



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

June 8, 1998

Ms. Theda Lambert
General Counsel/Director of Enforcement
Texas Department of Licensing and Regulation
P.O. Box 12157
Austin, Texas 78711

OR98-1413

Dear Ms. Lambert:

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# 115840.

The Texas Department of Licensing and Regulation (the "department") received a request for all information relating to Texsun Air Conditioning and Heating ("Texsun"). The requestor also seeks the personnel file of a department employee. You state that you have released some of the requested information. However, you claim that the remaining information is excepted from disclosure under sections 552.102 and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, you argue that the requested information is excepted from disclosure by section 552.103. To show that section 552.103(a) is applicable, the department must demonstrate 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. Contested cases conducted under the Administrative Procedure Act, chapter 2001 of the Government Code, are considered litigation under section 552.103. Open Records Decision No. 588 (1991) at 7. Section 552.103 requires concrete evidence that litigation may ensue. To demonstrate that litigation is reasonably anticipated, the department must furnish evidence that litigation is realistically contemplated and is more than mere conjecture. Open Records Decision No. 518 (1989) at 5. Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 (1986) at 4.

The department is authorized to enforce the Air Conditioning and Refrigeration Contractor License Law. V.T.C.S. art. 8861 § 3. The department's hearings are subject to the Administrative Procedure Act. *Id.* at § 5(b). In this instance, the department has informed this office that an enforcement action is pending against Texsun. We conclude that the department has demonstrated that litigation is pending in this case. Upon review of the submitted information, we find that the documents in Exhibit C are related to the litigation, and may be withheld.¹ However, the department has not established that the personnel file is related to the enforcement action. Therefore, the department may not withhold the personnel file from disclosure under section 552.103(a).

You also seek to withhold the personnel file under section 552.102. Section 552.102 excepts 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. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Common-law privacy excepts from disclosure private facts about an individual. 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. After reviewing the personnel file, we do not believe that the department may withhold the file based on common-law privacy. 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).

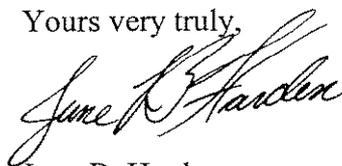
Notwithstanding this ruling, there appears to be some information within the personnel file that may be protected by section 552.117 of the Government Code. Section 552.117 of the Government Code excepts from required public disclosure the home addresses, telephone numbers, social security numbers, or 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, home address and social security number of a current or former employee or official who requested that this information be kept confidential under

¹It appears, however, that some of the documents in Exhibit C have either been obtained from or provided to the opposing party in the litigation. 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, and it must be disclosed. Open Records Decision Nos. 349 (1982), 320 (1982). Furthermore, 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).

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.

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,



June B. Harden
Assistant Attorney General
Open Records Division

JBH/ch

Ref.: ID# 115840

Enclosures: Submitted documents

cc: Mr. Mark Wagner
Texsun Air Conditioning and Heating
9705 Burnet Road, # 419
Austin, Texas 78758
(w/o enclosures)