



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

June 16, 2003

Ms. Joanne Wright
Associate General Counsel
Texas Department of Transportation
125 East 11th Street
Austin, Texas 78701-2483

OR2003-4139

Dear Ms. Wright:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 182809.

The Texas Department of Transportation (the "department") received a request for personnel file and other information relating to a former employee. You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.117, 552.130, 552.136, and 552.137 of the Government Code. We have considered the exceptions 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:

- (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). In this instance, the submitted information includes completed evaluations made of, for, or by the department. You must release the completed evaluations under section 552.022(a)(1) unless they are excepted from disclosure under section 552.108 of the Government Code or 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 may be waived). As such, section 552.103 is not other law that makes information expressly confidential for the purposes of section 552.022. Therefore, the department may not withhold the information that is subject to section 552.022(a)(1) under section 552.103. We have marked that information.

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.

...

(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 [1st 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.*

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To establish that litigation is reasonably anticipated, a governmental body must provide this office with "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." *Id.* You inform us that the submitted information relates to a former employee who has filed a complaint of discrimination against the department with the Texas Commission on Human Rights (the "TCHR"). You also state, and have provided documentation demonstrating, that the complaint was filed prior to the date of the department's receipt of the present request for information. This office has determined that the filing of a complaint with the federal Equal

Employment Opportunity Commission (the "EEOC") indicates that litigation is reasonably anticipated. *See* Open Records Decision No. 336 (1982). The TCHR operates as a federal deferral agency under section 706(c) of title VII, 42 U.S.C. § 2000e-5. The EEOC defers jurisdiction to the TCHR over complaints alleging employment discrimination. *Id.* Therefore, based on your representations and the submitted copy of the complaint, we find that the department reasonably anticipated litigation when it received this request for information. We also find that the information that is not subject to section 552.022(a)(1) relates to the anticipated litigation. We therefore conclude that the department has demonstrated that section 552.103 is applicable in this instance.

We note, however, that the opposing party in the anticipated litigation is a former employee of the department. Most of the information not subject to section 552.022(a)(1) that the department seeks to withhold under section 552.103 consists of the former employee's personnel records. Much of this information was provided to or obtained from the department by the former employee, and thus the opposing party in the anticipated litigation has had access to the information. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information that relates to the litigation through discovery procedures. *See* Open Records Decision No. 551 at 4-5 (1990). Thus, if the opposing party to anticipated litigation has seen or had access to information that relates to the anticipated litigation, through discovery or otherwise, there is no interest in now withholding that information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Therefore, to the extent that the former employee previously has seen or had access to the information that is not subject to section 552.022, the department may not now withhold that information under section 552.103. The remaining information that is not subject to section 552.022 is excepted from disclosure at this time under section 552.103. We have marked that information. We note that section 552.103 is no longer applicable to the marked information once the related litigation concludes or is no longer reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

We next note that Section 552.101 of the Government Code is applicable to some of the information that is subject to section 552.022 or otherwise not excepted from disclosure under section 552.103. Section 552.101 excepts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception encompasses information that another statute makes confidential. The disclosure of medical records is governed by the Medical Practice Act (the "MPA"), as codified at subtitle B of title 3 of the Occupations Code. *See* Occ. Code § 151.001. Section 159.002 of the MPA provides in part:

- (a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Id. § 159.002(a)-(c). This office has determined that in governing access to a specific subset of information, the MPA prevails over the more general provisions of chapter 552 of the Government Code. *See* Open Records Decision No. 598 (1991). Medical records must be released upon the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. *See* Occ. Code §§ 159.004, .005. Section 159.002(c) requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. *See* Open Records Decision No. 565 at 7 (1990). Medical records may be released only as provided under the MPA. *See* Open Records Decision No. 598 (1991). We have marked the submitted information that is subject to the MPA. The department may release that information only if the MPA permits the department to do so.

A W-4 form is confidential under section 6103 of title 26 of the United States Code. Section 6103(a) makes federal tax return information confidential. The term "return information" includes "the nature, source, or amount of income" of a taxpayer. *See* 26 U.S.C. § 6103(b)(2). We have marked W-4 forms that the department must withhold under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code.

Section 552.101 of the Government Code also encompasses the common-law right to privacy. Common-law privacy under section 552.101 protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, *and* (2) of no legitimate public interest. *See Industrial Found. v. Texas Ind. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). In prior decisions, this office has determined that financial information relating only to an individual ordinarily satisfies the first element of the common-law privacy test, but the public has a legitimate interest in the essential facts about a financial transaction between an individual and a governmental body. *See, e.g.*, Open Records Decision Nos. 545 at 4 (1990), 523 at 4 (1989), 373 at 4 (1983). Thus, a public employee's allocation of part of the employee's salary to a voluntary investment program offered by the employer is a personal investment decision, and information about that decision is protected by common-law privacy. *See, e.g.*, Open Records Decision Nos. 600 at 9-12 (1992) (TexFlex benefits), 545 at 3-5 (1990) (deferred compensation plan). Likewise, an employee's designation of a

retirement beneficiary is excepted from disclosure under the common-law right to privacy. *See* Open Records Decision No. 600 at 9 (1992). However, where a transaction is funded in part by the state, it involves the employee in a transaction with the state, and the basic facts about that transaction are not protected by common-law privacy. *Id.* at 9. We have marked personal financial information that the department must withhold under section 552.101 of the Government Code in conjunction with common-law privacy.

The department also must withhold some of the submitted information under section 552.117 of the Government Code. Section 552.117(1) excepts from public disclosure the home address and telephone number, social security number, and family member information of a current or former employee of a governmental body who requests that this information be kept confidential under section 552.024. Whether a particular item of information is protected by section 552.117(1) must be determined at the time that the request for the information is received by the governmental body. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the department may only withhold information under section 552.117(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date on which the department received this request for information. The department may not withhold information under section 552.117(1) on behalf of a current or former employee who did not make a timely election to keep the information confidential. You inform us that the submitted information relates to a former employee of the department who timely elected confidentiality for his section 552.117 information under section 552.024. We have marked the information that the department must withhold under section 552.117.

The submitted documents also include Texas driver's license information. Section 552.130 of the Government Code excepts from public disclosure information that relates to "a motor vehicle operator's or driver's license or permit issued by an agency of this state[.]" Gov't Code § 552.130(a)(1). We have marked Texas driver's license information that the department must withhold under section 552.130.

Lastly, we note that the submitted documents also contain e-mail addresses. Section 552.137 of the Government Code is applicable to certain e-mail addresses and provides as follows:

- (a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.
- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Gov't Code § 552.137. Section 552.137 is applicable only to personal e-mail addresses. This exception is not applicable to institutional e-mail addresses, internet website addresses, or e-mail addresses that governmental entities maintain for their officials and employees.

You inform us that the individual to whom this e-mail address belongs has not affirmatively consented to its public disclosure. Therefore, the department must withhold the marked e-mail address under section 552.137.¹

In summary, the department may withhold the marked information that is excepted from disclosure under section 552.103 of the Government Code. The department must not release the information that is subject to the MPA unless the MPA permits the department to do so. The W-4 forms are excepted from disclosure under section 552.101 in conjunction with section 6103 of title 26 of the United States Code. The department also must withhold the information that is confidential under section 552.101 in conjunction with common-law privacy. The former employee's home address and telephone number, social security number, and family member information are excepted from disclosure under section 552.117. The department also must withhold the Texas driver's license information under section 552.130 and the personal e-mail address under section 552.137. The rest of the submitted information must be released.

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,

¹ Because we base our ruling on the above-noted exceptions to disclosure, we need not address your claim regarding section 552.136 of the Government Code.

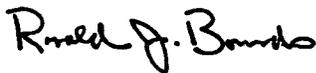
at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

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,



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/JWM/sdk

Ref: ID# 182809

Enc: Marked documents

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(w/o enclosures)