



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

June 9, 1997

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

OR97-1330

Dear Mr. Dempsey:

The City of Garland (the "City") has asked whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code (the "Act"). Your request was assigned ID# 37806.

The City received a request for information from an attorney representing Grace Rutherford, a former part-time employee of the City, relating to the City's participation in the Texas Municipal Retirement System ("TMRS"). The City agreed to release two of the categories of information, stated that the City was not in possession of three of the items, and claimed exemption from disclosure of the remaining items under sections 552.101, 552.102, 552.103 and 552.117 of the Act.

Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the governing body 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).

Litigation cannot be regarded as "reasonably anticipated" unless there is concrete evidence showing that the claim that litigation may ensue is more than mere conjecture. Open Records Decision Nos. 452 (1986), 331 (1982), 328 (1982). Whether litigation is

reasonably anticipated must be determined on a case-by-case basis. Open Records Decision Nos. 452 (1986), 350 (1982). This office has concluded that litigation is reasonably anticipated when an attorney makes a written demand for disputed payments and promises further legal action if they are not forthcoming, and when a requestor hires an attorney who threatens to sue a governmental entity. Open Records Decision Nos. 555 (1990), 551 (1990). However, the fact that an individual has hired an attorney or that a request for information was made by an attorney does not, without more, demonstrate that litigation is reasonably anticipated. Open Records Decision No. 361 (1983) at 2.

The request for information in this instance was made by an attorney on behalf of an individual involved in a dispute with the City over retirement benefits, and who asserted "you'll be hearing from my attorney" when she was not allowed to retroactively enroll in the retirement system. The request for information from the attorney does not threaten litigation, however, and the City offers no other concrete evidence of an impending lawsuit. Therefore, we conclude that the City has not established that litigation is reasonably anticipated, and thus the City may not withhold the requested information under section 552.103.

Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," and 552.102 excepts personnel file information if its disclosure would constitute a clearly unwarranted invasion of a person's personal privacy. Information may be withheld under common-law privacy if it meets the criteria the Texas Supreme Court articulated for section 552.101 in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The *Industrial Foundation* test for section 552.101 privacy is also applicable to section 552.102 privacy. ORD 545 (1990), 591 (1991). Under *Industrial Foundation*, a governmental body must withhold information on common-law privacy grounds only if the information is highly intimate or embarrassing *and* it is of no legitimate concern to the public. This office has determined that personal financial information, such as an individual's decisions about payroll savings plans, "is highly intimate or embarrassing," and thus meets the first part of the *Industrial Foundation* test. Open Records Decision No. 545 (1990). The amount voluntarily invested by payroll deduction is also of no legitimate concern to the public. *Id.* The total amount of contributions in an individual's municipal retirement account, however, does not involve an individual's personal investment decision but is completely regulated by state law. See Gov't Code ch. 855, subch. E (collection of contributions). Therefore, information containing an individual employee's contributions to his TMRS retirement account, or the amount of money contained therein, cannot be withheld pursuant to a common law right of privacy under Section 552.101 or 552.102.

You also argue that to the degree the City is in possession of the same information as that in the custody of TMRS, such as the amounts of contributions in members' TMRS accounts or any records the City is required to submit to TMRS under the TMRS statute, this information is also exempt from disclosure in the custody of the

City. Section 855.115 of the Government Code, in pertinent part, states: "(a) Information contained in records that are in the custody of the retirement system concerning an *individual* member, retiree, annuitant, or beneficiary is confidential under Section 552.101, and may not be disclosed in a form identifiable with a specific individual...." (Emphasis added). Because the TMRS document you submitted to this office entitled "Summary of Monthly Payroll Report" does not identify any individual, this information does not come under the provisions of 855.115 (a) and therefore is not excepted from disclosure under 552.101.

Further, although the document you submitted entitled "Monthly TMRS Report" does contain information identifying individual employees, subsection (a) of 855.115 states that this provision applies to member information while in the custody of the retirement system. While member information produced or provided by TMRS in the possession of the City remains confidential and may be withheld, this office concludes information produced by the City and transferred to TMRS does not come under the protection of 855.115 and thus is not excepted from disclosure under 552.101. Therefore, the Monthly TMRS Report must be released.

You additionally assert that, to the extent release of the requested records would reveal the information protected by section 552.117 of the Government Code, the information is excepted from disclosure. Section 552.117 excepts from public disclosure information relating to the home address, home telephone number, or 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 an official, employee, or former employee 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 this information if the employee had not made a request 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. Thus, to the extent the City determines that individual employees have elected to withhold the types of information made confidential by 552.117, the City must redact this information from the records otherwise disclosable to the requestor, including the Monthly TMRS Report.

Finally, you have requested our opinion whether recent amendments to the Act now require a governing body to create documents to satisfy a request. This office has consistently held that Chapter 552 of the Government Code does not require a governmental body to make available information which did not exist at the time the request was received. Open Records Decision No. 362 (1983); *see* Open Records Decision No. 452 (1986) (document not within chapter 552's purview if it does not exist when governmental body receives request for it). Nor must a governmental body prepare new information to respond to an open records request. Open Records Decision Nos. 605 (1992), 572 (1990), 416 (1984).

In conclusion, the City must release the information requested by the attorney for Ms. Rutherford, samples of which you have provided to this office, except to the extent such information reveals the home address, home telephone number, or social security number of an employee, or that the employee has family members, and the employee requested that this information be kept confidential under section 552.024.

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,



Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/ch

Ref.: ID# 37895

Enclosures: Submitted documents

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