



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 14, 2004

Mr. Eddie Martin
Assistant City Attorney
City of Denton
215 East McKinney
Denton, Texas 76201

OR2004-5804

Dear Mr. Martin:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 205219.

The City of Denton (the "city") received a request for various categories of information related to the requestor's employment with and subsequent termination by the city. You state, and provide documentation showing, that the city then sought and received clarification of the request, in which the requestor has also requested additional information. *See* Gov't Code § 552.222 (providing that a governmental body may ask the requestor to clarify the request if what information is requested is unclear to the governmental body); *see also* Open Records Decision No. 663 at 5 (1999)(discussing requests for clarification). You state that you have released portions of the requested information.¹ You claim that the remaining requested information is excepted from disclosure under sections 552.103 and 552.1175 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted representative samples of the information.³

¹We assume that, to the extent any additional responsive information existed on the date of the city's receipt of this request, you have released it to the requestor. If not, then you must do so immediately. *See* Gov't Code §§ 552.006, .301, .302; Open Records Decision No. 664 (2000).

²Although you did not timely raise section 552.1175, this provision constitutes a compelling reason to withhold information, and we will address your arguments on this issue. *See* Gov't Code §§ 552.301, .302.

³We assume that the representative sample of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Initially, we note that some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides in part 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). The submitted information includes completed evaluations and a completed report made of, for, or by the city, which must be released pursuant to section 552.022(a)(1), unless they are excepted from disclosure under section 552.108 or are expressly confidential under other law.⁴ Although the city claims that the completed evaluations and the completed report are excepted from disclosure under section 552.103 of the Government Code, we note that this exception is a discretionary exception to disclosure that does not constitute "other law" for the purposes of section 552.022.⁵ Accordingly, we conclude that the city may not withhold any portion of the completed evaluations or the completed report under section 552.103 of the Government Code.

We next address your claim that section 552.103 is applicable to the remaining submitted information. Section 552.103 provides 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.

....

⁴We note that the city does not claim that any portion of the submitted information is excepted from disclosure under section 552.108 of the Government Code.

⁵Discretionary 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. 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), 522 at 4 (1989) (discretionary exceptions in general); *see also Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.-Dallas 1999, no pet.) (governmental body may waive section 552.103). Discretionary exceptions, therefore, do not constitute "other law" that makes information confidential.

(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 governmental body receives the request, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. 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 section 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”). In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); 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). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982).

You state that the requestor was put on administrative leave on April 12, 2004, prior to his subsequent termination, and that he stated at that time that he planned to litigate the city’s actions based on gender and age discrimination. You explain that the requestor has repeatedly stated that he would sue before and after his termination by the city. However, you have not provided any evidence that the requestor has filed or has taken any concrete steps towards filing a lawsuit against the city regarding this matter. *See generally* Open Records Decision No. 452 at 4 (1986) (whether litigation is reasonably anticipated must be determined on case-by-case basis). Accordingly, the city may not withhold any of the remaining submitted information under section 552.103 of the Government Code.

We note, however, that the submitted documents contain information that would usually be excepted from disclosure under section 552.101 of the Government Code in conjunction with the common law right to privacy. Section 552.101 excepts information considered to be confidential by law, either constitutional, statutory, or by judicial decision, and incorporates information protected by the common law right to privacy. Common law privacy protects information if (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. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The type 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. 540 S.W.2d at 683.

Additionally, 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. 600 (1992), 545 (1990), 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). We note, however, that the requestor in this instance has a special right of access to information that would ordinarily be withheld to protect his common law privacy interests, and such information cannot be withheld from him solely on that basis. *See* Gov't Code § 552.023(b) (governmental body may not deny access to person to whom information relates or person's agent on grounds that information is considered confidential by privacy principles).⁶

Next, you claim that section 552.1175 is applicable to portions of the information you have labeled as Exhibit 8. We note, however, that section 552.1175 applies only to peace officers as those are defined by Article 2.12 of the Code of Criminal Procedure, county jailers, employees of the Texas Department of Criminal Justice and commissioned security officers. *See* Gov't Code § 552.1175(a). You do not suggest, nor does the information contained in Exhibit 8 reflect, that the information at issue relates to any of these specified classifications. Thus, you may not withhold the information you have marked under section 552.1175 of the Government Code.

⁶Because some of the information is confidential with respect to the general public, if the city receives a further request for this information from an individual other than the requestor, the city should again seek our decision.

However, in this instance, section 552.117 may be applicable to the information. Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is received by the governmental body. See Open Records Decision No. 530 at 5 (1989). Therefore, the city may only withhold information under section 552.117(a)(1) on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was received by the city. For those employees who timely elected to keep their personal information confidential, the city must withhold the employees' home addresses and telephone numbers and social security numbers, which you have marked, under section 552.117(a)(1) of the Government Code. The city may not withhold this information under section 552.117(a)(1) for those employees who did not make a timely election to keep the information confidential.

In summary, if any of the employees reflected in Exhibit 8 made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made, the city must withhold the home addresses, home telephone phone numbers and social security numbers under section 552.117(a)(1). All remaining information must be released 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 Dep't of Pub. 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,



Cary Grace
Assistant Attorney General
Open Records Division

ECG/krl

Ref: ID# 205219

Enc. Submitted documents

c: Mr. Cary Tower
19 Oak Circle
Lake Dallas, Texas 75065
(w/o enclosures)