



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 26, 2008

Mr. C. Patrick Phillips
Assistant City Attorney
City of Fort Worth
1000 Throckmorton Street
Fort Worth, Texas 76102

OR2008-04010

Dear Mr. Phillips:

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# 304430.

The Fort Worth Police Department (the "department") received a request for a specified internal investigation and personnel files related to a named individual. You state that you have redacted Texas motor vehicle record information under section 552.130 of the Government Code pursuant to a previous determination issued to the city in Open Records Letter No. 2007-00198 (2007). *See* Gov't Code § 552.301(a); Open Records Decision No. 673 at 7-8 (2001). You also state that you are withholding social security numbers under section 552.147 of the Government Code.¹ You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.108, 552.111, 552.117, 552.137, and 552.139 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted information.

¹ We note that section 552.147(b) authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

² Although you also raise Texas Rule of Evidence 503, you have not submitted arguments explaining how this rule applies to the submitted information. Therefore, we do not address rule 503. *See* Gov't Code §§ 552.301(e)(1)(A), .302.

Initially, we note that some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) 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). In this instance, the submitted information contains completed performance evaluations and a completed investigation, all of which we have marked. The completed evaluations and investigation must be released under section 552.022(a)(1), unless the information is excepted from disclosure under section 552.108 or expressly confidential under other law. We note that sections 552.103 and 552.111 of the Government Code are discretionary exceptions to disclosure that a governmental body may waive. *See id.* § 552.007; *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 Gov't Code § 552.103); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 473 (1987) (governmental body may waive section 552.111). As such, sections 552.103 and 552.111 are not other law that makes information confidential for the purposes of section 552.022. Therefore, the department may not withhold any portion of the marked evaluations or investigation under section 552.103 or section 552.111. However, because information subject to section 552.022(a)(1) may be withheld under sections 552.101, 552.108, 552.117, 552.137, and 552.139, we will address these claims for this information, as well as section 552.103 for the information that is not subject to section 552.022.

You claim that the information that is not subject to section 552.022 is protected under section 552.103, which 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). A 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 Univ. of Tex. Law Sch. v. Tex. 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 [1st Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See Open Records Decision No. 551 at 4 (1990).*

Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986). To demonstrate that litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* 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"). 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 requestor is an attorney for the individual who is the subject of the instant request for information. You assert that the department reasonably anticipates litigation involving the requestor's client because the requestor "has put the [department] on notice of a grievance relating to the incident which is the subject of [the requestor's] records request." In support of your claim, you have submitted a letter written by the requestor in which he states that his client has been wrongfully treated by the department, that his client requests certain actions be taken to remedy the situation, and requests a meeting to discuss the issues. You have not informed us, however, that the requestor has actually threatened litigation or otherwise taken any concrete steps toward the initiation of litigation. *See* ORD 331. Consequently, you have not established that the department reasonably anticipated litigation when it received the request for information. Accordingly, the department may not withhold any of the submitted information under section 552.103 of the Government Code.

We note that the submitted personnel records contain tax return information. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information protected by other statutes, such as section 6103(a) of title 26 of the United States Code. Prior decisions of this office have held that section 6103(a) of title 26 of the United States Code renders tax return information confidential. Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision Nos. 600 (1992) (W-4 forms), 226 (1979) (W-2 forms). Section 6103(b) defines the term "return information" as "a taxpayer's identity, the nature, source, or amount of income, payments, tax withheld, deficiencies, overassessments or tax payments . . . or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary [of the Internal Revenue Service] with respect to a return . . . or the determination of the existence, or possible existence, of liability . . . for any tax, . . . penalty, . . . , or offense[.]" See 26 U.S.C. § 6103(b)(2)(A). Federal courts have construed the term "return information" expansively to include any information gathered by the Internal Revenue Service regarding a taxpayer's liability under title 26 of the United States Code. See *Mallas v. Kolak*, 721 F. Supp 748, 754 (M.D.N.C. 1989), aff'd in part, 993 F.2d 1111 (4th Cir. 1993).

Section 6103(e) is an exception to the confidentiality provisions of section 6103(a) and provides for disclosure of tax information to the taxpayer. See 26 U.S.C. § 6103(e)(7) (information may be disclosed to any person authorized by subsection(e) to obtain such information if Secretary of Treasury determines such disclosure would not seriously impair tax administration); see also *Lake v. Rubin*, 162 F.3d 113 (D.C. Cir. 1998) (26 U.S.C. § 6103 represents exclusive statutory route for taxpayer to gain access to own return information and overrides individual's right of access under the federal Freedom of Information Act). The submitted personnel records contain the requestor's client's W-4 form. Therefore, pursuant to section 6103(e)(7) of title 26 of the United States Code, the department must release this form to the requestor if such disclosure would not seriously impair federal tax administration. Otherwise, the submitted W-4 form is confidential under section 6103 of title 26 of the United States Code and must be withheld under section 552.101 of the Government Code.

Section 552.101 also encompasses section 143.089(g) of the Local Government Code. We understand that the City of Fort Worth is a civil service city under chapter 143 of the Local Government Code. Section 143.089 contemplates two different types of personnel files: a file that must be maintained by the city's civil service director or the director's designee, and another file that may be maintained by the city's police department for its own use. Local Gov't Code § 143.089(a), (g). In cases in which a police department investigates a police officer's misconduct and takes disciplinary action against the police officer, section 143.089(a)(2) requires the department to place all investigatory records relating to the investigation and disciplinary action, including background documents such as complaints, witness statements, and documents of like nature from individuals who were not in a supervisory capacity, in the police officer's civil service file maintained under section 143.089(a). *Abbott v. City of Corpus Christi*, 109 S.W.3d 113, 122 (Tex.

App.—Austin 2003, no pet.). All investigatory materials in a case resulting in disciplinary action are “from the employing department” when they are held by or in possession of the department because of its investigation into a police officer’s misconduct, and the department must forward them to the civil service commission for placement in the civil service personnel file. *Id.* Such records are subject to release under chapter 552 of the Government Code. See Local Gov’t Code § 143.089(f); Open Records Decision No. 562 at 6 (1990). However, information maintained in a police department’s personnel file pursuant to section 143.089(g) is confidential and must not be released. *City of San Antonio v. Tex. Attorney Gen.*, 851 S.W.2d 946, 949 (Tex. App.—Austin 1993, writ denied).

The submitted information contains an internal affairs investigation involving police officers and department employees who are not police officers. You seek to withhold the identifying information of the police officers because the investigation did not result in any disciplinary action against the officers. Section 143.089(g) protects records pertaining to a police officer that are maintained in the officer’s personnel file. In this instance, the submitted information consists of an internal investigation and the personnel file of a department employee who is not a police officer. Having considered your argument, we find that you have not established that section 143.089(g) of the Local Government Code is applicable to the submitted information. Thus, the identifying information of the officers you have marked may not be withheld under section 552.101 in conjunction with section 143.089(g).

Section 552.101 also encompasses section 1703.306 of the Occupations Code, which provides:

(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] Board 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.

Occ. Code § 1703.306. We have marked the information that was acquired from polygraph examinations and is within the scope of section 1703.306. You state that the requestor does not fall into any of the categories of individuals authorized to receive the submitted polygraph information. We note, however, that a portion of the information is related to a polygraph examination of the requestor's client. Thus, the department has the discretion to release the client's information, which we have marked, pursuant to section 1703.306(a)(1). See Open Records Decision No. 481 at 9 (1987) (predecessor to section 1703.306 permitted, but did not require, polygraph examination results to be disclosed to examinees). Otherwise, the department must withhold the marked polygraph information under section 552.101 in conjunction with section 1703.306(a).³

Section 552.101 also encompasses the doctrine of common-law privacy, which 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). To demonstrate the applicability of common-law privacy, both prongs of this test must be demonstrated. *Id.* at 681-82. This office has found that the following types of information are excepted from required public disclosure under common-law privacy: personal financial information not relating to a financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990), and 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). Thus, the department must withhold the medical information we have marked in the completed investigation under section 552.101 of the Government Code in conjunction with common-law privacy. Furthermore, to the extent the personal financial information we have marked in the submitted payroll records does not pertain to financial transactions between the listed individuals and a governmental entity (*i.e.* the department or the City of Fort Worth), the information must be withheld under section 552.101 of the

³ As our ruling is dispositive for the polygraph examination reports, we need not address your remaining argument against disclosure of some of this information.

Government Code in conjunction with common-law privacy.⁴ To the extent the marked financial information does pertain to financial transactions between the listed individuals and a governmental body, the information may not be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.108(b)(1) of the Government Code excepts from disclosure the internal records and notations of law enforcement agencies and prosecutors when their release would interfere with law enforcement and crime prevention. Gov't Code § 552.108(b)(1); *see also* Open Records Decision No. 531 at 2 (1989) (quoting *Ex parte Pruitt*, 551 S.W.2d 706, 710 (Tex. 1977)). Section 552.108(b)(1) is intended to protect "information which, if released, would permit private citizens to anticipate weaknesses in a police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate the laws of this State." *City of Fort Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App.—Austin 2002, no writ). To demonstrate the applicability of this exception, a governmental body must meet its burden of explaining how and why release of the requested information would interfere with law enforcement and crime prevention. Open Records Decision No. 562 at 10 (1990). This office has concluded that section 552.108(b) excepts from public disclosure information relating to the security or operation of a law enforcement agency. *See, e.g.*, Open Records Decision Nos. 531 (1989) (release of detailed use of force guidelines would unduly interfere with law enforcement), 252 (1980) (Gov't Code § 552.108 is designed to protect investigative techniques and procedures used in law enforcement), 143 (1976) (disclosure of specific operations or specialized equipment directly related to investigation or detection of crime may be excepted). Section 552.108(b)(1) is not applicable, however, to generally known policies and procedures. *See, e.g.*, Open Records Decision Nos. 531 at 2-3 (1989) (Penal Code provisions, common law rules, and constitutional limitations on use of force not protected), 252 at 3 (1980) (governmental body failed to indicate why investigative procedures and techniques requested were any different from those commonly known). You state that release of the submitted information pertaining to department building security issues would interfere with ongoing law enforcement activities. You contend that the information you have marked in the remaining records "deals with security measures and analysis of security processes," and that "knowledge of these procedures and security concerns would render them susceptible to exploitation." Based on your representations and our review, we find that the release of portions of the investigation report would interfere with law enforcement. Accordingly, the department may withhold the information we have marked under section 552.108(b)(1) of the Government Code. The department, however, has failed to demonstrate how the remaining information would interfere with law

⁴ We note that the payroll records include the requestor's client's personal financial information. Because the requestor has a right of access to his client's private information under section 552.023 of the Government Code, we have not marked this information. *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).

enforcement and crime prevention. Thus, no portion of the remaining information may be withheld under section 552.108 of the Government Code.

Next, we address your claim under section 552.117 of the Government Code. Section 552.117(a)(1) excepts from disclosure the current and former 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 of the Government Code. Gov't Code § 552.117(a)(1). Whether information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Pursuant to section 552.117(a)(1), the department must withhold the personal information of a current or former official or employee of the department who elected, prior to the department's receipt of the request for information, to keep such information confidential. You state that the employees to whom the information in question pertains timely chose to not allow public access to their home addresses and home telephone numbers. Accordingly, we agree that the department must generally withhold the home addresses and telephone numbers that you have marked pursuant to section 552.117(a)(1). We note, however, that section 552.117 protects personal privacy. As previously stated, the requestor has a special right of access to his client's information pursuant to section 552.023 of the Government Code. *See* Gov't Code § 552.023(b). Thus, you may not withhold the requestor's client's information under section 552.117(a). We further note that you have also marked additional information relating to other current or former employees to be withheld under section 552.117. You have not informed us, however, whether or not those employees timely elected under section 552.024 to keep the additional information confidential. Nevertheless, to the extent that the other employees timely elected to keep the information you have marked confidential, the department must withhold that information under section 552.117(a)(1). To the extent that the other employees did not timely elect confidentiality, their information may not be withheld on under section 552.117(a)(1).

Section 552.137 of the Government Code excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body," unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov't Code § 552.137(a)-(c). We note that the e-mail address in question belongs to the requestor's client. Therefore, because this exception also protects personal privacy, the requestor has a right of access to his client's e-mail address, and it may not be withheld under section 552.137. *See id.* § 552.023.

Finally, we address your assertion that the some of the remaining information is excepted under section 552.139 of the Government Code, which provides:

(a) Information is excepted from the requirements of Section 552.021 if it is information that relates to computer network security or to the design, operation, or defense of a computer network.

(b) The following information is confidential:

(1) a computer network vulnerability report; and

(2) any other assessment of the extent to which data processing operations, a computer, or a computer program, network, system, or software of a governmental body or of a contractor of a governmental body is vulnerable to unauthorized access or harm, including an assessment of the extent to which the governmental body's or contractor's electronically stored information is vulnerable to alteration, damage, or erasure.

Id. § 552.139. After reviewing the information you claim is excepted by section 552.139, we find that you have not demonstrated how this information relates to computer network security or to the design, operation, or defense of a computer network as contemplated in section 552.139(a). Furthermore, you have not demonstrated that this information consists of a computer network vulnerability assessment or report as contemplated in section 552.139(b). Consequently, none of the information you marked may be withheld under section 552.139 of the Government Code.

In summary, pursuant to section 6103(e)(7) of title 26 of the United States Code, the department must release the marked W-4 form to the requestor, if such disclosure would not seriously impair federal tax administration. Otherwise, this form is confidential under section 6103 of title 26 of the United States Code and must be withheld under section 552.101 of the Government Code. The department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code, but the department has the discretion to release the requestor's client's polygraph information. The department must withhold the medical information we have marked under section 552.101 in conjunction with common-law privacy. To the extent that the personal financial information we have marked does not pertain to financial transactions between the listed individuals and a governmental body, this information must be withheld under section 552.101 of the Government Code in conjunction with common-law privacy. The department may withhold the information we have marked under section 552.108 of the Government Code. Except for the requestor's client's information, the department must withhold the employee home address and telephone number information you have marked under section 552.117 of the Government Code. To the extent that the other employees whose personal information you have marked timely elected to keep their information confidential under section 552.024 of the Government

Code, the department must withhold their information under section 552.117 of the Government Code. The remaining information must be released.⁵

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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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 challenge 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).

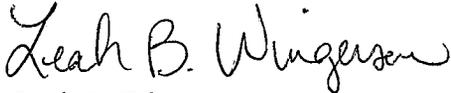
Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or

⁵ We note that this information contains confidential information that is not subject to release to the general public. See Gov't Code § 552.352. However, as previously stated, the requestor in this instance has a special right of access to his client's personal financial information, home address and home telephone number information, and e-mail address. Gov't Code § 552.023. Because some of the information to be released is confidential with respect to the general public, if the department receives a future request for this information from an individual other than this requestor or his client, the department should again seek our decision.

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,



Leah B. Wingerson
Assistant Attorney General
Open Records Division

LBW/ma

Ref: ID# 304430

Enc. Submitted documents

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