



December 22, 1999

Ms. Paige D. Scherr
Hayes, Coffey & Berry
1710 Westminster
P.O. Box 50149
Denton, Texas 76206

OR99-3739

Dear Ms. Scherr:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 130606.

The City of Argyle (the "city"), which you represent, received a request for the personnel files of three named individuals. You state that the city has released some of the requested information. You contend that certain documents, or portions thereof, are excepted from required public disclosure pursuant to sections 552.101, 552.102, 552.103, 552.115, 552.117, and 552.119 of the Government Code. Because some of the exceptions you raise apply to several of the records at issue, we will discuss the applicability of those exceptions in general terms rather than with regard to particular documents.

We generally agree with your contentions regarding the portions of the requested personnel files that come under the protection of common-law privacy as incorporated into section 552.102. 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 Tex. Newspapers, Inc.*, 652 S.W.2d 546, 550 (Tex. App.--Austin 1983, writ ref'd n.r.e.).

Specifically, the city must withhold the following types of information pursuant to section 552.102(a): information revealing personal financial information or personal financial

decisions, including beneficiary information, federal income tax information, and information pertaining to life and health insurance coverage. *See* Open Records Decision No. 600 (1992) and authorities cited therein. This office has also held that information relating to one's credit history meets the common law privacy test, Open Records Decision No. 481 (1987), as does certain medical history information.¹ Open Records Decision No. 455 (1987). *But see* Open Records Decision No. 336 (1982) (names of employees taking sick leave and dates thereof are not excepted by section 552.102(a)), Open Records Decision No. 455 (1987) (previous salary of job applicant not protected by privacy).

Additionally, the document you submitted to this office as Exhibit U-2 is an Employment Eligibility Verification, Form I-9. Form I-9 is governed by title 8, section 1324a of the United States Code, which provides that the form "may not be used for purposes other than for enforcement of this chapter" and for enforcement of other federal statutes governing crime and criminal investigations. 8 U.S.C. § 1324a(b)(5). Release of this document under the Public Information Act would be "for purposes other than for enforcement" of the referenced federal statutes. Accordingly, we conclude that Form I-9 is confidential for purposes of section 552.101 of the Government Code and may only be released in compliance with the federal laws and regulations governing the employment verification system. We also note that the annual statements pertaining to participation in the Texas Municipal Retirement System are made confidential under section 855.115 of the Government Code and therefore must be withheld.

Although section 552.102(a) is designed to protect public employees' personal privacy, the scope of section 552.102(a) protection is very narrow because of the greater public interest in disclosure of information regarding public employees. *See* Open Records Decision No. 336 (1982); *see also* Attorney General Opinion JM-36 (1983); Open Records Decision Nos. 269 (1981), 169 (1977). Some of the records you seek to withhold on privacy grounds pertain solely to the employees' qualifications and actions as public servants, and as such 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). Consequently, letters of reprimand must be released to the requestor. We have indicated with yellow flags the portions of the documents at issue that you have marked that do not satisfy the test for common-law privacy under section 552.102 and therefore must be released.

The documents you submitted to this office contain the home addresses, home telephone numbers, and social security numbers of city employees, as well as information revealing whether the employees have family members. Section 552.117(1) of the Government Code requires that the city withhold these types of information, but only if the employee has

¹After reviewing the records at issue, we could identify no medical information that comports with the test for common-law privacy.

elected to keep this information confidential in accordance with section 552.024 of the Government Code. Assuming the relevant employees made such an election prior to the city's receipt of the open records request, we conclude that these types of information must be withheld. *See* Open Records Decision No. 530 (1989). However, even if such an election had not been made, we note that section 552.117(2) requires that the city withhold the same categories of information pertaining to "a peace officer as defined by Article 2.12, Code of Criminal Procedure." 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).

A social security number or related information also is excepted from required public disclosure under section 552.101 of the Government Code in conjunction with 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), *if it was obtained or is maintained by a governmental body pursuant to any provision of law enacted on or after October 1, 1990*. *See* Open Records Decision No. 622 (1994). It is not apparent to us that the social security number information contained in the records at issue was obtained or is maintained by the city pursuant to any provision of law enacted on or after October 1, 1990. You have cited no law, nor are we aware of any law, enacted on or after October 1, 1990, that authorizes the city to obtain or maintain a social security number. Therefore, we have no basis for concluding that the social security numbers at issue were obtained or are maintained pursuant to such a law so as to be confidential under section 405(c)(2)(C)(viii)(I). We caution the city, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, the city should ensure that it was not obtained and is not maintained by the city pursuant to any provision of law enacted on or after October 1, 1990.

Section 552.119 of the Government Code excepts from public disclosure a photograph of a peace officer that, if released, would endanger the life or physical safety of the officer unless one of three exceptions applies. The three exceptions are: (1) the officer is under indictment or charged with an offense by information; (2) the officer is a party in a fire or police civil service hearing or a case in arbitration; or (3) the photograph is introduced as evidence in a judicial proceeding. Section 552.119 also provides that a photograph exempt from disclosure under this section may be made public only if the peace officer gives written consent to the disclosure. Open Records Decision No. 502 (1988). Assuming none of the exceptions are applicable in this instance, we conclude that unless the officer consents to the release, the city must withhold all photographs that depict police officers.

You seek to withhold a copy of a birth certificate pursuant to section 552.115 of the Government Code. Section 552.115 excepts from required public disclosure a "birth or death record *maintained by the bureau of vital statistics of the Texas Department of Health or a local registration official . . .*" (Emphasis added.) Section 552.115 does not apply to

records held by the city. *Cf.* Open Records Decision No. 338 (1982) (birth and death records maintained by city health department not excepted from disclosure). The city therefore must release the birth certificate except to the extent otherwise protected by section 552.117.

We now address your section 552.103 claims. To secure the protection of section 552.103 of the Government Code, a governmental body must demonstrate that the requested information relates to pending or reasonably anticipated litigation to which the governmental body is a party. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); Open Records Decision No. 588 (1991) at 1. To establish that litigation is reasonably anticipated, a governmental body must provide to 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 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. 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 for purposes of section 552.103. *See* Open Records Decision No. 331 (1982). Nor does the mere fact that an individual hires an attorney and alleges damages serve to establish that litigation is reasonably anticipated. Open Records Decision No. 361 at 2 (1983). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986).

Based on the facts as you have presented them to us, we cannot conclude that litigation against the city is reasonably anticipated at this time for purposes of section 552.103. We further note that as of the date of your initial correspondence to this office regarding the current records request, you have not apprized this office of any change of circumstance concerning litigation against the city. *See* Open Records Decision No. 638 at 3-4 (1996). Consequently, the city may not withhold any of the requested information pursuant to section 552.103.

Finally, please note that section 552.130(a)(1) of the Government Code requires that the city withhold “information [that] relates to . . . a motor vehicle operator’s or driver’s license or permit issued by an agency of this state.” Additionally, section 552.130(a)(2) requires the withholding of information relating to “a motor vehicle title or registration issued by an agency of this state.” Accordingly, the city must withhold these types of information contained in the documents at issue.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

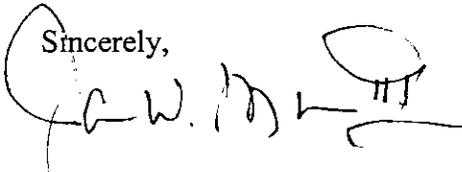
This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "J.W. Morris III", with a stylized flourish at the end.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/RWP/ljp

Ref: ID# 130606

Encl. Submitted documents

cc: Mr. Kevin Lahner
Denton Record Chronicle
314 E. Hickory
Denton, Texas 76202
(w/o enclosures)