



July 3, 2001

Mr. Joe Jackson
Assistant City Attorney
City of College Station
P.O. Box 9960
College Station, Texas 77842-9960

OR2001-2866

Dear Mr. Jackson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 149073.

The City of College Station (the "city") received a request for the complete personnel file along with any and all other documents the city has maintained regarding the requestor's client's employment and termination of employment with the city. You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.108, 552.111, 552.117, 552.119, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We first address your contention that Exhibits 32.2 through 32.8 are excepted from disclosure by section 552.108(a)(2) of the Government Code. You state that subsequent to the city's letter of request dated April 26, 2001, the city, upon closer examination and subsequent inquiry, discovered that Exhibits 32.3 through 32.8 should be withheld pursuant to section 552.108(a)(2) of the Government Code. Subsections 552.301(a) and (b) provide:

- (a) A governmental body that receives a written request for information that it wishes to withhold from public disclosure and that it considers to be within one of the [act's] exceptions . . . must ask for a decision from the attorney general about whether the information is within that exception if there has not been a previous determination about whether the information falls within one of the exceptions.
- (b) The governmental body must ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the 10th business day after the date of receiving the written request.

Gov't Code § 552.301(a), (b). You state that the city received the request for information on April 12, 2001. You did not request a decision as to the section 552.108(a)(2) exception from this office until May 2, 2001. Consequently, you failed to assert the section 552.108 exception within the ten business day period mandated by section 552.301(a) of the Government Code. Because the request for a decision regarding the section 552.108(a)(2) exception was not timely received, Exhibits 32.2 through 32.8 are presumed to be public information. Gov't Code § 552.302.

In order to overcome the presumption that the requested information is public information, the city must provide compelling reasons why the information should not be disclosed. *Id.*; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.--Austin 1990, no writ); *see* Open Records Decision No. 630 (1994). In this instance, you have not presented this office with a compelling demonstration as to why the requested information should be withheld pursuant to section 552.108. We therefore deem your claimed exception to required public disclosure under section 552.108 as being waived. Thus, with the exception of the following, you must release Exhibits 32.2 through 32.8.

Exhibits 32.2 through 32.8 contain information concerning a driver's license issued by an agency of this state and criminal history record information. Section 552.130 provides in relevant part:

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

Therefore, you must withhold the Texas driver's license number in Exhibit 32.7 under section 552.130.

Exhibit 32.8 consists of a local compilation of a person's criminal history information. Where an individual's criminal history information has been compiled by a governmental entity, the information takes on a character that implicates the individual's right to privacy. *See United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989). Thus, the city must withhold Exhibit 32.8.

We now address the remainder of your claimed exceptions. Initially, we note that some of the information submitted to this office is expressly made public under section 552.022 of the Government Code. Section 552.022 of the Government Code provides several categories

of information that are not excepted from required disclosure unless they “are expressly confidential under other law.” In pertinent part this section provides:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by [s]ection 552.108;

....

(17) information that is also contained in a public court record[.]

Gov’t Code § 552.022(a)(1), (17). Sections 552.103, 552.108, and 552.111 are discretionary exceptions that we believe do not “expressly [make] information confidential under other law.” Gov’t Code § 552.022. Therefore, some of the requested information may not be withheld under these claimed exceptions and must be released to the requestor because some are completed reports, investigations, and evaluations, and some are documents filed with a court. However, some of the information subject to section 552.022 (a)(1) is confidential under other law. We have marked those documents that are subject to section 552.022 and indicated the documents that are confidential. The confidentiality statutes are discussed below.

Next, we address your section 552.103 claim for the remainder of the information. Section 552.103(a), the “litigation exception,” excepts from disclosure information relating to litigation to which the state or a political subdivision 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, 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 city must meet both prongs of this test for information to be excepted under section 552.103(a).

The mere chance of litigation will not trigger section 552.103(a). Open Records Decision No. 452 at 4 (1986). To demonstrate that litigation is reasonably anticipated, the governmental body must furnish *concrete* evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* Whether litigation is

reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986).

You have submitted information to this office showing that the requestor has filed a complaint with the Texas Commission on Human Rights (the "TCHR") on or about April 11, 2001, alleging violations of the Americans With Disabilities Act ("ADA"). In addition, the requestor states in his letter dated April 5, 2001, that regardless of the ADA claim, he intends to bring an unlawful termination suit 60 days following the receipt of his initial letter dated April 2, 2001. The TCHR operates as a federal deferral agency under section 706(c) of title VII, 42 U.S.C. § 2000e-5. The Equal Employment Opportunity Commission ("EEOC") defers jurisdiction to the TCHR over complaints alleging employment discrimination. *Id.* This office has stated that a pending EEOC complaint indicates litigation is reasonably anticipated. Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982). By showing that the complaint filed with the TCHR is pending, you have shown that litigation is reasonably anticipated. Our review of the records at issue also shows that they are related to anticipated litigation for purposes of section 552.103(a). Thus, you may withhold some of the requested information pursuant to section 552.103(a).

However, we note that most of the requested information has either been obtained from or provided to the opposing party in the anticipated litigation. Once the information has been obtained by all parties to the pending litigation, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). We also note that the applicability of section 552.103(a) ends when the litigation is concluded. Attorney General Opinion MW-575 (1982) at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2 (1982). Although the documents seen by the opposing party are not excepted by section 552.103, some of the information contained in the documents is still excepted from public disclosure by the confidentiality statutes discussed below.

Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Criminal history record information ("CHRI") generated by the National Crime Information Center ("NCIC") or by the Texas Crime Information Center ("TCIC") is confidential. Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety ("DPS") maintains, except that the DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See* Gov't Code § 411.083.

Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another

criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090 - .127. Thus, any CHRI generated by the federal government or another state may not be made available to the requestor except in accordance with federal regulations. *See* Open Records Decision No. 565 (1990). Furthermore, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F. The information submitted for our review is CHRI generated by TCIC and NCIC. Accordingly, we have marked the information that is excepted from required public disclosure by section 552.101 of the Government Code.

Texas law prohibits the public disclosure of the results of polygraph examinations. Occ. Code § 1703.306. Section 1703.306 states in pertinent part:

(a) A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person other than:

(1) the examinee or any other person specifically designated in writing by the examinee;

(2) the person that requested the examination; [or]

....

(5) any other person required by due process of law.

Occ. Code § 1703.306(a)(1), (2), (5). The submitted information contains polygraph examination results. This information is confidential under section 1703.306 of the Occupations Code and must not be released by the city except as authorized under section 1703.306.

Employee W-4 forms are excepted from disclosure by section 6103(a) of title 26 of the United States Code. Open Records Decision No. 600 (1992). The return of any taxpayer may be disclosed to any person that the taxpayer designates. *See* 26 U.S.C. § 6103(c). Therefore, the city must withhold the W-4 form and the city may release it only as authorized under section 6103(c).

We also find that certain information contained in the records submitted is confidential under Title I of the Americans with Disabilities Act of 1990 (the "ADA"), 42 U.S.C. §§ 12101 *et seq.* The ADA provides that information about the medical conditions and medical histories of applicants or employees must be 1) collected and maintained on separate forms, 2) kept in separate medical files, and 3) treated as a confidential medical record. In addition,

information obtained in the course of a "fitness for duty examination," conducted to determine whether an employee is still able to perform the essential functions of his job, is to be treated as a confidential medical record. 29 C.F.R. § 1630.14(c). *See also* Open Records Decision No. 641 (1996). The Equal Employment Opportunity Commission (the "EEOC") has determined that medical information for the purposes of the ADA includes "specific information about an individual's disability and related functional limitations, as well as general statements that an individual has a disability or that an ADA reasonable accommodation has been provided for a particular individual." *See* Letter from Ellen J. Vargyas, Legal Counsel, EEOC, to Barry Kearney, Associate General Counsel, National Labor Relations Board, 3 (Oct. 1, 1997). We have marked the information that the city must withhold under section 552.101 and the ADA.

Some of the records at issue are medical records, access to which is governed by the MPA, chapter 159 of the Occupations Code. Section 159.002 of the MPA provides:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002(a),(c). Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See* Occ. Code §§ 159.002, .004; Open Records Decision No. 598 (1991). The medical records must be released upon the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Occ. Code §§ 159.004, .005. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). We have marked the medical records contained in the submitted information that may be released only as provided under the MPA. Open Records Decision No. 598 (1991).

Section 611.002 of the Health and Safety Code applies to "[c]ommunications between a patient and a professional, [and] records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional." *See also* Health & Safety Code § 611.001 (defining "patient" and "professional"). Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals. *See* Open Records Decision No. 565 (1990). We have marked the mental health records contained in the submitted information that may not be released except in accordance with sections 611.004

and 611.0045 of the Health and Safety Code. Health & Safety Code § 611.002(b); *see id.* §§ 611.004, .0045.

The requested records contain information that is excepted from disclosure under section 552.117(2). The city must withhold those portions of the records that reveal the officer's home address, home telephone number, social security number, and family member information, including Exhibit 75. The city must also withhold the officers' *former* home addresses and telephone information from disclosure. *See* Open Records Decision No. 622 (1994).

Section 552.119 excepts from public disclosure a photograph of a peace officer¹ 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. This section 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). The submitted copies of photographs depict a peace officer and it does not appear that any of the exceptions are applicable. You have not informed us that the peace officer has executed any written consents to disclosure. Thus, we agree that you must withhold the photographs depicting the peace officer.

Section 552.130 provides in relevant part:

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

Therefore, you must withhold information relating to a motor vehicle title or registration or a driver's license issued by an agency of this state under section 552.130, such as a copy of a driver's license, a driver's license number, vehicle identification number, or a license plate number.

Section 552.101 also encompasses the doctrine of common law privacy. Common law privacy protects information if (1) the information contains highly intimate or embarrassing

¹ "Peace officer" is defined by article 2.12 of the Code of Criminal Procedure.

facts the publication of which 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). This office has found that personal financial information not relating to the financial transaction between an individual and a governmental body is excepted from public disclosure under common law privacy. See Open Records Decision Nos. 600 (1992), 545 (1990). Thus, we have marked the types personal financial information that you must withhold. You must withhold all such information found in the submitted information.

Lastly, we note that information protected under section 552.101 in conjunction with common law privacy and sections 552.117(2), 552.119, and 552.130 are intended to protect a person's privacy. Therefore, under section 552.023 of the Government Code, a person who is the subject of the information or the person's authorized representative has a special right of access to such information. Here, the requestor is the attorney for the person who is the subject of the information protected by the exceptions enumerated above. Upon receipt of a consent to release letter prescribed by section 552.229 of the Government Code, the city must release such information to the requestor.

In summary, the city must release the information we have marked under section 552.022(a)(1) and (17). The city may withhold information under section 552.103, provided the opposing party has not had access to the information. The city must release Exhibits 32.2 through 32.8 except for a driver's license number excepted under section 552.130 and criminal history information excepted under Reporters Committee. The city must withhold: criminal history information under section 411.083 of the Government Code; polygraph results unless authorized to release under section 1703.306 of the Occupations Code; W-4 form unless authorized to release under section 6103(c) of Title 26 of the United States Code; ADA information; MPA records unless authorized to release under sections 159.004 and 159.005 of the Occupations Code; and mental health records unless authorized to release under sections 611.004 and 611.0045 of the Health and Safety Code. The city must also withhold private financial information, section 552.117(2) information, photographs of the peace officer under section 552.119, and section 552.130 information. Information protected under privacy and sections 552.117, 552.119, and 552.130 must be released to the requestor pursuant to section 552.023 upon receipt of a consent for release of the information as prescribed by section 552.229.

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).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

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,



Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL/DBF/seg

Ref: ID# 149073

Enc. Submitted documents

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