



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

March 16, 1998

Mr. Laurence E. Boyd
Attorney at Law
P.O. Box 269
Angleton, Texas 77516-0269

OR98-0728

Dear Mr. Boyd:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 113430.

The City of Manvel (the "city"), which you represent, received two open records requests for all records pertaining to the termination of the city's chief of police, any citizen complaints filed against the chief, and all internal affairs investigations regarding any of the city's police officers. You contend the requested information is excepted from required public disclosure pursuant to sections 552.101, 552.102, 552.103, 552.107, 552.108, and 552.117 of the Government Code.

You contend that all of the records at issue are excepted from public disclosure pursuant to section 552.103, the "litigation" exception, because the records directly relate to the termination of the former police chief, who has threatened to file a "whistle blower" lawsuit against the city as a result of the termination.¹ To secure the protection of section 552.103, a governmental body must demonstrate that the requested information relates to pending or reasonably anticipated litigation to which the governmental body is a party. Open Records Decision No. 588 (1991) at 1. The mere chance of litigation will not trigger section 552.103(a). Open Records Decision No. 452 (1986) at 4 and authorities cited therein. To demonstrate that litigation is reasonably anticipated, the governmental body must furnish

¹Although you make other arguments for withholding certain other records pursuant to section 552.103, we resolve those aspects of your request on other grounds.

evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.*

It is well established that where an individual has publicly stated on more than one occasion an intent to sue, these threats alone do not trigger section 552.103. Open Records Decision No. 331 (1982). *See also* Open Records Decision No. 351 (1982). Based on the limited facts before this office, we cannot conclude that you have met your burden in establishing the likelihood of litigation in this particular instance. Accordingly, the city may not withhold any of the requested records pursuant to section 552.103 because of the former police chief's threats.

We next address the applicability of section 552.108, the "law-enforcement" exception, to the records at issue. Section 552.108 of the Government Code, as amended by the Seventy-fifth Legislature, excepts from required public disclosure, in pertinent part,

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if:

....

(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[.]

....

(c) This section does not except from [public disclosure] information that is basic information about an arrested person, an arrest, or a crime.

Many of the internal affairs records you have submitted to this office directly pertain to separate criminal investigations conducted by the Manvel Police Department or the Brazoria County District Attorney that did not result in criminal convictions or deferred adjudications. Accordingly, the city may withhold pursuant to section 552.108(a)(2) most of the information pertaining to the following internal affairs investigations: 1) a DWI case where the arrestee was "un-arrested" as a "professional courtesy" and the subsequent offense of tampering with a government record, and 2) the investigation of a city police officer's alleged theft of a tractor and "bush hog" and the subsequent purchase of those items by other

city officer.² We also conclude that the city may also withhold most of the information pertaining to the theft of a city police officer's "Notary Public Record of Signatures" book, assuming this offense did not result in a conviction or deferred adjudication.

Please note, however, that section 552.108 does not except from required public disclosure "basic information about an arrested person, an arrest, or a crime." Gov't Code § 552.108(c). The city must release these types of information about the criminal offenses, including a *detailed* description of each offense, in accordance with *Houston Chronicle Publishing Company 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).³

We next address whether any of the information at issue may be withheld from the public pursuant to section 552.107(1) of the Government Code, which protects information "that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Civil Evidence, the Texas Rules of Criminal Evidence, or the Texas Disciplinary Rules of Professional Conduct." *See* Open Records Decision No. 574 (1990). In instances where an attorney represents a governmental entity, the attorney-client privilege protects only an attorney's legal advice and confidential attorney-client communications. *Id.* Accordingly, these two classes of information are the only types of information contained in the records at issue that may be withheld pursuant to the attorney-client privilege. We have identified two memoranda, both dated December 8, 1997, from the city administrator to the city attorney that consist of client confidences and therefore may be withheld from the public pursuant to section 552.107(1). We have marked these documents accordingly.

You contend that some of the information at issue is excepted from public disclosure under common-law privacy as incorporated into sections 552.101 and 552.102 of the Government Code. Section 552.102(a) excepts from public disclosure

information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, except that all information in the personnel file of an employee of a governmental body is to be made available to that employee or the employee's designated representative as public information is made available under this chapter.

²These records include the tape recordings you submitted to this office.

³None of the "basic information" at issue comes within the protection of any of the other exceptions you have raised.

Section 552.102(a) is designed to protect public employees' personal privacy. The scope of section 552.102(a) protection, however, is very narrow. *See* Open Records Decision No. 336 (1982). *See also* Attorney General Opinion JM-36 (1983). The test for section 552.102(a) protection is the same as that for information protected by common-law privacy under section 552.101: the information must contain highly intimate or embarrassing facts about a person's *private* affairs such that its release would be highly objectionable to a reasonable person *and* the information must be of no legitimate concern to the public. *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 550 (Tex. App.--Austin 1983, writ ref'd n.r.e.).

Employee privacy under section 552.102(a) is less broad than common-law privacy under section 552.101 because of the greater public interest in disclosure of information regarding public employees. Open Records Decision Nos. 269 (1981), 169 (1977). Where information pertains solely to an employee's actions as public servant, such information cannot be deemed to be outside the realm of public interest. *See* Open Records Decision No. 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees). This office has held that section 552.102(a) may be invoked only when information reveals "intimate details of a highly personal nature." Open Records Decision Nos. 315 (1982), 298 (1981), 224 (1979), 169 (1977). We believe that some of the information contained in the records of one internal affairs investigation comports with this standard, and thus, must be withheld from the public on privacy grounds. We have marked the information that the city must withhold pursuant to common-law privacy.

Finally, you contend that the home address, home telephone number, and social security number of city employees are excepted from public disclosure pursuant to section 552.117 of the Government Code. We agree. Section 552.117(1) of the Government Code requires that the city withhold its employees' home address, home telephone number, social security number, and any information revealing whether the employee has family members, but only if the employee has elected to keep this information confidential in accordance with section 552.024 of the Government Code.

Assuming the subject employees have made such an election, we conclude that these types of information must be withheld. However, even if such an election has not been made, we note that section 552.117(2) makes confidential the same categories of information pertaining to "a peace officer as defined by Article 2.12, Code of Criminal Procedure, or a security officer commissioned under Section 51.212, Education Code." Unlike other public employees, a peace officer need not affirmatively claim confidentiality for this information. Open Records Decision No. 488 (1988); *see also* Open Records Decision No. 506 (1988).

Having addressed the applicability of the exceptions you have raised, we conclude that the city must release all information not specifically held to be excepted from public disclosure as discussed above. 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,



Don Ballard
Assistant Attorney General
Open Records Division

JDB/RWP/ch

Ref.: ID# 113430

Enclosures: Submitted documents

cc: Ms. Kim Tilley
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(w/o enclosures)