



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

January 21, 1997

Mr. W. Daniel Vaughn
McLeod, Alexander, Powel & Apffel
P.O. Box 629
Galveston, Texas 77553

OR97-0108

Dear Mr. Vaughn:

You ask whether certain information is subject to required public disclosure under the Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 103010.

The Park Board of Trustees of the City of Galveston (the "Board") received a request for information pertaining to the Moody Foundation, Moody Gardens, Inc., and the Moody Gardens Complex. You assert that portions of the requested information are excepted from required public disclosure based on Government Code sections 552.101, 552.102, 552.103, 552.104, 552.107(1), 552.110, 552.111, 552.115 and 552.122. You submitted representative samples of the information the Board seeks to withhold from public disclosure.¹

Section 552.101 of the Government Code excepts from disclosure information that is made confidential by law, including constitutional, statutory and judicial decision. This exception applies to information made confidential by the common-law right to privacy. *Industrial Found. of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). We agree that section 552.101 in conjunction with the common-law right to privacy covers portions of the information, including salary, insurance and pension plan information, *see* Open Records Decision No. 600 (1992), drug test result information not covered by the Medical Practices Act ("MPA")², V.T.C.S. article 4495b,

¹In reaching our conclusion here, we 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) (where requested documents are numerous and repetitive, governmental body should submit representative sample; but if each record contains substantially different information, all must be submitted). 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.

²You also assert that Government Code section 552.102 covers the drug test results. In light of our decision that this information is covered by section 552.101, we need not address your section 552.102 claim.

certain information pertaining to allegations of sexual harassment, *cf. Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.-El Paso 1992, writ denied).

Section 552.101 also covers information deemed confidential by statute. The following information is confidential by statute: certain medical records, *see* V.T.C.S. art. 4495b, § 5.08; tax return information, 26 U.S.C. § 61.03(a); records of the identity, diagnosis, evaluation or treatment of a person with mental retardation, Health & Safety Code § 595.001; Employment Eligibility Verification, Form I-9, 8 U.S.C. § 1324a(b)(5); the peace officer's accident report in exhibit V of the November 14, 1996, submission, V.T.C.S. art. 6701d, § 47 (found following Transportation Code section 550.065); child support information, Family Code § 231.108(a); and information pertaining to welfare recipients found in exhibit B of the October 21, 1996, submission, *see* Open Records Decision No. 584 (1990).

Section 552.103(a) of the Government Code reads as follows:

(A) Information is excepted from [required public disclosure] if it is information:

- (1) relating to litigation of a civil or criminal nature or settlement negotiations, 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; and
- (2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

To secure the protection of section 552.103(a), a governmental body must demonstrate that requested information "relates" to a pending or reasonably anticipated judicial or quasi-judicial proceeding. Open Records Decision No. 588 (1991). A governmental body has the burden of providing relevant facts and documents to show the applicability of an exception in a particular situation. The test for establishing that section 552.103 applies is a two-prong showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.).

Section 552.103 is generally applicable only where litigation involves or is expected to involve the governmental body claiming the exception. *See* Open Records Decision Nos. 392 (1983). Exhibit A of your October 21, 1996, does not contain information that relates to litigation to which the Board is a party. Consequently, the Board may not withhold exhibit A from the requestor based on section 552.103. However, we agree that exhibit FF of your November 14, 1996, submission relates to pending litigation to which the Board is

a party. Therefore, the Board may withhold exhibit FF from the requestor based on section 552.103.³

Section 552.104 of the Government Code provides as follows:

Information is excepted from [required public disclosure] if it is information that, if released, would give advantage to a competitor or bidder.

You raise this exception for various information of Moody Gardens, Inc.

The purpose of section 552.104 is to protect the competitive interests of a governmental body usually in situations such as competitive bidding and requests for proposals in which the governmental body may wish to withhold information to obtain more favorable offers. *See* Open Records Decision No. 592 (1981). It is not designed to protect the interest of private parties that submit information to governmental bodies. *See id.*

We do not believe you have explained how the release of Moody Gardens information will harm the Board's competitive interests. Accordingly, the Board may not withhold exhibit X from the requestor based on section 552.104.

Government Code section 552.107 states that information is excepted from required public disclosure if:

- (1) it is information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Civil Evidence, the Texas Rules of Criminal Evidence, or the Texas Disciplinary Rules of Professional Conduct; or
- (2) a court by order has prohibited disclosure of the information.

As interpreted by this office, subsection (1) of this provision essentially incorporates the attorney-client privilege. *See* Open Records Decision No. 574 (1990). Thus, subsection (1) protects an attorney's communication of legal advice or opinion or client confidences. You raise this exception in regard to exhibit A of your October 21, 1996, submission. As you have not established that exhibit A is a Board attorney's communication of advice or opinion or a client confidence, we conclude that section 552.107(1) is inapplicable to exhibit A.

³If the opposing party in the litigation has seen or had access to any of the information in these records, there would be no justification for now withholding that information from the requestor pursuant to section 552.103(a). *See* Open Records Decision Nos. 349 (1982), 320 (1982). In addition, the applicability of section 552.103(a) ends once the litigation is concluded. *Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).* Having concluded that the Board may withhold exhibit FF from disclosure, we need not consider the other exceptions you raise for this information.

You raise subsection (2) of section 552.107 in regard to exhibit Q of your November 14, 1996, submission, a settlement agreement between Moody Gardens and AT & T Corporation. Even assuming subsection (2) applied to a settlement agreement to which the Board is a party, you have not established that a court by order has prohibited the disclosure of the agreement.

Section 552.115 of the Government Code provides:

A birth or death record maintained by the bureau of vital statistics of the Texas Department of Health is excepted from the requirements of Section 552.021, except that:

(1) a birth record is public information and available to the public on and after the 50th anniversary of the date on which the record is filed with the bureau of vital statistics or local registration official; and

(2) a death record is public information and available to the public on and after the 25th anniversary of the date on which the record is filed with the bureau of vital statistics or local registration official.

Exhibit U of your November 14, 1996, submission is a birth certificate. However, by its terms, section 552.115 is limited to the records of the bureau of vital statistics. Thus, the Board may not withhold the birth certificate from the requestor based on section 552.115.

Section 552.122 reads as follows:

(a) A test item developed by an educational institution that is funded wholly or in part by state revenue is excepted from [required public disclosure].

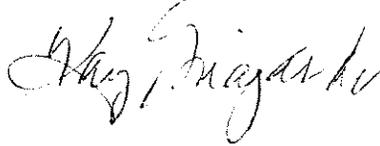
(b) A test item developed by a licensing agency or governmental body is excepted from [required public disclosure].

This exception applies to test items of certain educational institutions, a licensing agency or a governmental body. See Open Records Decision No. 626 (1994) (considering scope of the phrase "test item"). You raise section 552.122 for a test administered by Moody Gardens to its employees. Regardless of whether this test is a test item for purposes of section 552.122, we conclude that the exception is inapplicable here as you have not established that Moody Gardens is an educational institution, licensing agency or governmental body.

We have marked the submitted documents in accordance with the conclusions we have reached. We are resolving this matter with this informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue

under the facts presented to us in this request and may not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Kay Guajardo
Assistant Attorney General
Open Records Division

KHG/rho

Ref.: ID# 103010

Enclosures: Marked documents

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