



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 14, 2011

Mr. John S. Schneider
First Assistant City Attorney
City of Pasadena
P.O. Box 672
Pasadena, Texas 77501-0672

OR2011-16709

Dear Mr. Schneider:

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# 436163 (Pasadena No. SL1162).

The City of Pasadena (the "city") received a request for the civil service files, suspension and appeal letters, and information relating to the suspensions and related litigation of two named officers, as well as biographical information concerning a named arbitrator. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered the claimed exceptions and reviewed the submitted information.

We first note the city has redacted information from the submitted information, presumably under sections 552.117¹ and 552.130² of the Government Code. However, you have also

¹Section 552.024(c) of the Government Code authorizes a governmental body to redact under section 552.117(a)(1), without the necessity of requesting a decision from this office, the home addresses and telephone numbers, emergency contact information, social security number, and family member information of a current or former employee who properly elected to keep this information confidential. *See* Gov't Code § 552.024(c); Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 2 (to be codified as an amendment to Gov't Code § 552.117(a)). Open Records Decision No. 670 (2001) authorizes a governmental body to redact under section 552.117(a)(2), without the necessity of requesting a decision from this office, the home address, home telephone number, social security number, and family member information of a peace officer as defined by section 2.12 of the Code of Criminal Procedure. *See* ORD 670 at 6-7.

²Open Records Decision No. 684 (2009) is a previous determination issued by this office authorizing all governmental bodies to withhold ten categories of information, including a Texas driver's license number under section 552.130, without the necessity of requesting an attorney general decision. *See* ORD 684 at 14-15. However, on September 1, 2011, the Texas legislature amended section 552.130 to allow a governmental body

redacted business telephone numbers, places of birth, selective service numbers, and dates of birth. You do not assert, nor does our review of the records indicate, you have been authorized to withhold that information without seeking a ruling from this office. *See* Gov't Code § 552.301(a); Open Records Decision No. 673 (2001). Therefore, information must be submitted in a manner that enables this office to determine whether the information comes within the scope of an exception to disclosure. In this instance, we can discern the nature of the redacted information; thus, being deprived of that information does not inhibit our ability to make a ruling. In the future, however, the city should refrain from redacting any information it is not authorized to withhold in seeking an open records ruling. Failure to do so may result in the presumption the redacted information is public. *See* Gov't Code § 552.302.

We next note Exhibits A and B contain completed employee evaluations, and Exhibits C and D contain completed investigation reports, which are subject to section 552.022 of the Government Code. Section 552.022(a)(1) provides for the required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body," unless it is excepted by section 552.108 of the Government Code or confidential under "other law." Gov't Code § 552.022(a)(1). We note you do not raise section 552.108. Although you raise section 552.103 of the Government Code for this information, section 552.103 is a discretionary exception to disclosure that protects only a governmental body's interests and may be waived. *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 section 552.103); Open Records Decision No. 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(a), and the city may not withhold the information subject to section 552.022 on that basis. As you raise no additional exceptions to disclosure for the information we have marked under section 552.022 in Exhibits A and B, that information must be released to the requestor. However, you also raise section 552.101 of the Government Code for the information subject to section 552.022 in Exhibits C and D. Because section 552.101 is "other law" for purposes of section 552.022, we will address its applicability to Exhibits C and D.

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

to redact the information described in subsections 552.130(a)(1) and (a)(3) without the necessity of seeking a decision from the attorney general. *See* Act of May 30, 2011, 82nd Leg., R.S., S.B. 602, § 22 (to be codified at Gov't Code § 552.130(c)). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.130(e). *See* Act of May 30, 2011, 82nd Leg., R.S., S.B. 602, § 22 (to be codified at Gov't Code §§ 552.130(d)-(e)). Thus, the statutory amendments to section 552.130 of the Government Code superceded Open Records Decision No. 684 on September 1, 2011. Therefore, a governmental body may only redact information subject to subsections 552.130(a)(1) and (a)(3) in accordance with section 552.130, not Open Records Decision No. 684.

Code § 552.101. This section encompasses information made confidential by other statutes, such as section 143.089 of the Local Government Code. We understand the city is a civil service city under chapter 143 of the Local Government Code. Section 143.089 contemplates two different types of personnel files for police officers in a civil service city: a civil service file the civil service director is required to maintain and an internal file the police department may maintain for its own use. Local Gov't Code § 143.089(a), (g). The officer's civil service file must contain certain specified items, including commendations, periodic evaluations by the police officer's supervisor, and documents relating to any misconduct in which the department took disciplinary action against the officer under chapter 143 of the Local Government Code. *Id.* § 143.089(a)(1)-(2). Chapter 143 prescribes the following types of disciplinary actions: removal, suspension, demotion, and uncompensated duty. *Id.* §§ 143.051-.055; *see* Attorney General Opinion JC-0257 (written reprimand is not disciplinary action for purposes of chapter 143 of the Local Government Code).

In cases in which a police department investigates a police officer's misconduct and takes disciplinary action against an officer, it is required by section 143.089(a)(2) 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). *See 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 the Act. *See* Local Gov't Code § 143.089(f); Open Records Decision No. 562 at 6 (1990). However, information maintained in a police department's internal 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).

You state the information at issue in Exhibits C and D relates to misconduct that resulted in the suspensions of the police officers named in the request, and you inform us the officers are now appealing their suspensions. Although you contend this information must be maintained in the police department's confidential internal file created under section 143.089(g) because of the pending appeals, we note that an officer's civil service file must contain documents relating to any misconduct in those cases where the police department took disciplinary action against the officer. *See* Local Gov't Code § 143.089(a)(2); *see also id.* §§ 143.051-.055 (describing “disciplinary action” for purposes of section 143.089(a)(2)); Attorney General Opinion JC-0257 (2000). We note section 143.089(c) provides that information that must be placed in a civil service file under section 143.089(a)(2) may be removed if the civil service commission determines that (1) the disciplinary action was taken without just cause or (2) the charge of misconduct was not

supported by sufficient evidence. *See* Local Gov't Code § 143.089(c). Section 143.089(c), therefore, signifies that complaint files resulting in disciplinary action must be placed in the civil service file during the pendency of the appeal. We find Exhibits C and D relate to misconduct that resulted in disciplinary action against the officers at issue. Therefore, the information at issue must be maintained in the officers' civil service files pursuant to section 143.089(a)(2), and it may not be withheld under section 552.101 in conjunction with section 143.089(g) of the Local Government Code. As you raise no additional exceptions to disclosure for the information we have marked under section 552.022 in Exhibits C and D, it must be released to the requestor. However, we will address your remaining argument against disclosure for the remaining information in Exhibits C and D that is not subject to section 552.022.

You assert the remaining information in Exhibits A through E is protected by section 552.103 of the Government Code, which provides, in relevant 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 to show that the section 552.103(a) exception applies in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the requested information is related to that litigation. *See 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 governmental body must meet both parts of this test for information to be excepted under section 552.103(a). *See* ORD 551 at 4.

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 demonstrate 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.³ 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. 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).

In this instance, you inform us that the remaining information pertains to the appeals filed by the officers at issue. You state municipal civil service appeals, such as the ones requested by the officers, are governed by chapter 143 of the Local Government Code. *See* Local Gov't Code §§ 143.057, .127-.131. You contend that the civil service appeals in this instance constitute "litigation," and you contend that the documents at issue are related to the pending litigation for purposes of section 552.103. This office has determined that such appeal proceedings constitute litigation for purposes of section 552.103. *Cf.* Open Records Decision No. 588 (1991) (discussing factors used by attorney general in determining whether administrative proceeding not subject to Administrative Procedure Act may be considered to be litigation). The officer whose information is found in Exhibits A and C, and a portion of Exhibit E, filed his appeal before the date the city received the request. Therefore, we find, as to this officer, litigation was pending on the date of the request, and we agree the information at issue relates to the litigation. Accordingly, we find section 552.103 generally applies to the remaining portions of Exhibits A and C and the information pertaining to this officer's arbitration in Exhibit E. We note, however, the opposing party has seen or had access to some of the information at issue. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to the litigation to obtain such information through discovery procedures. *See* ORD 551 at 4-5. Thus, once the opposing party in pending litigation has seen or had access to information that is related to the litigation, there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Accordingly, the portions of the information in Exhibits C and E that the opposing party to the litigation has seen or had access to, which we have marked, and any other submitted information the opposing party has already seen or had

³ 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).

access to, must be released. However, the remaining information in Exhibit A and the information we have marked in Exhibit E may be withheld under section 552.103 of the Government Code. We note the applicability of section 552.103 ends once the related litigation concludes. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

We note the appeal of the officer whose information is found in Exhibits B and D and the remaining portion of Exhibit E was not filed until after the date the city received the instant request. Further, you have not established this officer had taken any other concrete steps toward litigation on the date of the request. Therefore, we conclude that litigation concerning this officer was neither pending nor reasonably anticipated when the city received the current request. Therefore, the city may not withhold the remaining information in Exhibit B, D, or E under section 552.103 of the Government Code. However, we note portions of the remaining information in Exhibit B are subject to sections 525.101, 552.102, 552.117, 552.1175, 552.130, and 552.136 of the Government Code.⁴ Therefore, we will address the applicability of these exceptions.

Section 552.101 of the Government Code also encompasses the common-law right to privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) 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 met. *Id.* at 681-82. Common-law privacy protects the types of information held to be intimate or embarrassing in *Industrial Foundation*. *See id.* at 683 (information relating to sexual assault, pregnancy, mental or physical abuse in workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). This office has found some kinds of medical information or information indicating disabilities or specific illnesses are generally highly intimate or embarrassing. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). In addition, this office has determined financial information that does not relate to a financial transaction between an individual and a governmental body ordinarily satisfies the first requirement of the test for common-law privacy. For example, information related to an individual's mortgage payments, assets, bills, and credit history is generally protected by the common-law right to privacy. *See* Open Records Decision Nos. 545 (1990), 523 (1989); *see also* Open Records Decision No. 600 (1992) (public employee's withholding allowance certificate, designation of beneficiary of employee's retirement benefits, direct deposit authorization, and employee's decisions regarding voluntary benefits programs are

⁴ The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

protected under common-law privacy). However, there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. *See* ORDs 600 at 9 (information revealing employee participation in group insurance plan funded partly or wholly by governmental body is not excepted from disclosure), 545 (financial information pertaining to receipt of funds from governmental body or debts owed to governmental body not protected by common-law privacy). Upon review, we find the information we have marked in Exhibit B is highly intimate or embarrassing and of no legitimate public interest. Therefore, the city must withhold the marked information under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.102(a) of the Government Code 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). The Texas Supreme Court recently held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, No. 08-0172, 2010 WL 4910163 (Tex. Dec. 3, 2010). Having carefully reviewed the information at issue, we have marked information in Exhibit B that must be withheld under section 552.102(a) of the Government Code.

Section 552.117 of the Government Code provides, in relevant part:

(a) Information is excepted from the requirements of Section 552.021 if it is information that relates to the home address, home telephone number, emergency contact information, or social security number of the following person or that reveals whether the person has family members:

(1) a current or former official or employee of a governmental body, except as otherwise provided by Section 552.024;

(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[.]

Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 2 (to be codified as an amendment to Gov’t Code § 552.117(a)). Section 552.117(a)(2) applies to the personal information of peace officers as defined by article 2.12 of the Code of Criminal Procedure. It is unclear whether the individuals whose information is at issue are currently licensed peace officers as defined by article 2.12 of the Code of Criminal Procedure. Therefore, if the individuals at issue in Exhibit B are currently licensed peace officers, then, with the exception of the information we have marked for release, the city must withhold the information you have marked, and the additional information we have marked, under section 552.117(a)(2) of the Government Code.

However, if the individuals at issue are not licensed peace officers, then those individuals' personal information is subject to section 552.117(a)(1) of the Government Code. Section 552.117(a)(1) of the Government Code excepts from disclosure the personal information of a current or former official or employee of a governmental body who requests that this information be kept confidential under section 552.024 of the Government Code. *See id.* §§ 552.117, .024. Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. We note the submitted information demonstrates one of the individuals at issue timely elected confidentiality under section 552.024. Thus, if that individual is not a currently licensed peace officer, then, with the exception of the information we have marked for release, the city must withhold the information you have marked under section 552.117(a)(1). If the other individual at issue is not a currently licensed peace officer and timely elected confidentiality under section 552.024, the city must withhold his information we have marked under section 552.117(a)(1). However, if the other individual did not timely elect confidentiality under section 552.024, the city may not withhold his information we have marked under section 552.117(a)(1).

Section 552.1175 of the Government Code protects certain information of peace officers, as defined by article 2.12 of the Code of Criminal Procedure, when the information is not held by the governmental body in an employment capacity. *See* Gov't Code § 552.1175(a)(1). Section 552.1175 provides, in relevant part:

(b) Information that relates to the home address, home telephone number, emergency contact information, or social security number of an individual to whom this section applies, or that reveals whether the individual has family members is confidential and may not be disclosed to the public under this chapter if the individual to whom the information relates:

(1) chooses to restrict public access to the information; and

(2) notifies the governmental body of the individual's choice on a form provided by the governmental body, accompanied by evidence of the individual's status.

Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 3 (to be codified as an amendment to Gov't Code § 552.1175(b)). We have marked information of peace officers in Exhibit B that is subject to section 552.1175. If these individuals are currently licensed peace officers and elect to restrict access to their information in accordance with section 552.1175(b), the city must withhold the marked information under section 552.1175 of the Government Code.

Section 552.130 of the Government Code exempts from disclosure information that relates to a motor vehicle operator's or driver's license, title, or registration issued by an agency of this state, or another state or country. Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 4 (to be codified as amendments to Gov't Code § 552.130(a)(1)-(2)). Therefore, the city must withhold the information we have marked in Exhibit B under section 552.130.

Section 552.136 of the Government Code provides that "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136(b). An access device number is one that may be used to "(1) obtain money, goods, services, or another thing of value; or (2) initiate a transfer of funds other than a transfer originated solely by paper instrument" and includes an account number. *Id.* § 552.136(a). This office has also concluded that an insurance policy number is an access device number for purposes of section 552.136. Therefore, the city must withhold the bank account, bank routing, and insurance policy numbers we have marked in Exhibit B under section 552.136.

In summary, the city must release the information we have marked under section 552.022(a)(1) in Exhibits A, B, C, and D. The city may withhold the remaining information in Exhibit A and the information we have marked in Exhibit E under section 552.103. The city must withhold the information we have marked in Exhibit B under section 552.101 in conjunction with common-law privacy and under section 552.102. If the individuals at issue in Exhibit B are licensed peace officers, then, with the exception of the information we have marked for release, the city must withhold the information you have marked and the additional information we have marked under section 552.117(a)(2). If the individual whose confidentiality form was submitted in Exhibit B is not a licensed peace officer, then, with the exception of the information we have marked for release, the city must withhold the information you have marked under section 552.117(a)(1). If the other individual is not a licensed peace officer and timely elected confidentiality, the city must withhold the information we have marked under section 552.117(a)(1). The city must withhold the information we have marked in Exhibit B under section 552.1175 if the individuals at issue are licensed peace officers and elect confidentiality. Finally, the city must withhold the information we have marked in Exhibit B under sections 552.130 and 552.136. The remaining information must be released to the requestor.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free,

at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free at (888) 672-6787.

Sincerely,

A handwritten signature in cursive script that reads "Misty Haberer Barham".

Misty Haberer Barham
Assistant Attorney General
Open Records Division

MHB/agn

Ref: ID # 436163

Enc. Submitted documents

c: Requestor
(w/o enclosures)