



June 27, 2001

Ms. Sylvia F. Hardman
General Counsel
Texas Rehabilitation Commission
4900 North Lamar Blvd.
Austin, Texas 78751-2399

OR2001-2773

Dear Ms. Hardman:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 148874.

The Texas Rehabilitation Commission (the "commission") received a request for all electronic messages sent or received by the requestor while in the commission's employment. You state that you will provide some of the requested information to the requestor. You claim, however, that the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.108, 552.111, and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

First, you contend that the information in Exhibit 3 is excepted from disclosure under section 552.103 of the Government Code. Initially, we note that Exhibit 3 contains information that falls within the purview of section 552.022(a)(1). Section 552.022 makes "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body" public information unless expressly made confidential under other law or "except as provided by [s]ection 552.108[.]" Gov't Code § 552.022(a)(1). Section 552.103 is a discretionary exception under the Public Information Act and is, therefore, not "other law" that makes the submitted information confidential. *See* Open Records Decision No. 551 (1990) (statutory predecessor to section 552.103 serves only to protect a governmental body's position in litigation and does not itself make information confidential). Therefore, you may not withhold the completed report in Exhibit 3 from disclosure under section 552.103 of the Government Code.

We now address your claim under section 552.103 with respect to the remaining information in Exhibit 3. Section 552.103 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). Section 552.103 was intended to prevent the use of the Act as a method of avoiding the rules of discovery in litigation. Attorney General Opinion JM-043 at 4 (1989). The litigation exception enables a governmental body to protect its position in litigation by requiring information related to the litigation to be obtained through discovery. Open Records Decision No. 551 at 3 (1990). To show that the litigation exception is applicable, the commission must demonstrate that (1) litigation was pending or reasonably anticipated at the time of the request and (2) the information at issue is related to that litigation. *See* Gov't Code § 552.103(a), (c); *see also* *University of Tex. Law Sch. v. Texas 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).

You state that the commission is currently a defendant in a pending lawsuit, which was filed on December 18, 2001. Our review of the submitted information indicates that this lawsuit involves an employee's claim of discrimination, which the employee alleges resulted in false performance appraisals and the denial of merit raises. You state that some of the electronic messages in Exhibit 3 pertain to issues related to this pending lawsuit or to employment issues related to the plaintiff in this lawsuit. Based on your arguments and our review of the submitted information, we conclude that you have made the requisite showing that some of the electronic messages in Exhibit 3 relate to litigation that was pending on the day that the request was received and may therefore be withheld from disclosure under section 552.103(a).

We note, however, that if the opposing party in the litigation has seen or had access to any of the information in these records, there is no section 552.103(a) interest in withholding that information from the requestor. Open Records Decision Nos. 349 (1982), 320 (1982). Here, it is apparent that at least some of the electronic messages related to the pending litigation were addressed to or created by the plaintiff in the pending litigation. Such electronic messages may not be withheld from disclosure under section 552.103. In addition, the applicability of section 552.103(a) ends once the litigation concludes. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

You also argue that some of the information in Exhibit 3 relates to the status of actions in pending cases, to charges of racism asserted by commission employees against the commission, or to employee terminations. We agree that the information regarding the status of actions in pending cases may be withheld under section 552.103(a). However, you have not demonstrated that the information regarding charges of racism or employee termination relate to either pending or anticipated litigation. 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; the mere chance of litigation will not establish the litigation exception. Open Records Decision No. 452 at 4 (1986) Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *Id.* As you have not provided any evidence to indicate that litigation involving any of the charges of racism or any of the employee terminations is pending or anticipated, we conclude that you may not withhold electronic messages regarding such issues under section 552.103(a). We have marked the information in Exhibit 3 that may be withheld under section 552.103(a). The remaining information in Exhibit 3 must be released to the requestor.

Next, you argue that the information in Exhibits 4a and 4b is confidential pursuant to Title I of the Americans with Disabilities Act of 1990 (the "ADA"), 42 U.S.C. §§ 12101 *et seq.*, and must therefore be withheld from disclosure under section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. The ADA provides that information about the medical conditions and medical histories of applicants or employees must be 1) collected and maintained on separate forms, 2) kept in separate medical files, and 3) treated as a confidential medical record. In addition, information obtained in the course of a "fitness for duty examination," conducted to determine whether an employee is still able to perform the essential functions of his job, is to be treated as a confidential medical record. 29 C.F.R. § 1630.14(c). *See also* Open Records Decision No. 641 (1996). The Equal Employment Opportunity Commission (the "EEOC") has determined that medical information for the purposes of the ADA includes "specific information about an individual's disability and related functional limitations, as well as general statements that an individual has a disability or that an ADA reasonable accommodation has been provided for a particular individual." *See* Letter from Ellen J. Vargyas, Legal Counsel, EEOC, to Barry Kearney, Associate General Counsel, National Labor Relations Board, 3 (Oct. 1, 1997). We agree that most of the information in Exhibit 4a must be withheld under section 552.101 and the ADA. We have marked the information in Exhibit 4a that we conclude is not confidential under the ADA and must therefore be released to the requestor. The unmarked information in Exhibit 4a must be withheld from disclosure under section 552.101 and the ADA. Upon careful review of the information in Exhibit 4b, however, we are unable to conclude that the majority of this information, which relates to individuals taking sick leave, leave under the FMLA, or leave without pay, is confidential under the ADA. We have, however, marked some information that must be withheld under section 552.101 and the ADA.

Section 552.101 also encompasses the Family and Medical Leave Act, 29 U.S.C. § 2654 (the "FMLA"). Section 825.500 of chapter V of title 29 of the Code of Federal Regulations identifies the record-keeping requirements for employers that are subject to the FMLA. Subsection (g) of section 825.500 states that

[r]ecords and documents relating to medical certifications, recertifications or medical histories of employees or employees' family members, created for purposes of FMLA, shall be maintained as confidential medical records in separate files/records from the usual personnel files, and if ADA is also applicable, such records shall be maintained in conformance with ADA confidentiality requirements . . . , except that:

- (1) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations;
- (2) First aid and safety personnel may be informed (when appropriate) if the employee's physical or medical condition might require emergency treatment; and
- (3) Government officials investigating compliance with FMLA (or other pertinent law) shall be provided relevant information upon request.

29 C.F.R. § 825.500(g). While certain records related to an employee's medical leave may be confidential under the FMLA, such as the person's medical history, nowhere does the FMLA or its regulations provide for the confidentiality of the identity of a person taking advantage of family or medical leave. Therefore, we are unable to conclude that the information in Exhibit 4b, which relates to individuals taking sick leave, leave under the FMLA, or leave without pay, is confidential under that federal statute or its implementing regulations.

You also contend that the information in Exhibits 4a and 4b is excepted under section 552.102 of the Government Code. Section 552.102 protects "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." The scope of section 552.102(a) protection, however, is very narrow. *See* Open Records Decision No. 336 (1982); *see also* Attorney General Opinion JM-36 (1983). The test for section 552.102(a) protection is the same as that for information protected by common law privacy under section 552.101: the information must contain highly intimate or embarrassing facts about a person's *private* affairs such that its release would be highly objectionable to a reasonable person *and* the information must be of no legitimate concern to the public. *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 550 (Tex. App. - Austin 1983, writ ref'd n.r.e.).

This office has concluded that financial information concerning an individual is in some instances protected by a common law right to privacy. *See* Open Records Decision Nos. 545 (1990), 523 (1989). A previous opinion of this office states that “all financial information relating to an individual . . . ordinarily satisfies the first requirement of common law privacy, in that it constitutes highly intimate or embarrassing facts about the individual, such that its public disclosure would be highly objectionable to a person of ordinary sensibilities.” Open Records Decision No. 373 at 3 (1983). We have marked the personal financial information in Exhibit 4a and 4b that must be withheld from disclosure under section 552.102 and common law privacy.

You also assert that the information in Exhibit 4b “relates to personal family information” and should be excepted from disclosure under the common law right to privacy or section 552.102 of the Government Code. The information in Exhibit 4b, which relates to individuals taking sick leave, leave under the FMLA, or leave without pay, cannot be deemed to be outside the realm of public interest. *See* Open Records Decision No. 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees). Section 552.102 was not intended to protect this type of information in Exhibit 4b from disclosure.

Next, you contend that information in Exhibit 4c “relating to criminal history record information (CHRI) or criminal background checks (CBC) obtained from the Texas Department of Public Safety on applicants and/or employees of [the commission],” is confidential under section 552.101. Section 411.083 of the Government Code provides that any criminal history record information (“CHRI”) maintained by the Department of Public Safety (“DPS”) is confidential. Gov’t Code § 411.083(a). Similarly, CHRI obtained from DPS pursuant to statute is also confidential and may only be disclosed in very limited instances. *Id.* § 411.084; *see also id.* § 411.087 (restrictions on disclosure of CHRI obtained from department also apply to CHRI obtained from other criminal justice agencies). CHRI consists of “information collected about a person by a criminal justice agency that consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions.” Gov’t Code § 411.082(2). Based on our review of the information submitted in Exhibit 4c, we conclude that it does not constitute CHRI and, therefore, is not confidential under section 411.083 of the Government Code.

You also argue that the information in Exhibit 4c is excepted from disclosure under section 552.108. Section 552.108, the “law enforcement exception” applies to certain information held by a law enforcement agency or prosecutor. Gov’t Code § 552.108. The commission is neither a law enforcement agency nor a prosecutor. Nor do you assert the interests of any other law enforcement agency or prosecutor. *See, e.g.*, Open Records Decision Nos. 474 (1987), 372 (1983); *see also* Open Records Decision No. 586 (1991). Therefore, the commission may not withhold the information in Exhibit 4c under section 552.108 of the Government Code. This information must therefore be released to this requestor.

Next, you contend that the information in Exhibit 5 is excepted from disclosure under section 552.111 of the Government Code. Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. An agency's policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. Open Records Decision 615 at 5-6. An agency's policymaking functions do include, however, administrative and personnel matters of broad scope that affect the governmental body's policy mission. Open Records Decision 631 at 3 (1995). Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. Open Records Decision 615 at 4-5. We have marked the information in Exhibit 5 that the commission may withhold under section 552.111 of the Government Code. The remaining information in Exhibit 5 must be released to the requestor.

Lastly, we note that section 552.117 may be applicable to some of the submitted information. Section 552.117 excepts from disclosure the home address and telephone number, social security number, and family member 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. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the commission may only withhold information under section 552.117 on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was received. For any employee who timely elected to keep his or her personal information confidential, the commission must withhold the employee's home address and telephone number, social security number, and any information that reveals whether the employee has family members. The commission may not withhold this information under section 552.117 for an employee who did not make a timely election to keep the information confidential. We have marked the type of information in the submitted documents that is excepted from disclosure under section 552.117 if the employee has made a timely election under section 552.024.

To summarize: (1) the commission may withhold the information we have marked in Exhibit 3 under section 552.103(a); (2) the remaining information in Exhibit 3 must be released to the requestor; (3) we have marked the information in Exhibit 4a that is not confidential under the ADA and must therefore be released to the requestor; (4) the unmarked information in Exhibit 4a must be withheld under section 552.101 and the ADA; (5) we have marked the information in Exhibit 4b that is confidential under the

ADA; (6) we have marked the information in Exhibit 4a and 4b that must be withheld under section 552.102 and common law privacy; (7) the unmarked information in Exhibit 4b must be released to the requestor; (8) as the information in Exhibit 4c does not consist of CHRI, and as you have not demonstrated that the commission may withhold this information under section 552.108, the commission must release the information in Exhibit 4c to the requestor; (9) we have marked the information in Exhibit 5 that the commission may withhold under section 552.111; (10) the remaining information in Exhibit 5 must be released to the requestor; and (11) we have marked the type of information in the submitted documents that is excepted from disclosure under section 552.117 for any employee that has made a timely election under section 552.024.

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 Hadassah Schloss at 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,



Karen A. Eckerle
Assistant Attorney General
Open Records Division

KAE/sdk

Ref: ID# 148874

Enc: Submitted documents

cc: Ms. Josefina Sanchez
15508 Sarah's Creek Drive
Pflugerville, Texas 78660
(w/o enclosures)