



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

July 24, 2003

Mr. Bill Crow
Corporate Counsel
San Antonio Water System
P. O. Box 2449
San Antonio, Texas 78298-2449

OR2003-5099

Dear Mr. Crow:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 187170.

The San Antonio Water System ("SAWS") received a request for information related to the termination of two named SAWS employees. You claim that the requested information is excepted from disclosure under sections 552.101, 552.102, 552.103 and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We note initially that the documents you submitted as responsive to the present request for "Employee 2" were created and received by SAWS after the date SAWS received the present request for information. Specifically, the documents for Employee 2 consist of a letter dated June 19, 2003 and an Equal Employment Opportunity Commission ("EEOC") Charge of Discrimination bearing a stamp that indicates SAWS received this document on June 30, 2003. The Public Information Act (the "Act") applies only to information in existence at the time the governmental body receives the request for information. *See* Open Records Decision Nos. 452 at 2-3 (1986) (document is not within the purview of the act if, when a governmental body receives a request for it, it does not exist), 342 at 3 (1982) (Act applies only to information in existence, and does not require the governmental body to prepare new information). Accordingly, the instant request for information, which was received by SAWS on June 18, 2003, does not apply to the submitted documents that were created after that date. As you have not submitted any other documents for Employee 2, this ruling will therefore only address your arguments with respect to the documents submitted for "Employee 1."

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 the doctrine of 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) for information claimed to be protected under the doctrine of common law privacy as incorporated by section 552.101. We will therefore consider your claims regarding common law privacy under section 552.101 together with your claims regarding section 552.102.

In *Industrial Foundation*, the Texas Supreme Court stated that information is excepted from disclosure if it (1) contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person and (2) is not of legitimate concern to the public. *Id.* at 685. The type 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.

After carefully reviewing your arguments and the submitted information, we find that none of this information is protected from disclosure under the common-law right to privacy. *See* Open Records Decision Nos. 470 (1987) (public employee’s job performance does not generally constitute his private affairs), 455 (1987) (public employee’s job performances or abilities generally not protected by privacy), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees), 438 (1986) (work behavior of a public employee and the conditions for the employee’s continued employment are matters of legitimate public interest not protected by the common-law right of privacy), 423 at 2 (1984) (explaining that because of the greater legitimate public interest in the disclosure of information regarding public employees, employee privacy is confined to information that reveals “intimate details of a highly personal nature”), 405 at 2 (1983) (manner in which employee performed his job cannot be said to be of minimal public interest), 400 at 5 (1983) (statutory predecessor protected information only if its release would lead to clearly unwarranted invasion of privacy). Accordingly, we conclude that SAWS may not withhold any of the submitted information under section 552.101 or section 552.102 in conjunction with common law privacy.

You also assert that the submitted information is confidential under constitutional privacy. Constitutional privacy, which is also incorporated by section 552.101 of the Government Code, consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual’s interest in avoiding disclosure of personal

matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual's autonomy within "zones of privacy" that include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common law doctrine of privacy and includes only information that concerns the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)). Having reviewed the submitted information, we conclude that none of it comes within one of the constitutional zones of privacy or involves the most intimate aspects of human affairs. See Open Records Decision Nos. 470, 455, 444, 423 at 2. We therefore find that none of the submitted information may be withheld on the basis of constitutional privacy.

We next address your argument that the submitted information is excepted from disclosure under section 552.103 of the Government Code. This section 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.

SAWS has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the governmental body received the request 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, 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). SAWS must meet both prongs of this test for information to be excepted under 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a

claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. Open Records Decision No. 555 (1990); see Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated.¹ See Open Records Decision No. 331 (1982). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983).

You assert that SAWS anticipates that litigation may ensue as a result of the notice of final termination issued to Employee 1. You state that Employee 1 has retained the services of a labor and employment attorney to handle an internal appeal from his termination at SAWS. Having reviewed your arguments and the submitted information related to Employee 1, we find that SAWS has failed to provide this office with concrete evidence that litigation with Employee 1 is reasonably anticipated for purposes of section 552.103. See Open Records Decision No. 361 (1983). Thus, none of the information related to Employee 1 may be withheld pursuant to section 552.103.

Finally, you assert that some of the submitted information is excepted from disclosure under section 552.137 of the Government Code. Section 552.137 makes e-mail addresses of members of the public confidential. We note, however, that the submitted information does not contain any e-mail addresses of members of the public. Therefore, no portion of the submitted information is excepted from disclosure under section 552.137.

We note, however, that section 552.117 of the Government Code may also be applicable to some of the submitted information. Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. See Open Records Decision No. 530 at 5 (1989). Therefore, SAWS may only withhold information under section 552.117(a)(1) on behalf of current or former employees who made a request for confidentiality under section 552.024 prior to the date on

¹In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission ("EEOC"), see Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, see Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, see Open Records Decision No. 288 (1981).

which the present request for information was made. If Employee 1 timely elected to keep his personal information confidential, SAWS must withhold his home address, which we have marked. SAWS may not withhold this information under section 552.117(a)(1) if Employee 1 did not make a timely election to keep his information confidential.

To summarize, we conclude: (1) the information submitted for Employee 2 is not within the purview of the Act and this ruling therefore does not encompass those documents, and (2) if Employee 1 timely elected under section 552.024 of the Government Code to keep his personal information confidential, you must withhold the address we have marked under section 552.117(a)(1). The remaining 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, 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,



Sarah I. Swanson
Assistant Attorney General
Open Records Division

SIS/lmt

Ref: ID# 187170

Enc. Submitted documents

c: Mr. Roddy Stinson
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