



December 27, 1999

Mr. Thomas H. Arnold
City Attorney
City of Texarkana
P.O. Box 1967
Texarkana, Texas 75504

OR99-3757

Dear Mr. Arnold:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 130633.

The City of Texarkana (the "city") received a request for disciplinary proceedings and violations of rules and regulations for three police officers. You have submitted for our review three documents concerning one of the police officers. We assume that you have released any responsive information concerning the other two police officers. You claim that the submitted documents are exempted from disclosure under sections 552.101, 552.102, 552.103, 552.108 and 552.111 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 exempts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by statute. The submitted information contains letters concerning the officer's temporary suspension from duty without pay and a reprimand. You claim that documents contained in the officer's civil service file are exempted from required disclosure under section 143.089 of the Local Government Code. Files of internal affairs investigations

¹You urge that we rely on the arguments and exceptions to disclosure in your July 16, 1999 letter submitted for a previous request involving documents pertaining to the same police officer. *See* Open Records Letter No. 99-3033 (1999).

that result in disciplinary action are not excepted from disclosure based on section 552.101. However, when the records concern a complaint against a police officer for which no disciplinary action was taken, the records are confidential under section 552.101 in conjunction with section 143.089(g) of the Local Government Code. *See City of San Antonio v. Texas Attorney Gen.*, 851 S.W.2d 946 (Tex. App.—Austin 1993, writ denied). No such confidentiality provision governs information that is required to be maintained in the civil service personnel files pursuant to section 143.089(a) through (c). Information maintained in the civil service personnel files must generally be released to the public upon request, unless some provision of chapter 552 of the Government Code permits the civil service commission to withhold the information. Local Gov't Code § 143.089(f); Gov't Code §§ 552.006, .021; Open Records Decision No. 562 at 6 (1990) (construction of Local Gov't Code § 143.089(f) provision requiring release of information as required by law). Having reviewed the submitted documents, we find that the documents are maintained in the civil service file pursuant to section 143.089(a) of the Local Government Code.² Thus, the submitted documents must be released unless an exception to disclosure under chapter 552 of the Government Code applies to the information.

You also assert that the information is excepted by 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). Therefore, we will address whether section 552.101 applies to the requested information.

Section 552.101 encompasses common-law and constitutional privacy. Common-law privacy excepts from disclosure private facts about an individual. *Id.* 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),

²In your letter of July 16, 1999, you indicate in footnote number seven that a copy of Exhibit A, the temporary suspension without pay letter, is contained in the officer's civil service file. Exhibit B is addressed to the civil service director, and Exhibit C is a letter of reprimand which would be contained in the civil service file.

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)).

After reviewing the submitted documents, we do not believe that the information you seek to withhold is protected by the right of privacy. *See* Open Records Decision Nos. 484 (1987) (public interest in knowing how police departments resolve complaints against police officer ordinarily outweighs the officer’s privacy interest), 470 (1987) (public employee’s job performance does not generally constitute his private affairs), 455 (1987) (public employee’s job performances or abilities generally not protected by privacy), 329 (1982) (reasons for an employee’s resignation are not ordinarily excepted by constitutional or common-law privacy). Thus, you may not withhold the documents under section 552.102.

You also assert that the requested documents are protected from disclosure under section 552.103 of the Government Code. Section 552.103(a), amended by the Seventy-sixth Legislature, reads as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature 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.

A governmental body has the burden of providing relevant facts and documents to show the applicability of an exception in a particular situation. The test for establishing that section 552.103(a) applies is a two-prong 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 (Tex. App.—Houston [1st Dist.] 1984, writ ref’d n.r.e.); Open Records Decision No. 588 (1991). Further, litigation must be pending or reasonably

anticipated on the date the requestor applies to the public information officer for access. Gov't Code § 552.103(c).

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 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. *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).

In your letter of July 16, 1999, you assert that you received a representation letter from the officer's attorney. You asserted that based on the letter you believed that the officer would appeal any disciplinary action taken against him. However, you have not provided us with any information indicating that the officer or his attorney has taken any objective steps toward filing suit. Thus, you have not demonstrated that litigation is reasonably anticipated and, therefore, you may not withhold the requested information under section 552.103.

With regard to exceptions 552.108 and 552.111, you did not assert or argue that these exceptions apply to the civil service file.³ Therefore, we will not consider the applicability of these exceptions to the requested information. Because we have found that no exception applies to the documents, you must release the requested information.

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.

³In your letter of July 16, 1999, which contains your arguments concerning applicable exceptions, you maintain that section 552.108 excepts information in the officer's internal affairs investigation but do not assert section 552.108 with regard to the civil service file. Although you raise section 552.111 in your October 18, 1999 letter, you do not explain in your July 16th letter the applicability of section 552.111 to the submitted information. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must submit written comments stating the reasons exceptions apply to requested information).

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.

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.

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Sincerely,



Jennifer Bialek
Assistant Attorney General
Open Records Division

JHB/ch

Ref: ID# 130633

Encl. Submitted documents

cc: Ms. Angie Golightly
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(w/o enclosures)