



October 24, 2002

Mr. Mark A. Sanchez  
Ms. Beverly W. Irizarry  
Gale, Wilson & Sanchez  
115 East Travis, Suite 618  
San Antonio, Texas 78205

OR2002-6047

Dear Mr. Sanchez and Ms. Irizarry:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 171186.

The Alamo Community College District (the "district"), which you represent, received a request for (1) the personnel files of five named individuals; (2) information relating to polygraph examinations; and (3) an investigative file involving three named individuals.<sup>1</sup> You claim that the requested information is excepted from disclosure under sections 552.101, 552.102, 552.103, and 552.108 of the Government Code and Texas Rule of Civil Procedure 192.5.<sup>2</sup> We have considered your arguments and have reviewed the information you submitted.<sup>3</sup>

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<sup>1</sup>We note that the district requested and received a clarification of this request for information. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information); Open Records Decision No. 663 at 2-5 (1999) (addressing circumstances under which governmental body's communications with a requestor to clarify or narrow request will toll ten-business-day deadline to request decision under section 552.301(b)).

<sup>2</sup>We note that the district has withdrawn its claims under sections 552.107 and 552.108 and Texas Rule of Evidence 503 regarding the personnel files of Don Adams and Howard Crowell.

<sup>3</sup>We note that one of the submitted documents is not responsive to this request for information. This decision does not address the non-responsive document, which we have marked accordingly.

Initially, we address your statement that the district received a second request for some of the information that is the subject of your request for this decision. You have submitted a copy of the second request for information, which is dated August 12, 2002.<sup>4</sup> You do not indicate that your request for this decision encompasses the August 12, 2002 request for information. You do not inform this office, and our records do not reflect, that the district has otherwise requested a decision with regard to the August 12, 2002 request. Therefore, unless the district has already released the information that is the subject of that request, it must do so at this time. *See* Gov't Code §§ 552.301, .302; Open Records Decision No. 664 (2000). Furthermore, to the extent that any of the information presently at issue also is responsive to the August 12, 2002 request, the district's release of that information constitutes a waiver of its discretionary exceptions to the disclosure of the information. *See* Gov't Code § 552.007; *see also* Open Records Decision No. 400 at 2 (1983). Thus, the district may not withhold any of the submitted information that also is responsive to the August 12, 2002 request under sections 552.103 or 552.108. *See* Open Records Decision Nos. 542 at 4 (1990) (governmental body may waive litigation exception), 177 (1977) (governmental body may waive law enforcement exception).

Subject to the consequences of the August 12, 2002 request, we address the district's arguments with regard to the submitted information. We first note that some of this information is subject to section 552.022 of the Government Code. Section 552.022 provides that

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 Section 552.108[.]

Gov't Code § 552.022(a)(1). In this instance, the submitted information includes an investigation made of, for, or by the district. The information reflects that the investigation has concluded. Thus, the district must release the completed investigation under section 552.022(a)(1) unless the information is excepted from disclosure under section 552.108 or expressly confidential under other law. As a discretionary exception to disclosure that a governmental body may waive, section 552.103 is not other law that makes information confidential for the purposes of section 552.022. Thus, the district may not withhold the requested information that is subject to section 552.022 under section 552.103.

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<sup>4</sup>The August 12, 2002 request is for "all findings and supporting documentation related to the investigation that was recently conducted regarding the false allegations made by Officer C. Martinez[.]"

Next, we address your claim under section 552.103 with regard to the information that is not subject to section 552.022. Section 552.103 of the Government Code provides in 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 governmental body has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate: (1) that litigation was pending or reasonably anticipated on the date of its receipt of the request for information *and* (2) that the information at issue is related to that litigation. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App. – Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App. – Houston [1<sup>st</sup> Dist.] 1984, writ ref'd n.r.e.); *see also* Open Records Decision No. 551 at 4 (1990). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *Id.*

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To establish that litigation is reasonably anticipated, a governmental body must provide this office with "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." *Id.* Among other examples, this office has concluded that litigation was reasonably anticipated where the opposing party took the following objective steps toward litigation: (1) filed a complaint with the Equal Employment Opportunity Commission ("EEOC"), *see* Open Records Decision No. 336 (1982); (2) 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 (3) threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

You inform us that the requested information that is not subject to section 552.022 relates to a pending administrative grievance. You note that the requestor, who filed the grievance, is demanding back pay and may seek monetary damages. You also point out that the requestor is represented by an attorney. Having considered your arguments, however, we

find that you have not demonstrated that litigation was pending when the district received the request for information. Likewise, you have not established that litigation was reasonably anticipated when the district received the request. Therefore, the information that is not subject to section 552.022 is not excepted from disclosure under section 552.103.

The district also raises section 552.108 with regard to much of the requested information, including the information that is subject to section 552.022. Section 552.108(a)(2) excepts from disclosure “information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . 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[.]” A governmental body that raises section 552.108 must reasonably explain, if the requested information does not supply an explanation on its face, how and why section 552.108 is applicable to that information. *See* Gov’t Code § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986). Section 552.108(a)(2) is applicable only if the requested information relates to a concluded criminal investigation that did not result in a conviction or a deferred adjudication.

You raise section 552.108(a)(2) with regard to requested investigation files, statements, notes, polygraph examinations, and personnel records. You state that this information relates to police investigations that did not result in a conviction or deferred adjudication. We note, however, that section 552.108 generally is not applicable to the personnel records of law enforcement officers or to information relating to complaints involving law enforcement officers. *See City of Fort Worth v. Cornyn*, \_\_\_ S.W.3d \_\_\_, 2002 WL 31026981 (Tex. App. 2002, no pet. h.); Open Records Decision No. 562 at 10 (1990). Likewise, section 552.108 is not applicable to information relating to an administrative investigation that did not result in a criminal investigation or prosecution. *See Morales v. Ellen*, 840 S.W.2d 519, 525-26 (Tex. Civ. App.--El Paso 1992, writ denied) (statutory predecessor not applicable to internal investigation that did not result in criminal investigation or prosecution); Open Records Decision No. 350 at 3-4 (1982). In this instance, the information that you seek to withhold under section 552.108 relates only to an internal investigation of a personnel matter. You have not demonstrated, nor is it otherwise clear to this office, that the internal investigation resulted in a criminal investigation or prosecution. Therefore, the district may not withhold any of the requested information under section 552.108.

The district also raises Texas Rule of Civil Procedure 192.5 with regard to two of the requested personnel files. An attorney’s work product is confidential under rule 192.5. The Texas Supreme Court has held that the Texas Rules of Civil Procedure and Texas Rules of Evidence are ‘other law’ that makes information expressly confidential for purposes of section 552.022 of the Government Code. *See In re City of Georgetown*, 53 S.W.3d 328, 337 (Tex. 2001) (“We hold that if documents are privileged or confidential under the Texas Rules of Civil Procedure or Texas Rules of Evidence, they are within a ‘category of information that is expressly made confidential under other law’ within the meaning of section 552.022[.]”). In this instance, however, section 552.022 is not applicable to the

personnel information that the district seeks to withhold under rule 192.5. Therefore, the district may not withhold that information under Texas Rule of Civil Procedure 192.5.

The district also raises sections 552.101 and 552.102 of the Government Code. Section 552.102(a) excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]" This exception is applicable to the personnel file information of public officials and employees. The test of privacy under section 552.102(a) is the same as the test under section 552.101 of the Government Code in conjunction with common-law privacy. *See Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.--Austin 1983, writ ref'd n.r.e.). Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Common-law privacy protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, *and* (2) of no legitimate public interest. *See Industrial Found. v. Texas Ind. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977).

Common-law privacy under section 552.101 encompasses the specific types of information that the Texas Supreme Court deemed to be intimate or embarrassing in *Industrial Foundation*. *See* 540 S.W.2d at 683 (sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). This office has since concluded that other subjects also are private under section 552.101. *See* Open Records Decision Nos. 659 at 4-5 (1999) (summarizing types of information attorney general has found to be private), 470 at 4 (1987) (illness from severe emotional job-related stress), 455 at 9 (1987) (prescription drugs, illnesses, operations, and physical handicaps), 343 at 1-2 (1982) (references in emergency medical records to a drug overdose, acute alcohol intoxication, obstetrical/gynecological illness, convulsions/seizures, or emotional/mental distress).

You assert that the release of the requested personnel file information would be an unwarranted invasion of the personal privacy of individuals who are the subjects of the information. We note that one of the requested personnel files is that of the requestor. The requestor has a special right of access to information that is protected from disclosure under laws that are intended to protect her privacy interests. *See* Gov't Code § 552.023.<sup>5</sup> Thus, the personnel information that relates only to the requestor may not be withheld from her on privacy grounds. *See* also Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual asks governmental body to provide her with information concerning herself). Having reviewed the rest of the personnel information that you claim

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<sup>5</sup>Section 552.023(a) provides that "[a] person or a person's authorized representative has a special right of access, beyond the right of the general public, to information held by a governmental body that relates to the person and that is protected from public disclosure by laws intended to protect that person's privacy interests."

is private, we conclude that you have not demonstrated that any of the information is excepted from disclosure under section 552.102. *See also* Open Records Decision Nos. 470 at 4 (1987) (public employee's job performance does not generally constitute that individual's private affairs), 444 at 3 (1986) (public has obvious interest in information concerning qualifications and performance of governmental employees, particularly those involved in law enforcement), 423 at 2 (1984) (statutory predecessor to section 552.102 applicable when information would reveal intimate details of a highly personal nature), 400 at 5 (1983) (statutory predecessor to section 552.102 protected information only if its release would lead to clearly unwarranted invasion of privacy).

Section 552.101 of the Government Code also encompasses information that another statute makes confidential. Chapter 1703 of the Occupations Code codifies the Polygraph Examiners Act. *See* Occ. Code § 1703.001. Section 1703.306 of the Occupations Code provides as follows:

(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;
- (3) a member, or the member's agent, of a governmental agency that licenses a polygraph examiner or supervises or controls a polygraph examiner's activities;
- (4) another polygraph examiner in private consultation; or
- (5) any other person required by due process of law.

(b) The [Polygraph Examiners B]oard or any other governmental agency that acquires information from a polygraph examination under this section shall maintain the confidentiality of the information.

(c) A polygraph examiner to whom information acquired from a polygraph examination is disclosed under Subsection (a)(4) may not disclose the information except as provided by this section.

*Id.* § 1703.306. Some of the submitted information was acquired from polygraph examinations and is confidential under section 1701.306. The requestor has a right of access to the information that relates to her own polygraph examination. *See id.* § 1703.306(a)(1).

Otherwise, the submitted information that was acquired from polygraph examinations is excepted from disclosure under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code. We have marked that information.

We also note that section 552.117 of the Government Code is applicable to some of the submitted information. Section 552.117 excepts from public disclosure

information that relates to the home address, home telephone number, or social security number of the following person or that reveals whether the person has family members:

...

(2) a peace officer as defined by Article 2.12, Code of Criminal Procedure . . . regardless of whether the officer complies with Section 552.024 or 552.1175, as applicable; [or]

...

(5) a commissioned security officer as defined by Section 1702.002, Occupations Code, regardless of whether the officer complies with Section 552.024 or 552.1175, as applicable.

Gov't Code § 552.117(2), (5). We have marked the information that the district must withhold if it relates to a peace officer under article 2.12 of the Code of Criminal Procedure or a security officer commissioned under section 1702.002 of the Occupations Code. We note that the district may not withhold information that relates to the requestor under section 552.117. *See* Gov't Code § 552.023; Open Records Decision No. 481 at 4 (1987).

To the extent that the section 552.117 information is not that of a peace officer or security officer, the information may nevertheless be excepted from disclosure under section 552.117(1). Section 552.117(1) excepts from public disclosure the home address, home telephone number, and social security number of a current or former employee of a governmental body, as well as information that reveals whether the person has family members, if the current or former employee requested that this information be kept confidential under section 552.024. *See* Open Records Decision Nos. 622 at 5-6 (1994), 455 at 2-3 (1987). This information may not be withheld, however, if the current or former employee made the request for confidentiality under section 552.024 after the request for information was made. Whether a particular piece of information is public must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989).

A social security number also may be excepted from disclosure under section 552.101 in conjunction with 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), if the social security number was obtained or is maintained by a governmental body pursuant to any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 at 2-4 (1994). It is not apparent to this office that any social security number contained in the submitted documents is confidential under section 405(c)(2)(C)(viii)(I) of the federal law. You have cited no law, and we are aware of no law, enacted on or after October 1, 1990 that authorizes the district to obtain or maintain a social security number. Thus, we have no basis for concluding that any social security number contained in the submitted information was obtained or is maintained pursuant to such a law and is therefore confidential under the federal law. We note that the requestor's own social security number may not be withheld from her under section 552.101 in conjunction with section 405(c)(2)(C)(viii)(I) of title 42 of the United States Code. *See* Gov't Code § 552.023. Otherwise, we caution the district that chapter 552 of the Government Code imposes criminal penalties for the release of confidential information. *See* Gov't Code §§ 552.007, .352. Therefore, before releasing a social security number other than that of the requestor, the district should ensure that it was not obtained and is not maintained pursuant to any provision of law enacted on or after October 1, 1990.

The requested information also contains photographs that the district may be required to withhold under section 552.119 of the Government Code. Section 552.119 excepts from public disclosure a photograph of a peace officer that, if released, would endanger the life or physical safety of the officer unless one of three exceptions applies.<sup>6</sup> 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. *See* Open Records Decision No. 502 (1988). We have marked the photographs that are subject to section 552.119 if they depict peace officers. You do not inform us that any of the exceptions under section 552.119 are applicable to these photographs or that any of the individuals depicted in them have executed any written consents to disclosure. Therefore, to the extent that these photographs depict a peace officer, they are excepted from disclosure under section 552.119.

We also note that section 552.130 of the Government Code is applicable to some of the requested information. Section 552.130 excepts from public disclosure information that relates to "a motor vehicle operator's or driver's license or permit issued by an agency of this state[.]" We have marked Texas driver's license numbers that the district must withhold under section 552.130. The requestor has a special right of access to her own Texas driver's license number under section 552.023.

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<sup>6</sup>Section 552.119 also adopts the definition of peace officer found at article 2.12 of the Code of Criminal Procedure.

Lastly, we note that the requested information contains a private e-mail address. Section 552.137 of the Government Code provides as follows:

- (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. The private e-mail address that we have marked must be withheld under section 552.137 unless the person to whom the e-mail address belongs has affirmatively consented to its public disclosure.

In summary, the district must withhold some of the requested information under sections 552.101 and 552.130 of the Government Code. Under section 552.117(2), the district must withhold the home address, home telephone number, social security number, and family member information of a person other than the requestor who is either a peace officer under article 2.12 of the Code of Criminal Procedure or a security guard under section 1702.002 of the Occupations Code. The district may also be required to withhold home address, home telephone number, social security number, and family member information under section 552.117(1) if it pertains to a current or former employee of the district who timely requested confidentiality under section 552.024. The district must withhold the photographs under section 552.119 if they depict peace officers. The district must withhold the e-mail address under section 552.137 unless the person to whom it belongs has affirmatively consented to its public disclosure. The rest of the requested information is not excepted from disclosure and must be released to the requestor.<sup>7</sup>

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.

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<sup>7</sup>Should the district receive another request for the submitted information to which the requestor has a right of access from a person who would not have a right of access to the information, the district should resubmit that same information and request another decision.

*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).

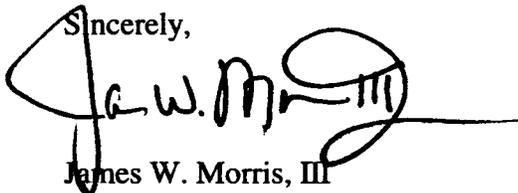
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following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

A handwritten signature in black ink, appearing to read "J.W. Morris III", with a long horizontal flourish extending to the right.

James W. Morris, III  
Assistant Attorney General  
Open Records Division

JWM/sdk

Ref: ID# 171186

Enc: Marked documents

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