



OFFICE *of the* ATTORNEY GENERAL  
GREG ABBOTT

May 8, 2003

Ms. Carol Longoria  
The University of Texas System  
Office of General Counsel  
201 West Seventh Street  
Austin, Texas 78701-2902

OR2003-3121

Dear Ms. Longoria:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 180710.

The University of Texas Health Science Center (the "university") received a request for ten categories of information related to current and former university employees, and an additional six categories of information relating to university employees that the requestor previously requested. You advise that you are willing to release information that is responsive to item nine of the first part of the request, and the six categories of information of the second part of the request.<sup>1</sup> You claim that the university is not required to comply with most of the remaining portions of the request, and in the alternative, that all of the remaining requested information is excepted from disclosure under sections 552.101, 552.102, and 552.103 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted representative samples of information.<sup>2</sup>

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<sup>1</sup> You acknowledge that in Open Records Letter No. 2003-0059 (2003), this office ruled that certain information encompassing the six categories of information the requestor currently seeks in the second part of his request must be released. You advise that the request for this information was subsequently withdrawn by operation of law. *See* Gov't Code § 552.2615(b) (request is considered to have been withdrawn if requestor does not respond in writing to itemized statement sent by governmental body to requestor pursuant to section 552.2615 within ten days after statement is sent). You state that the university will provide this information to the requestor upon the requestor's agreement to payment and securing of a bond of payment. *See* Gov't Code § 552.263.

<sup>2</sup> We assume that the "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). 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.

We first note that some of the submitted records, which we have marked, are not responsive to any portion of the request for information. Therefore, we do not address the extent to which these records are public information subject to disclosure.

Next, we note that the Public Information Act (the "Act") does not require a governmental body to answer factual questions, perform legal research, or create new information in responding to a request. *See* Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 534 at 2-3 (1989). Upon review of items 5 and 10 of the first part of the request for information, we find that responding to these portions of the request would require the university to answer questions, conduct legal research, and/or create new information. Thus, we agree that the university is not required to comply with items 5 and 10 of the first part of the request.

With regard to items 1-4, 7, and 8 of the first part of the request, you claim that providing the requested information to the requestor would require the university to compile information in a manner not required by the Act. You state that these portions of the request do not seek "specific documents, but rather a list of personal and/or personnel data about unnamed individuals meeting certain criteria outlined in [the requestor's] inquiry." You argue that these items consist of interrogatories that would require the university to conduct research to collect the requested data. In this regard, we note that a hyper technical reading of the Act does not effectuate the purpose of the Act. *See* Open Records Decision Nos. 497 (1988), 44 (1974). In this instance, we find that items 1-4, 7, and 8 of the request can reasonably be judged as a request for categories of public information for purposes of the Act. Furthermore, you acknowledge that information responsive to these items exists. A governmental body has a duty to make a good faith effort to relate a request for information to information the governmental body holds or to which it has access. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App. – San Antonio 1978, writ dismissed); Open Records Decision No. 561 at 8 (1990). We note that section 552.231 of the Government Code sets out the procedures a governmental body must follow if responding to a request for information would require programming or manipulation of data.<sup>3</sup> *See* Gov't Code § 552.231 (providing procedures for governmental body to respond to requestor if manipulation of requested information is not feasible, will result in substantial interference with ongoing operations, or will result in costs to cover manipulation of information). A governmental body that fails to follow the requirements of section 552.231 is not released by that section from its obligation under the Act to provide the requested information to the requestor or seek a ruling from this office as to whether the information is exempted from disclosure. *See Fish v. Dallas Indep. Sch. Dist.*, 31 S.W. 3d 678, 682 (Tex. App. - Eastland 2000, pet. denied). Thus, a governmental body's officer for public information carries the duty of promptly producing such information to a requestor when it is requested, unless it wishes to withhold the information from disclosure. *See* Gov't Code §§ 552.203, .221. Because you have submitted information responsive to these

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<sup>3</sup> We note that the term "manipulation" is defined by the Act as the "process of modifying, rendering, or decoding of information with human intervention." Gov't Code § 552.003(2).

portions of the request, as well as information responsive to item six of the request, we will address your claims that the information is excepted from disclosure under sections 552.101, 552.102, and 552.103 of the Government Code.

Initially, we note that section 552.022 of the Government Code makes certain information expressly public, and therefore not subject to discretionary exceptions to disclosure. Section 552.022 states 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 are not excepted from required disclosure under this chapter unless they are expressly confidential under other law.

One such category of expressly public information under section 552.022 is “the name, sex, ethnicity, salary, title, and dates of employment of each employee and officer of a governmental body[.]” Gov’t Code § 552.022(a)(2). We have marked such information within the submitted documents. As prescribed by section 552.022, this information must be released to the requestor unless it is confidential under other law. Section 552.103, which serves to protect a governmental body’s position in litigation, is a discretionary exception and does not provide a compelling reason to overcome the presumption of openness. *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), 522 at 4 (1989) (discretionary exceptions in general). Therefore, you may not withhold this information under section 552.103. However, sections 552.101 and 552.102 of the Government Code constitute other law for purposes of section 552.022. Thus, we will address your claims under these exceptions for the information subject to section 552.022.

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 common-law privacy. Section 552.102 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 Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977), for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the Government Code. Accordingly, we address your section 552.101 and section 552.102 claims together.

Information must be withheld from the public under common-law privacy 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. *See Industrial Found.*, 540 S.W.2d at 685; *see also* Open Records Decision No. 611 at 1

(1992). The types of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. This office has also found that the following types of information are excepted from required public disclosure under common-law privacy: some kinds of medical information or information indicating disabilities or specific illnesses; *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps), and personal financial information pertaining to voluntary financial decisions and financial transactions that do not involve public funds, *see* Open Records Decision Nos. 600 (1992), 545 (1990).

Because of the greater legitimate public interest in information that relates to public employees, privacy under section 552.102(a) is confined to information that reveals “intimate details of a highly personal nature.” *See Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d at 549-51; *see also* Open Records Decision Nos. 470 at 4 (1987) (public employee's job performance does not generally constitute that individual's private affairs), 444 at 3 (1986) (public has obvious interest in information concerning qualifications and performance of governmental employees, particularly those involved in law enforcement), 423 at 2 (1984) (statutory predecessor to section 552.102 applicable when information would reveal intimate details of highly personal nature), 400 at 5 (1983) (statutory predecessor to section 552.102 protects information only if release would lead to clearly unwarranted invasion of privacy). Thus, privacy under section 552.102(a) is “very narrow.” *See* Open Records Decision No. 400 at 5 (1983). After reviewing the information, we find that none of it is private. Therefore, you may not withhold any of the information subject to section 552.022 under section 552.101 in conjunction with common-law privacy, or under section 552.102. Consequently, you must release the marked information to the requestor.

We now address your claim under section 552.103 of the Government Code in relation to the information not subject to section 552.022. 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-048 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). A governmental body that raises section 552.103 has the burden of providing relevant facts and documents sufficient to establish the applicability of the exception to the information that it seeks to withhold. To show that the litigation exception is applicable, the university must demonstrate that (1) litigation was pending or reasonably anticipated on the date it received 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 advise and provide documentation showing that the requestor has filed a lawsuit in Harris County District Court, involving allegations of age discrimination against the university, and you indicate that the lawsuit is currently pending. The copy of the lawsuit you provided reflects that it was filed on February 17, 2003. Based on your representations and the information you provided, we find that the university has established that civil litigation was pending when it received this request for information. Further, we conclude that you have demonstrated that the information at issue relates to the pending litigation for purposes of section 552.103.

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. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing parties in a pending lawsuit is not excepted from disclosure under section 552.103(a), and must be disclosed.<sup>4</sup> Otherwise, the university may withhold the information at issue under section 552.103.

In summary, the information that we have marked as subject to section 552.022 must be released. The remaining information may be withheld 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

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<sup>4</sup> Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

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).

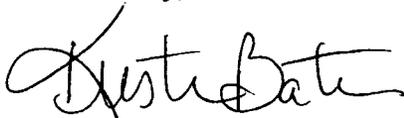
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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,



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Assistant Attorney General  
Open Records Division

KAB/lmt

Ref: ID# 180710

Enc. Submitted documents

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(w/o enclosures)