



May 30, 2002

Mr. Jay A. Cantrell
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OR2002-2927

Dear Mr. Cantrell:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 163643.

The City of Burkburnett (the "city"), which you represent, received a request for copies of records relating to all complaints resulting in disciplinary action taken against a specified city police department officer. You state that you have provided some responsive information to the requestor. You claim, however, that the submitted information is excepted from disclosure pursuant to sections 552.102, 552.103, and 552.1175 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information.

Section 552.103 of the Government Code was intended to prevent the use of the Act as a method of avoiding the rules of discovery in litigation. *See* Attorney General Opinion JM-1048 at 4 (1989). The purpose of section 552.103 is to protect a governmental body's position in litigation by forcing parties to obtain information relating to the litigation through the discovery process. *See* Open Records Decision No. 551 (1990). Further, section 552.103 only applies where the litigation involves or is expected to involve the governmental body which is claiming the exception. *See* Open Records Decision No. 392 (1983) (finding predecessor to section 552.103 only applicable to governmental body which has the litigation interest). Section 552.103 provides in pertinent part:

- (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 on the date that the governmental body receives the request for information 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).

You state that the information pertains to a pending case styled as *In the Matter of William Andrew Dilbeck A Juvenile*, Cause No. 9295-JD-A in the Juvenile Court of Wichita County. Based on our review of your arguments and the information, we conclude that the city has demonstrated that litigation was pending on the date that it received the request for information. However, we note that the State of Texas is a party to this litigation, not the city. Consequently, the city has no section 552.103 interest with respect to the information related to that litigation. *See Open Records Decision No. 392* (1983). In this type of situation, our office requires an affirmative representation from the governmental body that would be a party to the litigation that it seeks to have the requested information withheld from disclosure under section 552.103. You have not provided us with this affirmative representation. Accordingly, we conclude that the city may not withhold any portion of the information from disclosure pursuant to section 552.103 of the Government Code.

You also claim that the information is excepted from disclosure pursuant to section 552.102 of the Government Code. 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 v. Texas Industrial Accident Board*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977) for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the Government Code.¹ *See Industrial Found.*, 540

¹ 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.

S.W.2d at 683-85. Accordingly, we address your section 552.102 claim under section 552.101 in conjunction with the common-law right to privacy.

Information is protected from disclosure by the common-law right to privacy 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. *See id.* Although you state that the incident reflected in the information at issue “did not occur in the course of the officer’s assigned duties with the [city],” we find that there is a legitimate public interest in the information at issue. *See* Open Records Decision Nos. 470 at 4 (1987) (public has legitimate interest in having access to information concerning the performances of governmental employees), 444 (1986) (public has legitimate interest in knowing reasons for public employee’s demotion, dismissal, or resignation), 423 at 2 (1984) (scope of public employee privacy is narrow). Accordingly, we conclude that the city may not withhold any portion of the information from disclosure pursuant to section 552.101 of the Government Code in conjunction with the common-law right to privacy.

We note, however, that the information contains some information that is subject to section 552.117 of the Government Code. Section 552.117(2) excepts from disclosure a peace officer’s home address, home telephone number, social security number, and information indicating whether the peace officer has family members, regardless of whether the peace officer made an election under section 552.024 of the Government Code. Section 552.117(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. Thus, we conclude that the city must withhold the information that we have marked from disclosure pursuant to section 552.117(2). However, we note that section 552.117(2) only protects a peace officer’s section 552.117 information in the context of his or her role as a “peace officer” and not as a “suspect,” “complainant,” or “victim” in a criminal investigation. Therefore, we conclude that the city may not withhold any information from disclosure concerning the home address, home telephone number, social security number, or family member information of the peace officer who is named as a suspect in the submitted documents under section 552.117(2) of the Government Code.

You also claim, however, that some of the information concerning the peace officer who is named as a suspect in the submitted documents is excepted from disclosure pursuant to section 552.1175 of the Government Code. Section 552.1175 provides in pertinent part:

(a) This section applies only to:

(1) peace officers as defined by Article 2.12, Code of Criminal Procedure;

...

(b) Information that relates to the home address, home telephone number, or social security number of an individual to whom this section applies, or that

reveals whether the individual has family members is confidential and may not be disclosed to the public under this chapter if the individual to whom the information relates:

- (1) chooses to restrict public access to the information; and
- (2) notifies the governmental body of the individual's choice on a form provided by the governmental body, accompanied by evidence of the individual's status.

Gov't Code § 552.1175(a), (b). We have marked the information that is subject to section 552.1175. However, we note that you do not inform this office, nor does any of the information indicate, whether the peace officer in this instance has elected confidentiality for information about him in accordance with the above-cited subsection 552.1175(b)(1) and (2). If so, the information that we have marked must be withheld from disclosure in accordance with section 552.1175. Otherwise, we conclude that the city may not withhold this marked information from disclosure under section 552.1175.

We also note that the documents contain some information that is subject to section 552.130 of the Government Code. Section 552.130 excepts information from disclosure that relates to a motor vehicle operator's or driver's license or permit issued by an agency of this state or a motor vehicle title or registration issued by an agency of this state. *See* Gov't Code § 552.130. Accordingly, we conclude that the city must withhold the information that we have marked from disclosure pursuant to section 552.130 of the Government Code.

In summary, the city must withhold from disclosure the information that we have marked pursuant to section 552.117(2) of the Government Code. The city must withhold the information that we have marked pursuant to section 552.1175 of the Government Code, if the subject peace officer elected confidentiality for information about him in accordance with section 552.1175(b)(1) and (2) of the Government Code. Otherwise, we conclude that the city may not withhold this marked information from disclosure under section 552.1175. The city must withhold from disclosure the information that we have marked pursuant to section 552.130 of the Government Code. The city must release the remaining information to the requestor.

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).

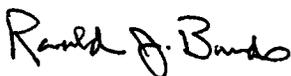
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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# 163643

Enc. Marked documents

cc: Ms. Angela Jacob-Ware
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(w/o enclosures)