



May 5, 1999

Mr. Douglas Poneck  
Escamilla & Poneck, Inc.  
1200 South Texas Building  
603 Navarro Street  
San Antonio, Texas 78205-1826

OR99-1227

Dear Mr. Poneck:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 123806.

The San Antonio Housing Authority (the “housing authority”), which you represent, received requests for the report prepared by Peggy Pou concerning the suspension of SAHA Senior Vice President Choco Meza and for related information. You submitted to this office for our review a document entitled “Legal Analysis Report Regarding Choco Meza Matter” dated January 13, 1998 prepared by Peggy J. Pou of Matthews & Branscomb, P.C (the “report”). We assume that you have released all other requested information. You claim that the report is excepted from disclosure under sections 552.103 and 552.107 of the Government Code and, as work product under sections 552.103 and 552.111. We have considered the exceptions you claim<sup>1</sup> and reviewed the submitted information.

Section 552.103(a) of the Government Code excepts from disclosure 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

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<sup>1</sup>You did not cite to specific exceptions in Chapter 552 of the Government Code, but instead raised generally “anticipation of litigation,” “privileged attorney-client communications,” and “attorney work-product.” In the future, please raise specific exceptions by section number. *See* Gov’t Code § 552.301(a).

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

The housing authority has the burden of providing relevant facts and documents to show that section 552.103(a) 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, 481 (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 housing authority must meet both prongs of this test for information to be excepted under 552.103(a).

Litigation cannot be regarded as "reasonably anticipated" unless there is more than a "mere chance" of it -- unless, in other words, we have 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). This office has determined, for example, 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). Litigation is not reasonably anticipated when an applicant who was rejected for employment hired an attorney and that attorney asked for information about the governmental entity's actions as part of his investigation. Open Records Decision No. 361 (1983). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision Nos. 452 (1986), 350 (1982).

We do not have concrete evidence, or a sufficient basis in the information that you have provided, that litigation involving the information at issue is reasonably anticipated by the housing authority. Consequently, the report is not excepted from disclosure under section 552.103(a).

Section 552.107(1) excepts from disclosure communications that reveal client confidences or the attorney's legal opinion, advice, or recommendation. Open Records Decision Nos. 589 at 1 (1991), 574 at 3 (1990), 462 at 9-11 (1987). However, section 552.107(1) does not protect from disclosure factual information compiled by an attorney acting on behalf of a governmental entity in the capacity of an investigator rather than a legal advisor. Open Records Decision No. 462 (1987). The report as a whole is not excepted from disclosure because it contains factual information compiled by an attorney acting as an investigator. We agree, however, that certain portions of the report, including sections VI through X and section XIV, are protected from disclosure pursuant to section 552.107(1) because they contain an attorney's legal advice or opinion. These portions of the report apply the law to the facts of the case and include legal analyses of regulations, an administrative plan and other documents related to the case. We have marked the information that may be withheld from disclosure under section 552.107(1).

You also claim that the requested documents constitute work product. A governmental body may withhold attorney work product from disclosure under sections 552.103 and 552.111 of the Government Code if it demonstrates that the material was 1) created for trial or in anticipation of civil litigation, and 2) consists of or tends to reveal an attorney's mental processes, conclusions and legal theories. Open Records Decision No. 647 (1996). The first prong of the work product test, which requires a governmental body to show that the information at issue was created in anticipation of litigation, has two parts. A governmental body must demonstrate that 1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue, and 2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. Open Records Decision No. 647 at 4 (1996). The second prong of the work product test requires the governmental body to show that the documents at issue tend to reveal the attorney's mental processes, conclusions and legal theories. You have not established that the submitted documents meet this two-pronged test. Thus, the documents are not excepted from disclosure as attorney work product.

Section 552.130 governs the release and use of information obtained from motor vehicle records. It provides in relevant part as follows:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

(1) a motor vehicle operator's or driver's license or permit issued by an agency of this state;

(2) a motor vehicle title or registration issued by an agency of this state[.]

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(b) Information described by Subsection (a) may be released only if, and in the manner, authorized by Chapter 730, Transportation Code.

Gov't Code § 552.130. We have marked information which you must withhold pursuant to section 552.130.

Although you have not raised section 552.101 of the Government Code as an applicable exception, we must consider whether the information at issue is excepted from required public disclosure pursuant to section 552.101. The Office of the Attorney General will raise section 552.101 on behalf of a governmental body when necessary to protect third-party interests. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987). Section 552.101

excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This section encompasses information protected by other statutes.

Information that is confidential by statutory law includes criminal history record information (“CHRI”). In Open Records Decision No. 655 (1997) this office addressed whether a housing authority can obtain CHRI regarding housing applicants. Local public housing authorities are authorized to obtain criminal history record information for the purposes of applicant screening, lease enforcement, and eviction as provided by federal statute. 42 U.S.C. § 1437d(q)(1)(A)(B). However, the housing authority is prohibited from disclosing CHRI under sections 411.084, 411.085, 411.087 of the Government Code. Gov’t Code §§ 411.084-.085, .087. You must withhold all CHRI.

Section 552.101 encompasses not only information that is made confidential by statute, but also information that is confidential under the common-law right to privacy. It excepts from disclosure private facts about an individual. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Therefore, information must 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 at 1(1992).

The constitutional right to privacy protects two interests. Open Records Decision No. 600 at 4 (1992) (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985), *cert. denied*, 474 U.S. 1062 (1986)). The first is the interest in independence in making certain important decisions related to the “zones of privacy” recognized by the United States Supreme Court. Open Records Decision No. 600 at 4 (1992). The zones of privacy recognized by the United States Supreme Court are matters pertaining to marriage, procreation, contraception, family relationships, and child rearing and education. *See id.*

The second interest is the interest in avoiding disclosure of personal matters. The test for whether information may be publicly disclosed without violating constitutional privacy rights involves a balancing of the individual’s privacy interests against the public’s need to know information of public concern. *See* Open Records Decision No. 455 at 5-7 (1987)(citing *Fadjo v. Coon*, 633 F.2d 1172, 1176 (5th Cir. 1981)). The scope of information considered private under the constitutional doctrine is far narrower than that under the common law; the material must concern the “most intimate aspects of human affairs.” *See* Open Records Decision No. 455 at 5 (1987) (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490, 492 (5th Cir. 1985), *cert. denied*, 474 U.S. 1062 (1986)).

In Open Records Decision No. 318 (1982), this office concluded that the names and present addresses of former residents of a public housing development were not excepted

by constitutional or common-law privacy. We have also found that information on a housing grant application regarding the applicant's family composition, employment, age, and ethnic origin is not ordinarily excepted by common-law privacy. Open Records Decision No. 373 (1983). Likewise, the amounts paid by a housing authority on behalf of eligible tenants are not excepted by common-law privacy. Open Records Decision No. 268 (1981); *see* Open Records Decision No. 385 (1983) (determining that a public hospital's accounts receivable showing patients' names and the amounts they owed were open to the public), Open Records Decision No. 374 (1983) (names of doctors who receive medicaid payments and the amounts paid are subject to disclosure).

Although the information at issue contains personal financial and family information about applicants for housing assistance, we must determine whether this information is of legitimate concern to the public based on the facts of this case. Open Records Decision Nos. 545 (1990), 523 (1989), 385 (1983), and 373 (1983). Prior decisions of this office have found that there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. Open Records Decision Nos. 600 at 9-10 (1992), 545 (1990), 489 (1987), 480 (1987). The report at issue addresses allegations that individuals were given preferential treatment by the housing authority when they applied for public housing assistance. For this reason, we conclude that there is a legitimate public interest in the information these individuals provided in their applications for assistance. The report does, however, contain some highly intimate and embarrassing information in which the public has no legitimate interest. We have marked this information and it must be withheld under common-law privacy.

You take no position as to whether federal law prohibits the disclosure of information obtained by the housing authority from applicants for public assistance; however, section 552.352 of the Government Code makes it a crime to distribute information considered confidential by law. *See e.g.* 5 U.S.C. § 552a(b); 42 U.S.C. § 405(c)(2)(C)(vi), (viii)(I); 42 U.S.C. § 3544 (c)(2)(a). Federal law also contains criminal penalties and creates civil causes of action for disclosure of protected information.<sup>2</sup>

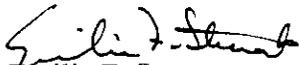
In summary, you must withhold all CHRI to the extent that such information exists. You must also withhold the marked information that is protected under the right of common-law privacy. Finally, you must withhold the marked information that is protected under section 552.130 of the Government Code. You may withhold under section 552.107 of the Government Code marked portions of the report, including sections VI through X and section XIV. You must release the remaining information.

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<sup>2</sup>If you wish for this office to rule upon the applicability of federal law to information provided to the housing authority by applicants for public housing assistance, you should re-submit to this office your request for a ruling with written comments stating the reasons why federal statutes would require the information in question to be withheld. *See* Gov't Code § 552.301(b)(1).

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.

Sincerely,



Emilie F. Stewart  
Assistant Attorney General  
Open Records Division

EFS\ch

Ref: ID# 123806

encl: Marked documents

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