



September 6, 2002

Ms. Sheri Bryce Dye  
Assistant Criminal District Attorney  
Bexar County  
300 Dolorosa, 5<sup>th</sup> Floor  
San Antonio, Texas 78205-3030

OR2002-4996

Dear Ms. Dye:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 168205.

The Bexar County Fire Marshall's Office (the "fire marshal") received a request for copies of a detailed activity report for the time period of January 1, 2000 until the present. The requestor also seeks copies of correspondence transmitted between the "[fire marshal]/Carl Mixon and myself, and/or CVF&R, along with any letters/communications between the [fire marshal]/Carl Mixon and Nancy Busch and/or the Montgomery Area Neighborhood Assc. Pertaining to C.V.F.&R, or myself/and or any investigations/accusations against me or C.V.F.&R." Finally, the requestor seeks access to "any law or portion of the county contract that bestows upon Carl Mixon the authority to involve himself in any of these issues." You state that there are no documents that are responsive to the requests for the detailed activity report or the "law or portion of the county contract that bestows upon Carl Mixon the authority to involve himself in any of these issues."<sup>1</sup> You also state that you have provided

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<sup>1</sup> We note that it is implicit in several provisions of the Public Information Act (the "Act") that the Act applies only to information already in existence. *See* Gov't Code §§ 552.002, .021, .227, .351. The Act does not require a governmental body to prepare new information in response to a request. *See* Attorney General Opinion H-90 (1973); *see also* Open Records Decision Nos. 87 (1975), 342 at 3 (1982), 416 at 5 (1984), 452 at 2-3 (1986), 555 at 1-2 (1990), 572 at 1 (1990). A governmental body must only make a good faith effort to relate a request to information which it holds. *See* Open Records Decision No. 561 at 8 (1990). In addition, the Act does not require a governmental body to prepare answers to questions posed by a requestor or to do legal research. *See* Open Records Decision Nos. 563 at 8 (1990) (considering request for federal and state laws

the requestor with some information. You claim, however, that the submitted information, or portions thereof, is excepted from disclosure pursuant to sections 552.101, 552.103, 552.108, and 552.111 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information.

Initially, we note that this office previously addressed the entirety of the information in Exhibit B and some of the information in Exhibit D, which we have marked, in Open Records Letter No. 2002-4617 (2002). Specifically, we ruled with respect to these particular documents that the fire marshal must withhold from disclosure the information that we marked pursuant to section 552.101 of the Government Code in conjunction with the common-law right to privacy, any social security numbers that may be confidential under federal law, and Texas driver's license numbers that we marked pursuant to section 552.130 of the Government Code. We also ruled that the fire marshal must release the remaining submitted information to the requestor. Accordingly, with respect to this particular information, we conclude that the fire marshal must rely on our decision in Open Records Letter No. 2002-4617 (2002), so long as the facts, law, and circumstances upon which that ruling was based have not changed since the issuance of that ruling. *See Gov't Code § 552.301(f); see also* Open Records Decision No. 673 (2001).

You claim that the remaining information at issue is excepted from disclosure pursuant to section 552.103 of the Government Code. 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 fire marshal 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

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and regulations), 555 at 1-2 (1990) (considering request for answers to fact questions).

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 fire marshall must meet both prongs of this test for information to be excepted under section 552.103(a).

A governmental body must provide this office with "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture" when establishing that litigation is reasonably anticipated. *See* 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.<sup>2</sup> *See* Open Records Decision Nos. 555 (1990), 518 at 5 (1989) (litigation must be "realistically contemplated"). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986).

You state that litigation is reasonably anticipated in this matter based on the requestor's written request for information. After carefully reviewing the language of the written request and the remaining information at issue, we do not agree that this language constitutes concrete evidence that the fire marshall reasonably anticipated litigation on the date that it received the written request for purposes of section 552.103. Accordingly, we conclude that the fire marshall may not withhold any portion of the remaining information from disclosure pursuant to section 552.103 of the Government Code.

You also claim that Exhibit C is excepted from disclosure pursuant to section 552.108 of the Government Code. Section 552.108 provides in pertinent part:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted . . . if:

...

(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[.]

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<sup>2</sup> In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

...

(b) 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 . . . if:

...

(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[.]

...

Gov't Code § 552.108(a)(2), (b)(2). Section 552.108(a)(2) and section 552.108(b)(2) protect records pertaining to a criminal investigation or prosecution that concluded in a final result other than conviction or a deferred adjudication. 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 since there were no charges brought against the requestor the records in Exhibit C do not appear to be a matter of legitimate concern to the public and, therefore, the public may not possess a legitimate interest in the names of witnesses or their statements. You indicate that this information relates to an investigation that did not result in conviction or deferred adjudication. However, based on our review of your representations and the information in Exhibit C, it does not appear, nor have you sufficiently explained, that the investigation conducted by the fire marshall involved an investigation of crime. We note, for example, that section 552.108 is inapplicable to a police department's internal administrative investigation that does not result in a criminal investigation or prosecution of crime. *See Morales v. Ellen*, 840 S.W.2d 519, 526 (Tex. App.--El Paso 1992, writ denied). Accordingly, we conclude that the fire marshall may not withhold any portion of Exhibit C from disclosure pursuant to section 552.108 of the Government Code.

However, you also claim that Exhibit C and the remaining information in Exhibit D are excepted from disclosure pursuant to section 552.111 of the Government Code. Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations,

opinions, and other material reflecting the policymaking processes of the governmental body. See *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); see also *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin, 2001, no pet.). The purpose of section 552.111 is “to protect from public disclosure advice and opinions on policy matters and to encourage frank and open discussion within the agency in connection with its decision-making processes.” *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, writ ref’d n.r.e.). An agency’s policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. See Open Records Decision No. 615 at 5-6 (1993).

Based on our review of your representations, Exhibit C, and the remaining information in Exhibit D, we do not agree that any portion of this information constitutes communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the fire marshall. Instead, Exhibit C and the remaining information in Exhibit D relate solely to personnel matters. Consequently, we conclude that the fire marshall may not withhold from disclosure any portion of Exhibit C or the remaining information in Exhibit D pursuant to section 552.111 of the Government Code.

However, you also claim that the remaining information, or portions thereof, is excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with the common-law and constitutional rights to privacy.<sup>3</sup> We note that information is protected from disclosure under the common-law right to privacy if it meets the criteria set out in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), cert. denied, 430 U.S. 931 (1977). The *Industrial Foundation* court held that information is excepted from disclosure 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 *id.* at 685. The types of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included 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. We also note, however, that although information relating to an investigation of a public employee may be highly intimate or embarrassing, the public generally has a legitimate interest in knowing the details of such an investigation. See Open Records Decision Nos. 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), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees), 423 at 2 (1984) (scope of public employee privacy is

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<sup>3</sup> 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 from disclosure by the common-law and constitutional rights to privacy.

narrow); *see also Ellen*, 840 S.W.2d at 525. Based on our review of your arguments and the remaining information at issue, we do not agree that any portion of this information implicates the common-law privacy rights of any individual noted in the submitted records. Accordingly, we conclude that the fire marshall may not withhold from disclosure any portion of the remaining information pursuant to section 552.101 of the Government Code in conjunction with the common-law right to privacy.

Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. *See Open Records Decision No. 455 at 4 (1987)*. The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *See id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *See id.* The scope of information protected is narrower than that under the common-law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)). Based on our review of the remaining information at issue, we find that no portion of the information implicates the constitutional right to privacy of any individual noted in the submitted records. Accordingly, we conclude that the fire marshall may not withhold any portion of the information at issue from disclosure pursuant to section 552.101 of the Government Code in conjunction with the constitutional right to privacy.

However, we note that the remaining information contains an e-mail address that is subject to section 552.137 of the Government Code. Section 552.137 makes certain e-mail addresses confidential and provides in pertinent part:

- (a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.
- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Gov't Code § 552.137. Accordingly, we conclude that the fire marshall must withhold from disclosure the marked e-mail address pursuant to section 552.137 of the Government Code, unless the member of the public in question has affirmatively consented to its release.

In summary, the fire marshall must withhold some information from disclosure pursuant to Open Records Letter No. 2002-4617 (2002), so long as the facts, law, and circumstances upon which that ruling was based have not changed since the issuance of that ruling. The fire marshall must withhold from disclosure the marked e-mail address pursuant to

section 552.137 of the Government Code, unless the member of the public in question has affirmatively consented to its release. The fire marshal must release the remaining submitted 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).

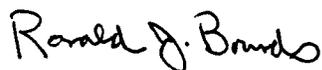
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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# 168205

Enc. Marked documents

cc: Mr. Alfred Gilles  
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(w/o enclosures)