



November 29, 2001

Mr. Milton Henderson  
Nichols, Jackson, Dillard, Hager & Smith, LLP  
1800 Lincoln Plaza  
500 North Akard  
Dallas, Texas 75201

OR2001-5556

Dear Mr. Henderson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 154787.

The City of Lancaster (the "city"), which you represent, received a request for copies of information pertaining to several city employees, insurance and bonding companies, and the requestor. You claim that the submitted information is excepted from disclosure pursuant to sections 552.101, 552.103, and 552.108 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information.

Initially, we note that some portions of the submitted information that we have marked are subject to section 552.022 of the Government Code. Section 552.022 provides in relevant part:

(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:

....

(2) the name, sex, ethnicity, salary, title, and dates of employment of each employee and officer of a governmental body;

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

Gov't Code § 552.022(a)(2),(3), (17). The marked section 552.022(a) information may only be withheld from disclosure to the extent that it is confidential under "other law." *See id.* You claim that the marked section 552.022 information is excepted from disclosure pursuant to sections 552.103 and 552.108 of the Government Code. However, sections 552.103 and 552.108 are discretionary exceptions under the Public Information Act and do not constitute "other law" for purposes of section 552.022.<sup>1</sup> Consequently, we do not address your section 552.103 and 552.108 claims with regard to this information. However, you also claim that the marked section 552.022(a) information may be excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with the common law right to privacy. Accordingly, we address this claim with regard to the marked section 552.022(a) information.

Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. Section 552.101 encompasses information protected by the common law right to privacy. Information is protected by the common law right to privacy if (1) the information contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *See Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The types of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* include information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *See id.* at 683. Based on our review of the marked section 552.022(a) information, we find that none of it implicates the common law right to privacy. Accordingly, the city must release the marked section 552.022(a) information to the requestor.

You claim that the remaining submitted information is excepted from disclosure pursuant to section 552.108 of the Government Code. Section 552.108(a) provides in pertinent part that information held by a law enforcement agency or prosecutor that deals with the

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<sup>1</sup> Discretionary exceptions are intended to protect only the interests of the governmental body as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.*, Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 586 (1991) (governmental body may waive section 552.108), 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation and does not itself make information confidential), 473 (1987) (governmental body may waive section 552.111), 522 at 4 (1989) (discretionary exceptions in general). Discretionary exceptions, therefore, do not constitute "other law" that makes information confidential.

detection, investigation, or prosecution of crime is excepted from disclosure if "release of the information would interfere with the detection, investigation, or prosecution of crime[.]" Gov't Code § 552.108(a)(1). Section 552.108(b) provides in pertinent part that an internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from disclosure if "release of the internal record or notation would interfere with law enforcement or prosecution[.]" Gov't Code § 552.108(b)(1). Generally, a governmental body claiming section 552.108 as an exception to disclosure of requested information must demonstrate, if the information does not supply the explanation on its face, how and why the release of the requested information would interfere with law enforcement or prosecution. *See* Gov't Code §§ 552.108(a), (b), .301(e)(1)(a); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977).

You state that the remaining submitted information pertains to active litigation between the city and the requestor regarding the city's enforcement of certain code restrictions on the condition of the requestor's real property. Therefore, we conclude that the release of most portions of the remaining submitted information that we have marked "would interfere with the detection, investigation, or prosecution of crime." Gov't Code § 552.108(a); *see Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.--Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases). However, section 552.108 is inapplicable to basic information about an arrested person, an arrest, or a crime. *See* Gov't Code § 552.108(c). We believe such basic information refers to the information held to be public in *Houston Chronicle Publishing Company v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.--Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Accordingly, with the exception of basic information, you may withhold most portions of the remaining submitted information that we have marked from disclosure pursuant to section 552.108 of the Government Code. *See* Open Records Decision No. 127 (1976) (summarizing the types of basic information that must be made available to the public).<sup>2</sup> However, we find that you have not adequately demonstrated how the release of the submitted insurance and bonding information that we have marked and the remaining marked information in the "Lancaster Police Extension Listing" document would interfere with law enforcement or prosecution. Accordingly, we conclude that you may not withhold any of this information from disclosure pursuant to section 552.108 of the Government Code.

However, you also claim that the submitted insurance and bonding information that we have marked and the remaining marked information in the "Lancaster Police Extension Listing" document is excepted from disclosure pursuant to section 552.103 of the Government Code. Section 552.103 provides in pertinent part:

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<sup>2</sup> We note that "basic information" may not generally be withheld from disclosure under section 552.103 of the Government Code. *See* Open Records Decision Nos. 597 (1991), 362 (1983).

(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.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code, § 552.103(a),(c). The city maintains 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. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *see also 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). Further, the litigation must be pending or reasonably anticipated on the date that the information is requested. *See Gov't Code § 552.103(c).*

The city states that the submitted information pertains to pending litigation between the city and the requestor. Based on our review of your representations, the submitted insurance and bonding information that we have marked, and the remaining marked information in the "Lancaster Police Extension Listing" document, we conclude that the city has demonstrated that litigation is pending and that this information is related to that litigation for purposes of section 552.103. Accordingly, we conclude that the city may withhold the submitted insurance and bonding information that we have marked and the remaining marked information in the "Lancaster Police Extension Listing" document from disclosure pursuant to section 552.103 of the Government Code.

However, we note that once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. *See Open Records Decision Nos. 349 (1982), 320 (1982).* Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a) and may not be withheld from disclosure on that basis. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. *See Attorney General Opinion MW-575 (1982); see also Open Records Decision No. 350 (1982).*

In summary, the city must release the marked section 552.022(a) information to the requestor. With the exception of basic information, the city may withhold most portions of the remaining submitted information that we have marked from disclosure pursuant to section 552.108 of the Government Code. The city may withhold the submitted insurance and bonding information that we have marked and the remaining marked information in the "Lancaster Police Extension Listing" document from disclosure pursuant to section 552.103 of the Government Code.

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 Texas Building and Procurement 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,



Ronald J. Bounds  
Assistant Attorney General  
Open Records Division

RJB/seg

Ref: ID# 154787

Enc. Marked documents

cc: Mr. James Black  
P.O. Box 14  
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(w/o enclosures)