



October 17, 2000

Mr. Mark Anthony Sanchez  
Gale, Wilson & Sanchez  
115 East Travis, Suite 618  
San Antonio, Texas 78205

OR2000-4043

Dear Mr. Sanchez:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 140170

The Alamo Community College District (the "district"), which you represent, received a request for seven categories of information. You claim that the requested information is excepted from disclosure under sections 552.102 and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information, Exhibits 5-11.

First, we note that the submitted documents contain certain information that must be released under section 522.022(a). Section 552.022(a) provides in relevant part:

(a) Without limiting the amount or kind of information that is public information under this chapter, 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;

(2) the name, sex, ethnicity, salary, title, and dates of employment of each employee and officer of a governmental body;

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by governmental body;

...

(8) a statement of the general course and method by which an agency's functions are channeled and determined, including the nature and requirements of all formal and informal policies and procedures[.]

Gov't Code § 552.022(a)(2), (3), (8). Section 552.103 is a discretionary exception and not "other law" for purposes of section 552.022.<sup>1</sup> However, section 552.102 is a mandatory exception and therefore does constitute such "other law." Therefore, we must consider whether section 552.102 excepts this information from public disclosure.

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 ref'd 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 Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976) for information claimed to be protected under the doctrine of common law privacy as incorporated by section 552.101 of the Act. Common law privacy excepts from disclosure private facts about an individual. Therefore, information must be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 at 1 (1992). Section 552.102(b) also excepts the release of a professional public school employee's transcript from an institution of higher education that is maintained in that employee's personnel file. However, the degree obtained and the curriculum on that transcript must be released. See Gov't Code § 552.102(b). After reviewing the submitted documents that fall under section 552.022(a), we conclude that they contain no information that is excepted from public disclosure under either subsection of 552.102. Therefore, the information contained in the submitted documents that falls under section 552.022(a) must be released. We have marked the types of information to be released.

Section 552.103(a) excepts from disclosure information relating to litigation to which a governmental body is or may be a party. The governmental body has the burden of providing relevant facts and documents to show that section 552.103(a) applies. To show that section 552.103 is applicable, the city must demonstrate that 1) litigation is pending or reasonably anticipated and 2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App. -- Austin, 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.-- Houston[1st Dist] 1984,

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<sup>1</sup>Discretionary 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. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 592 at 8 (1991) (governmental body may waive section 552.104, information relating to competition or bidding), 549 at 6 (1990) (governmental body may waive informer's privilege), 522 at 4 (1989) (discretionary exceptions in general). Discretionary exceptions therefore do not constitute "other law" that makes information confidential.

writ ref'd n.r.e.); Open Records Decision No. 588 (1991). Additionally, Section 552.103(c) provides that

[i]nformation 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 the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(c).

Section 552.103 requires concrete evidence that litigation may ensue. To demonstrate that litigation is reasonably anticipated, the city must furnish evidence that litigation is realistically contemplated and is more than mere conjecture. Open Records Decision No. 518 at 5 (1989). You inform this office that prior to receiving this instant request for information, the district has received a Notice of Charge of Discrimination from the Equal Employment Opportunity Commission ("EEOC") in which a named employee claims that he is the victim of discrimination based upon gender and national origin. You have provided a copy of the notice for our review. This office has stated that a pending EEOC complaint indicates that litigation is reasonably anticipated. *See* Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982). You have also submitted a copy of an employee grievance submitted to the district by the employee's attorney, which sets forth a complaint regarding the constructive termination of the employee's employment with the district and demands, among other things, a settlement for a specific amount of money. Based on your arguments and our review of the submitted information, we conclude that you have shown that litigation is reasonably anticipated. Furthermore, we find that the requested information relates to the anticipated litigation. Therefore, you may withhold the remainder of the submitted information pursuant to section 552.103(a).

We note, however, that once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information and such information must be disclosed. *See* Open Records Decision Nos. 349 (1982), 320 (1982). We find that portions of the submitted documents, especially in Exhibits 9 and 11, contain information that has been created or seen by the opposing party. We emphasize that none of the submitted information that has been seen by the opposing party is excepted from public disclosure by section 552.103(a) and must be released to the requestor. In addition, the applicability of section 552.103(a) ends once the litigation has concluded. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, the district must release the information in the submitted documents that fall within the purview of section 552.022(a). We have marked the types of information that the district must release under section 552.022(a). The district may withhold much of the remaining submitted information under section 552.103(a). However, the district must

release all information that was created or seen by the opposing party under section 552.103(c).

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 Department of Public 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 the General Services 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. 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,

  
Noelle C. Letten  
Assistant Attorney General  
Open Records Division

NCL/pr

Ref: ID# 140170

Encl. Submitted documents

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