.212, Education Code.

Since section 552.117 excepts from required disclosure peace officers' home addresses, home telephone numbers, social security numbers, and information revealing whether the officers have family members, you must also withhold any of this information. Code Crim. Proc. art. 2.12; Open Records Decision Nos. 532 (1989), 530 (1989). Additionally, although you have raised no exception to disclosure for category 16, directories and phone lists, you must withhold any information contained in this category that is protected by section 552.117.

Finally, you argue that the records contained in category 12 need not be disclosed because they are records of the judiciary. The information includes arrest warrants, complaints, and citations. The Open Records Act does not apply to records of the judiciary. Gov't Code § 552.003(B). In this instance, however, we are unable to determine whether these are records held by the judiciary or whether they are records filed with the municipal court and also maintained by the department. If they are genuinely records maintained solely by the municipal court, you need not release them. Attorney General Opinion DM-166 (1992). If, on the other hand, the records are maintained by the department and were merely filed with the court, they are public records and must be disclosed. Documents filed with a court are generally considered public and must be released. See *Star Telegram, Inc. v. Walker*, 834 S.W.2d 54, 57 (Tex. 1992).

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 that reads "Don Ballard". The signature is written in a cursive style with a large, stylized "D" and "B".

Don Ballard
Assistant Attorney General
Open Records Division

JDB/alg

Ref: ID# 105496

Enclosures: Submitted documents
List of Confidential Information

