



August 5, 2002

Mr. John S. Schneider, Jr.
First Assistant City Attorney
City of Pasadena
P.O. Box 672
Pasadena, Texas 77501

OR2002-4273

Dear Mr. Schneider:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 166789.

The City of Pasadena (the "city") received a request for the personnel files of four specified officers and documents concerning "all past and pending litigation, the outcome of that suit, and the nature of that litigation against" the four specified officers. You claim that the requested information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.107, 552.108, 552.117, 552.119, and 552.1175 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that the submitted information does not include any documentation of litigation involving the officers in question. To the extent that information exists that is responsive to this portion of the request for information, it must be released to the requestor. *See Gov't Code §§ 552.006, .301, .302; see also Open Records Decision No. 664 (2000)* (noting that if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible). We also note that the submitted information contains documents, which we have marked, that are not responsive to the current request for information. We will not address the applicability of the Public Information Act (the "Act") in regard to these documents.

In regard to the submitted responsive information, section 552.103 of the Government Code provides in relevant part 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.

....

(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.

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 on the date the city received the request for information, 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 552.103(a).

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

You state that the officers in question "make arrests and write citations on a weekly basis to which the state or City of Pasadena may be a party litigant or reasonably expect to be a party litigant." However, you have failed to provide concrete evidence establishing that any particular litigation is pending or was reasonably anticipated at the time the request for information was received. Therefore, the city has failed to meet the first prong of the test mandated by section 552.103 and, thus, you may not withhold the submitted information under section 552.103 of the Government Code.

Section 552.108, in part, excepts from required public disclosure

(a) [i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if:

(1) release of the information would interfere with the detection, investigation, or prosecution of crime;

(2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that *did not* result in conviction or deferred adjudication;

(b) [a]n 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 . . . if:

(1) release of the internal record or notation would interfere with law enforcement or prosecution;

(2) the internal record or notation relates to law enforcement only in relation to an investigation that *did not* result in conviction or deferred adjudication;

A governmental body claiming an exception from disclosure under section 552.108 must reasonably explain, if the information does not supply the explanation on its face, how and why the exception applies. *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You have failed to explain, and we are unable to determine from the face of the submitted information, how and why section 552.108 is applicable. Therefore, you may not withhold any of the submitted information pursuant to section 552.108 of the Government Code.

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 the doctrine of common-law privacy. Section 552.102 protects "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." The protection of section 552.102 is the same as the protection provided by the common-law right to privacy under section 552.101. *Hubert v. Harte-Hanks Tex. Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.). Consequently, we will consider these two exceptions together.

Information is protected under the common-law right to privacy when (1) the information contains highly intimate or embarrassing 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. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Prior decisions of this office have found that financial information relating only to an individual ordinarily satisfies the first requirement of the test for common-law privacy but that there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. *See, e.g.*, Open Records Decision No. 600 (1992) (information revealing that employee

participates in group insurance plan funded partly or wholly by governmental body is not excepted from disclosure). In addition, this office has found that the following types of information are excepted from required public disclosure under common-law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps), personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 545 (1990), 523 (1989) (individual's mortgage payments, assets, bills, and credit history), certain personal choices relating to financial transactions between the individual and the governmental body, *see* Open Records Decision No. 600 (1992) (federal tax Form W-4; designation of beneficiary of employee's retirement benefits and optional insurance coverage; choice of particular insurance carrier; direct deposit authorization; and forms allowing employee to allocate pretax compensation to group insurance, health care, or dependent care), information concerning the intimate relations between individuals and their family members, *see* Open Records Decision No. 470 (1987), and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). Having reviewed the submitted information, we conclude that portions of the information, which we have marked, are protected by common-law privacy and must be withheld under section 552.101.

Section 552.101 also encompasses information made confidential by statute. Section 6103(a) of Title 26 of the United States Code makes confidential certain tax return information, including Form W-4, the Employee's Withholding Allowance Certificate. Open Records Decision No. 600 at 8-9 (1992). In addition, the submitted information includes Employment Eligibility Verifications, 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); *see* 8 C.F.R. § 274a.2(b)(4). Release of this document in this instance would be "for purposes other than for enforcement" of the referenced federal statutes. Accordingly, we conclude that Form I-9 is confidential under section 552.101 and may only be released in compliance with the federal laws and regulations governing the employment verification system. We have marked the W-4 and I-9 documents contained in the submitted information.

We note that some of the records at issue are medical records, access to which is governed by Title 3, Subtitle B of the Occupations Code, commonly known as the Medical Practice Act (the "MPA"). Occ. Code §§ 151.001-165.160. Section 159.002 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.

Medical records must be released upon the patient's properly executed written consent. 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). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). For your convenience, we have marked the documents that are medical records subject to the MPA.

In addition, we note that the submitted information contains a declaration of psychological and emotional health. Section 1701.306 of the Occupations Code, which makes such a declaration confidential, provides in part:

(a) The commission may not issue a license to a person as an officer or county jailer unless the person is examined by:

(1) a licensed psychologist or by a psychiatrist who declares in writing that the person is in satisfactory psychological and emotional health to serve as the type of officer for which a license is sought

(b) An agency hiring a person for whom a license as an officer or county jailer is sought shall select the examining physician and the examining psychologist or psychiatrist. The agency shall prepare a report of each declaration required by Subsection (a) and shall maintain a copy of the report on file in a format readily accessible to the commission. *A declaration is not public information.*

Occ. Code § 1701.306 (emphasis added). We have marked the information that is made confidential by section 1701.306 of the Occupations Code must be withheld under section 552.101 of the Government Code.

We also note that the submitted information contains accident report forms that appear to have been completed pursuant to chapter 550 of the Transportation Code. *See* Transp. Code § 550.064 (officer's accident report). Section 550.065(b) of the Transportation Code states that except as provided by subsection (c), accident reports are privileged and confidential. The Seventy-seventh Legislature amended section 550.065(c)(4) to provide for release of accident reports to a person who provides two of the following three pieces of information: (1) date of the accident; (2) name of any person involved in the accident; and (3) specific location of the accident. *See* Act of May 22, 2001, 77th Leg., R.S., H.B. 1544, § 5 (to be

codified at Transp. Code § 550.065(c)(4)). Under this provision, a governmental entity is required to release a copy of an accident report to a person who provides the law enforcement agency with two or more pieces of information specified by the statute. *Id.* You do not indicate, nor does it appear based on the documents you have provided, that the requestor has supplied two of the three pieces of information required by the statute. Thus, you must withhold the accident reports, which we have marked, under section 550.065(b) of the Transportation Code in conjunction with section 552.101 of the Government Code.

You also contend that some of the submitted information is excepted under section 552.117(2) of the Government Code. That section excepts from disclosure “information that relates to the home address, home telephone number, or social security number” of a peace officer, or that reveals whether the peace officer has family members. Therefore, the city must withhold this information under section 552.117(2) of the Government Code. We have marked a representative sample of the types of information that must be withheld under section 552.117(2).¹

You also assert section 552.119 of the Government Code. Section 552.119 excepts from public disclosure a photograph of a peace officer² 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 information includes a photograph depicting 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 consent to disclosure. Thus, you must withhold this photograph.

Finally, you claim that some of the submitted information is excepted from disclosure under section 552.130 of the Government Code. That section prohibits the release of information 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, the city must withhold the Texas driver’s license and license plate information pursuant to section 552.130 of the Government Code. We have marked the types of information you must withhold under this section.

¹As we are able to make this determination, we need not address section 552.1175 of the Government Code.

²“Peace officer” is defined by article 2.12 of the Code of Criminal Procedure.

In summary, we conclude that the city must withhold the following information pursuant to section 552.101 of the Government Code: 1) the information we have marked as being protected by common-law privacy; 2) Form W-4, the Employee's Withholding Allowance Certificate, which is confidential as tax return information under title 26, section 6103(a) of the United States Code; 3) Form I-9, the Employment Eligibility Verification, which is confidential under title 8, section 1324a of the United States Code; 4) medical records, which are subject to the MPA and may only be released accordingly; 5) the declaration of psychological and emotional health, which is confidential under section 1701.306 of the Occupations Code; and 6) the accident report forms that are confidential under section 550.065(b) of the Transportation Code. In addition, you must withhold: 7) the home address, home telephone number, social security number, and family member information of peace officers under section 552.117 of the Government Code; 8) the photograph depicting a peace officer under section 552.119 of the Government Code; and 9) the Texas driver's license and license plate information under section 552.130 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. 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,



W. Montgomery Meitler
Assistant Attorney General
Open Records Division

WMM/sdk

Ref: ID# 166789

Enc: Submitted documents

c: Ms. Deanna Sheffield
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(w/o enclosures)