



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

September 5, 1997

Ms. Hala L. Carey
Vial, Hamilton, Koch & Knox, L.L.P.
1717 Main Street, Suite 4400
Dallas, Texas 75201-7388

OR97-1975

Dear Ms. Carey:

On behalf of the City of Cockrell Hill (the "city"), you ask whether certain information is subject to required public disclosure under the Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 108359.

The city received a request for a copy of certain information in Corporal Wallace W. Brown's personnel file, information concerning the patrol car driven by Corporal Brown on a certain night, copies of a certain arrest report and accident report and the city police department policy regarding procedures for transporting prisoners. You assert that the requested information is excepted from required public disclosure based on sections 552.101, 552.102, 552.103, 552.108, 552.115, 552.117 and 552.119 of the Government Code.

We begin with the requested accident report. Section 47(b)(1) of V.T.C.S. article 6701d¹ reads in pertinent part as follows:

¹Effective September 1, 1995, article 6701d was repealed and codified as part of the Transportation Code. Act of May 1, 1995, 74th Leg., R.S., ch. 165, § 24, 1995 Tex. Sess. Law Serv. 1025, 1870-71. See Transp. Code § 550.065 (release of accident report). The repeal of a statute by a code does not affect an amendment of the statute by the same legislature which enacted the code and the amendment is preserved and given effect as part of the code provision. Gov't Code § 311.031(c). The amendment of section 47 of V.T.C.S. article 6701d may be found following section 550.065 of the Transportation Code. See also Act of May 27, 1995, 74th Leg., R.S., ch. 894, § 1, 1995 Tex. Sess. Law Serv. 4413, 4414. The Seventy Fifth Legislature, repealed, codified, and amended V.T.C.S. article 6701d, concerning the disclosure of accident report information. Act of May 29, 1997, S.B.1069, § 13, 75th Leg., R.S. (to be codified at Transp. Code § 550.065). However, a Travis County district court has issued a temporary injunction enjoining the enforcement of section 13 of SB 1069 for ninety days. *Texas Daily Newspaper Association, et al., v. Morales, et al.*, No. 97-08930 (345th Dist. Ct., Travis County, Tex., Aug. 29, 1997) (order granting temporary injunction). A temporary injunction preserves the status quo until the final hearing of a case on its merits. *Janus Films, Inc. v. City of Fort Worth et al.* 163 Tex. 616, 617 358 S.W.2d 589 (1962). The Supreme Court has defined the status quo as the last, actual peaceable, non-contested status that preceded the pending controversy. *Texas v. Southwestern Bell Telephone Co.* 526 S.W.2d 526, 528 (Tex. 1975). The status quo of accident report information prior to the enactment of SB 1069 is governed by section 47 of article 6701d, V.T.C.S.

The Department or a law enforcement agency employing a peace officer who made an accident report is required to release a copy of the report on request to

(D) a person who provides the Department or the law enforcement agency with two or more of the following:

- (i) the date of the accident;
- (ii) the name of any person involved in the accident; or
- (iii) the specific location of the accident.

As the requestor appears to have provided you with the required information about the reported accident, section 47(b) entitles her to a copy of the accident report she seeks.

Section 552.103(a) of the Government Code reads as follows:

(a) Information is excepted from [required public disclosure] if it is 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) the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

To secure the protection of section 552.103(a), a governmental body must demonstrate that requested information "relates" to a pending or reasonably anticipated judicial or quasi-judicial proceeding. Open Records Decision No. 588 (1991). A governmental body has the burden of providing relevant facts and documents to show the applicability of an exception in a particular situation. The test for establishing that section 552.103 applies is a two-prong 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 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.).

In this instance, you have not shown that litigation is reasonably anticipated for purposes of section 552.103(a). Accordingly, the city may not withhold the requested information from the requestor based on section 552.103.

The Seventy-Fifth Legislature amended section 552.108 of the Government Code to read as follows:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of Section 552.021 if:

(1) release of the information would interfere with the detection, investigation, or prosecution of crime;

(2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication; or

(3) it is information that:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation;

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

(b) An 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 is excepted from the requirements of Section 552.021 if:

(1) release of the internal record or notation would interfere with law enforcement or prosecution;

(2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication; or

(3) the internal record or notation:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation;

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

(c) This section does not except from the requirements of Section 552.021 information that is basic information about an arrested person, an arrest, or a crime.

See Act of June 1, 1997, H.B. 951, § 1, 75th Leg., R.S. (to be codified at Gov't Code § 552.108). We conclude that section 552.108(b) of the Government Code excepts from required public disclosure exhibit 2. We also conclude that section 552.108(a) applies to the requested arrest report. However, you must release the type of information that is considered to be front page offense report information. See generally Act of June 1, 1997, H.B. 951, § 1, 75th Leg., R.S. (to be codified at Gov't Code § 552.108(c)); *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). Section 552.108 does not apply to the remaining requested information. Cf. Open Records Decision No. 562 (1990) at 10 (predecessor provision not applicable to law enforcement officer's personnel information).

Section 552.101 excepts from required public disclosure information considered to be confidential by law, including information made confidential by judicial decision. This exception applies to information made confidential by the common-law right to privacy. *Industrial Found. of the S. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), cert. denied, 430 U.S. 931 (1977). Information may be withheld under section 552.101 in conjunction with the common-law right to privacy if the information contains highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person and if the information is of no legitimate concern to the public. See *id.* Section 552.102(a) of the Government Code excepts from public disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." The test to be applied to information claimed to be protected under section 552.102 is the same test formulated by the Texas Supreme Court in *Industrial Foundation of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), cert. denied, 430 U.S. 931 (1977) for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101. See *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.). We have considered whether the requested records include information protected from required public disclosure based on common-law privacy and conclude that they do not.

We have marked certain information, the release of which is governed by statutes other than the Open Records Act, specifically section 5.08 of the Medical Practice Act, V.T.C.S. 4495b, and chapter 611 of the Health and Safety Code. See Open Records Decision No. 598 (1991). The city may release that information only in accordance with the release provisions of those statutes. See V.T.C.S. art. 4495b, § 5.08(c), (j), (k); Health and Safety Code §§ 611.004-.008.

The personnel file includes information that appears to have been generated by the Texas Crime Information Center ("TCIC") or the National Crime Information Center ("NCIC"). Title 28, Part 20 of the Code of Federal Regulations governs the release of criminal history information which states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to criminal history information it generates. *Id.*

Section 411.083 of the Government Code deems confidential criminal history records that the Department of Public Safety (the "DPS") maintains, except that the DPS may disseminate such records as provided in chapter 411, subchapter F of the Government Code. *See also* Gov't Code § 411.087 (entities authorized to obtain information from DPS are authorized to obtain similar information from any other criminal justice agency; restrictions on disclosure of CHRI obtained from DPS also apply to CHRI obtained from other criminal justice agencies). Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain criminal history record information; however, a criminal justice agency may not release the information except to another criminal justice agency for a criminal justice purpose, *id.* § 411.089(b)(1). Other entities specified in Chapter 411 of the Government are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release the information except as provided by Chapter 411. *See generally id.* §§ 411.090 - .127. Thus, any criminal history record information generated by the federal government or another state may not be made available to the requestor except in accordance with federal regulations. *See* Open Records Decision No. 565 (1990). Furthermore, any criminal history record information obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F.

Section 552.115(1) of the Government Code provides an exception to public disclosure of certain birth records maintained by the bureau of vital statistics of the Texas Department of Health. We do not believe this exception applies to a birth record in the city's possession. *See* Open Records Decision No. 338 (1982). Accordingly, the birth record is not excepted from disclosure based on section 552.115. We note, however, that the birth record contains information that may be excepted from disclosure based on section 552.117.

The requested material includes the current or former home address, phone number, social security number and family information of a current or former city employee. 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, may 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 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 address and telephone number, social security number and family member information 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). The exception also applies to former home addresses and telephone numbers. *See* Open Records Decision No. 622 (1994). 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 has elected to not allow 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. We have marked a sample of that kind of information that must be withheld if the employee made the election not to allow public access to the information.

Section 552.119 of the Government Code exempts from required public disclosure a "photograph that depicts a peace officer as defined by Article 2.12, Code of Criminal Procedure, or a security officer commissioned under Section 51.212, Education Code," except in certain circumstances that do not appear to be applicable here or if the officer has given written consent to the disclosure. Thus, unless the officer consents to their public disclosure, the city must withhold the officer's photograph based on section 552.119.

We are resolving this matter with this 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 may 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,



Kay Hastings
Assistant Attorney General
Open Records Division

KH/rho

Ref.: ID# 108359

Enclosures: Marked documents

cc: Ms. Patricia B. deLarios
3524 Fairmount Street
Dallas, Texas 75219
(w/o enclosures)