



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

December 8, 1998

Ms. Julie B. Ross  
Haynes & Boone, L.L.P.  
201 Main Street, Suite 2200  
Fort Worth, Texas 76102-3126

OR98-2997

Dear Ms. Ross:

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# 120226.

The City of Coppell (the "city"), which you represent, received a request for access to the personnel file of former city employee Lisa Andrus.<sup>1</sup> You contend that the personnel file is excepted from disclosure pursuant to section 552.103 of the Government Code. We have considered the exception you claim and have reviewed the documents at issue.

Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state 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. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.--Austin 1997, no pet.); *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 at 4 (1990). The city must meet both prongs of this test for information to be excepted under section 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for

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<sup>1</sup>The only documents at issue here are those contained in the requested personnel file. We assume that you have provided the requestor with the other documents he requested in items 1 and 2 of his request.

example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.<sup>2</sup> Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986).

You explain that Ms. Lisa Andrus was terminated from her position as police officer with the Coppell Police Department following internal affairs investigation, I.A. #98-083. Ms. Andrus has employed an attorney, Mr. David B. Sloane, to represent her in matters relating to her termination. You have submitted a Verified Petition to Perpetuate Testimony of Employees of the City of Coppell in which Mr. Sloane states that he anticipates that Ms. Andrus "will be a party to a lawsuit for wrongful termination, negligent and/or intentional infliction of mental distress, and various causes of action for unlawful and discriminatory employment practices." In addition, you have submitted an affidavit from the attorney representing the city in connection with the termination of Ms. Andrus in which the attorney states that, during a court hearing, "Mr. Sloane represented that Ms. Andrus planned to sue the City for wrongful termination if her termination was not overturned and she was not reinstated to her job with the Police Department." We have considered your arguments and the submitted materials and conclude that you have shown that litigation is reasonably anticipated. We have reviewed the personnel file and agree that it is related to the anticipated litigation.

However, the personnel file at issue includes documents that were obtained from or have been provided to the opposing party in the anticipated litigation. Information that has either been obtained from or provided to the opposing party in anticipated litigation, through discovery or otherwise, is not excepted from disclosure under section 552.103(a), and it must be disclosed. Open Records Decision Nos. 349 (1982), 320 (1982). The city may withhold the remaining information in the personnel file from disclosure under section 552.103(a). We note that the applicability of section 552.103(a) ends once the litigation has concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

We are unable to determine precisely which documents in the personnel file were obtained from or have been provided to the opposing party in the anticipated litigation. However, because the city will not be able to withhold all documents in the personnel file from disclosure under section 552.103, we will address the other exceptions that will require the city to withhold information from documents not excepted from disclosure under section 552.103.

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<sup>2</sup>In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982), and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

Section 552.117(2) of the Government Code provides for the confidentiality of the home addresses, home telephone numbers, and social security numbers of peace officers, as well as information that reveals whether the peace officer has family members. Similarly, section 552.117(1) protects these categories of personal information for current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. The protection for peace officers is automatic. However, current and former officials and employees of a governmental body are entitled to this protection only if they opt for the protection under section 552.024 prior to the governmental body's receipt of a request for the information. *See* Open Records Decision No. 530 at 5 (1989) (whether particular piece of information is protected by section 552.117 is determined at time request for it is made). We note that section 552.117 applies to former and current home addresses and home telephone numbers. Open Records Decision No. 622 (1994). We have marked an example of the type of information that reveals whether an individual has family members (see red tabs).

We note that the personnel file contains drivers license numbers. Section 552.130 excepts from disclosure information that relates to

- (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]
- (2) a motor vehicle title or registration issued by an agency of this state[.]

Section 552.130 requires the city to withhold from disclosure the drivers license numbers contained in the requested personnel file.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Some of the information at issue is confidential by law and must be withheld from disclosure pursuant to section 552.101. First, section 552.101 encompasses the common-law right to privacy. Information is protected by the common-law right to privacy if (1) the information is highly intimate or embarrassing such that its release would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977); Open Records Decision No. 611 at 1 (1992). We have marked the information that is protected by the common-law right to privacy (see red tabs). *See* Open Records Decision Nos. 600 (1992), 545 (1990) (common-law privacy protects some personal financial information), 455 (1987) (common-law privacy protects information about prescription drugs, illnesses, operations, and physical handicaps).

Second, the personnel file includes a criminal history background check routinely performed on applicants for law enforcement positions. Criminal history information obtained from the National Crime Information Center or the Texas Crime Information Center is generally confidential by law. 28 C.F.R. § 20; Gov't Code § 411.083. Criminal history information that has been compiled by a governmental entity is protected by the common-

law right to privacy. See *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989).

Finally, federal tax information is confidential under federal law and must be withheld from disclosure under section 552.101. Prior decisions of this office have held that title 26, section 6103(a) of the United States Code renders tax return information confidential. Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision Nos. 600 (1992) (W-4 forms), 226 (1979) (W-2 forms). Generally, any information gathered by the Internal Revenue Service regarding a taxpayer's liability under title 26 of the United States Code is confidential. *Mallas v. Kolak*, 721 F. Supp. 748 (M.D.N.C. 1989); *Dowd v. Calabrese*, 101 F.R.D. 427 (D.C. 1984).

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,



Karen E. Hattaway  
Assistant Attorney General  
Open Records Division

KEH/ch

Ref: ID# 120226

Enclosures: Marked documents

cc: Mr. R. G. Harrell  
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(w/o enclosures)