



OFFICE *of the* ATTORNEY GENERAL  
GREG ABBOTT

March 19, 2003

Ms. Alice Cardozo  
Assistant Disclosure Officer  
Texas Workforce Commission  
101 East 15<sup>th</sup> Street  
Austin, Texas 78778-0001

OR2003-1883

Dear Ms. Cardozo:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 178076.

The Texas Workforce Commission (the "commission") received a request for information relating to claims for wages made by a named individual; intake information given by the individual to the commission's local offices; appeal documents; and audiotapes of any hearings held. You claim that the requested information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and have reviewed the information you submitted.

We first note that some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides 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:

...

(12) final opinions, including concurring and dissenting opinions, and orders issued in the adjudication of cases[.]

Gov't Code § 552.022(a)(12). We have marked the submitted information that is subject to section 552.022(a)(12). The commission must release the marked information unless it is expressly confidential under other law. Section 552.103 of the Government Code is a discretionary exception to disclosure that protects the governmental body's interests and may be waived. *See 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. 542 at 4 (1990) (litigation exception does not implicate third-party rights and may be waived). As such, section 552.103 is not other law that makes information confidential for the purposes of section 552.022. Therefore, the commission may not withhold the marked information that is subject to section 552.022(a)(12) under section 552.103.

We note, however, that the information that is subject to section 552.022(a)(12) includes a social security number. A social security number may be excepted from disclosure under section 552.101 of the Government Code in conjunction with 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), if a governmental body obtained or maintains the social security number pursuant to any provision of law enacted on or after October 1, 1990.<sup>1</sup> *See* Open Records Decision No. 622 at 2-4 (1994). It is not apparent to this office that the social security number in question here is confidential under section 405(c)(2)(C)(viii)(I) of the federal law. You have cited no law, and we are aware of no law, enacted on or after October 1, 1990 that authorizes the commission to obtain or maintain a social security number. Thus, we have no basis for concluding that this social security number was obtained or is maintained pursuant to such a law and is therefore confidential under the federal law. We caution the commission, however, that chapter 552 of the Government Code imposes criminal penalties for the release of confidential information. *See* Gov't Code §§ 552.007, .352. Therefore, before releasing this social security number, the commission should ensure that it was not obtained and is not maintained pursuant to any provision of law enacted on or after October 1, 1990.

Next, we address your claim under section 552.103 of the Government Code with regard to the information that is not subject to section 552.022. Section 552.103 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.

...

---

<sup>1</sup>Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception protects information that another statute makes confidential.

(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). The 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 *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 (Tex. App.—Houston [1<sup>st</sup> Dist.] 1984, writ ref'd n.r.e.); see also Open Records Decision No. 551 at 4 (1990). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *Id.*

You state that the submitted information relates to a pending lawsuit to which the commission is a party. We understand that the litigation was pending when the commission received this request for information. Based on your representation and our review of the submitted information, we find that section 552.103 is applicable in this instance. We note, however, that the purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties that seek information relating to the litigation to obtain the information through discovery procedures. See Open Records Decision No. 551 at 4-5 (1990). Therefore, if the opposing party or parties to pending litigation have seen or had access to information relating to the litigation, through discovery or otherwise, there is no interest in withholding such information from public disclosure under section 552.103. See Open Records Decision Nos. 349 (1982), 320 (1982). In this instance, you do not identify the opposing party or parties to the litigation to which the submitted information is related. Nevertheless, an opposing party to the litigation appears to have seen or had access to some of the information that you now seek to withhold. The commission may not now withhold, under section 552.103, any information that the opposing party or parties to the pending litigation have seen or to which the opposing party or parties have had access. Otherwise, the submitted information that is not subject to section 552.022 is excepted from disclosure at this time under section 552.103. We note that the applicability of section 552.103 to this information ends once the related litigation concludes. See Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982). The commission must not release confidential information, however, even at the conclusion of the litigation. See Gov't Code §§ 552.007, .352.

In summary, the submitted information that is subject to section 552.022(a)(12) includes a social security number that may be excepted from disclosure under section 552.101 of the Government Code in conjunction with section 405(c)(2)(C)(viii)(I) of title 42 of the United

States Code. With the possible exception of the social security number, the commission must release the information that is subject to section 552.022(a)(12). To the extent that the opposing party or parties to the pending litigation have not seen or had access to the submitted information that is not subject to section 552.022, that information is excepted from disclosure at this time under section 552.103.

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).

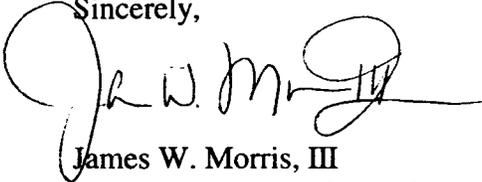
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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 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 complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,

A handwritten signature in black ink, appearing to read "J.W. Morris, III". The signature is fluid and cursive, with a large initial "J" and a long horizontal stroke at the end.

James W. Morris, III  
Assistant Attorney General  
Open Records Division

JWM/sdk

Ref: ID# 178076

Enc: Submitted documents

c: Ms. Rose C. Magallanes  
Cox & Smith  
112 East Pecan Street, Suite 1800  
San Antonio, Texas 78205-1521  
(w/o enclosures)