



ATTORNEY GENERAL OF TEXAS
G R E G A B B O T T

January 13, 2006

Mr. Forrest K. Phifer
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OR2006-00487

Dear Mr. Phifer:

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# 240226.

The Rusk Police Department (the "department"), which you represent, received a request for the following information: 1) any complaints of sexual harassment filed by a department officer and/or any complaints of sexual harassment filed against a department officer within the past three months; 2) any complaints of any nature filed by any current or former department officer with a state agency within the past three months and correspondence relating to those complaints; and 3) personnel files of a specified former department officer, excluding any social security numbers, course grades or test scores, health information, personal financial information, private identifiers such as phone numbers and addresses, and anything explicitly exempted from disclosure by the Act. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.108, 552.117, 552.1175, and 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that the department sought clarification from the requestor with regard to the second item requested. A governmental body may communicate with the requestor for the purpose of clarifying or narrowing a request for information. *See Gov't Code § 552.222(b)*. We note that where a governmental body is presented with a broad or unclear request for information, it is incumbent upon the governmental body to make a good faith effort to attempt to identify such records as might fit the request and advise the requestor of the types of documents available, so that he may narrow his request to specifics. *See Open Records Decision No. 663 (1999)*. Additionally, we note that the difficulty of complying with a request does not relate to the availability of requested information. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 687 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977).

Next, we note that in the present request, the requestor specifically states that the requested documents may exclude social security numbers, course grades or test scores, health information, personal financial information, and private identifiers such as phone numbers and addresses. Accordingly, we have marked the information that is not responsive to the request.¹ This ruling does not address the public availability of any information that is not responsive to the request, and the department is not required to release such information in response to the request for information. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex.Civ.App.—San Antonio 1978, writ dismissed).

Next, we note that some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides that “a completed report, audit, evaluation, or investigation made of, for, or by a governmental body” may not be withheld from the public unless the information is excepted from disclosure under section 552.108 of the Government Code or expressly confidential under other law. Gov’t Code § 552.022(a)(1). The submitted information contains a completed investigation and a completed report made for the department, which are made expressly public by section 552.022, unless they are expressly made confidential under other law. Section 552.103 of the Government Code is a discretionary exception under the Act that does not constitute “other law” for purposes of section 552.022. See Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.103 is not other law that makes information confidential for the purposes of section 552.022. Therefore, the city may not withhold this information under section 552.103 of the Government Code. However, section 552.101 is “other law” for purposes of section 552.022. Therefore, we will address your argument under this section.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision,” including information that is encompassed by the common law right to privacy. See *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). 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.” Gov’t Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ refused 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* for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the Government Code. See *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976). Accordingly, we will consider your section 552.101 and section 552.102 claims together. Information is protected from disclosure under the common law right to privacy if (1) it contains highly intimate or embarrassing facts, the release of which would be highly objectionable to a reasonable person, and (2) it is not of legitimate concern to the public. See

¹As this information is not responsive, we need not address your arguments pursuant to sections 552.117, 552.1175, and 552.147.

id. at 685. 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. *Id.* at 683.

In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied), the court addressed the applicability of the common law privacy doctrine to files of an investigation of allegations of sexual harassment. The investigation files in *Ellen* contained individual witness statements, an affidavit by the individual accused of the misconduct responding to the allegations, and conclusions of the board of inquiry that conducted the investigation. *Ellen*, 840 S.W.2d at 525. The court ordered the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the public's interest was sufficiently served by the disclosure of such documents. *Id.* In concluding, the *Ellen* court held that "the public did not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released." *Id.*

When there is an adequate summary of an investigation, the summary and any statements of the person under investigation must be released, but the identities of the victims and witnesses must be redacted and their detailed statements must be withheld from disclosure. However, when no adequate summary exists, detailed statements regarding the allegations must be released, but the identities of witnesses and victims must still be redacted from the statements.

The submitted information contains a completed investigation and report of sexual harassment allegations and contains an adequate summary of the investigation into alleged sexual harassment. Therefore, you must withhold the documents in the investigation file except for the summary which must be disclosed pursuant to *Ellen*, 840 S.W.2d at 525. However, the identities of the victims and witnesses to the alleged sexual harassment are protected by the common law privacy doctrine and must be withheld. *Id.* We have marked the information the department must withhold from the investigation and report under section 552.101 in conjunction with common law privacy. We now address your arguments for the remaining information.

We note that the submitted information includes an Employment Eligibility Verification, 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 under the Public Information Act 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.

The submitted information also includes a Report of Resignation or Separation of License Holder, which is commonly referred to as an "F-5." Section 1701.452 of the Occupations Code requires a law enforcement agency to submit a report to the Texas Commission on Law Enforcement Officer Standards and Education regarding an officer licensed under chapter 1701 who resigns or is terminated from the law enforcement agency. *See id.* § 1701.452. Section 1701.454 provides in relevant part the following:

(a) A report or statement submitted to the commission under this subchapter is confidential and is not subject to disclosure under Chapter 552 of the Government Code.

Id. § 1701.454. After reviewing the submitted information, we conclude that the department must withhold the F-5 form pursuant to section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code.

Next, you contend that the responsive information is excepted under section 552.101 in conjunction with section 143.089(f) of the Local Government Code. Section 143.089(f) provides that the civil service director may not release any information contained in a civil service personnel file without first obtaining the person's written permission, unless the release of the information is required by law. In Open Records Decision No. 562 (1990), this office determined that chapter 552 of the Government Code is considered law that requires the release of information. Thus, information in the civil service personnel file is subject to disclosure under the Act regardless of whether the officer consents to the release of the information. Therefore, we conclude that the submitted information is not confidential by virtue of section 143.089(f) of the Local Government Code.

Section 552.103 of the Government Code 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.

.....

(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 department 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 received 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 department 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.² Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be “realistically contemplated”). 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). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983).

You state that the person whose records are the subject of the present request is represented by counsel and is possibly seeking “to allege wrongful termination or other legal injury against the city” with regard to the allegations made and the action taken by the city. However, the department does not affirmatively represent that any litigation is pending. The information the department provided is not sufficient to establish that litigation is pending or reasonably anticipated for purposes of section 552.103. Thus, the department may not withhold any of the submitted information pursuant to section 552.103.

Section 552.108(a) of the Government Code excepts from disclosure “[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.” Gov’t Code § 552.108(a)(1). Generally, a governmental body claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See* Gov’t Code §§ 552.108(a)(1), (b)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). However, we conclude that the department has not explained how this exception applies to the submitted information. Therefore, the department has failed to

²In 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).

establish that section 552.108 is applicable to the submitted information. *See* Gov't Code § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706; Open Records Decision No. 434 at 2-3 (1986).

In summary, the department must withhold the I-9 form pursuant to section 552.101 and may only release this form in compliance with the federal laws and regulations governing the employment verification system. The department must withhold the F-5 form pursuant to section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code. The department must also withhold the information we have marked under section 552.101 in conjunction with common law privacy. With the exception of the non-responsive information, the 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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Office of the Attorney General 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. 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,



Jaime L. Flores
Assistant Attorney General
Open Records Division

JLF/er

Ref: ID# 240226

Enc. Submitted documents

c: Ms. Sara Foley
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(w/o enclosures)