



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

September 23, 2003

Mr. Dewey Duane Britt
First Assistant County Attorney
Ector County
300 North Grant, Room 201
Odessa, Texas 79761

OR2003-6675

Dear Mr. Britt:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 188123.

Ector County (the "county") received a request for the personnel file of a named individual. You claim that the requested information is excepted from disclosure under sections 552.101, 552.102, and 552.103 of the Government Code. We note that you have notified the attorney of the individual whose information is at issue under section 552.305 of the Government Code. *See* Gov't Code § 552.305. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that the submitted information contains documents that are expressly public under section 552.022 of the Government Code, which provides in pertinent part as follows:

Without limiting the amount or kind of information that is public information under this chapter, 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[.]

Because some of the submitted information consists of completed evaluations, the county may withhold this information only to the extent it is made confidential under other law or is otherwise protected by section 552.108 of the Government Code. You do not argue that the information is protected by section 552.108. Section 552.103 is a discretionary exception under the Public Information Act and does not constitute “other law” for purposes of section 552.022. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); 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); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Thus, the county may not withhold the completed evaluations, which we have marked, under section 552.103 of the Government Code. However, you contend that portions of the evaluations are excepted under sections 552.101 and 552.102, and we will address those arguments.

Section 552.102 of the Government Code 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 of the Government Code. Therefore, we will address your claim of section 552.102 by addressing the applicability of 552.101 to the information at issue.

Section 552.101 protects “information considered to be confidential by law, either constitutional, statutory, or by judicial decision,” including information coming within the common-law right to privacy. *Industrial Found.*, 540 S.W.2d 668. Common-law privacy protects information if it is highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and it is of no legitimate concern to the public. *Id.* at 683-85. 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. 540 S.W.2d at 683. However, common-law privacy does not apply to highly embarrassing or intimate information “unless the records [at issue] are also of no legitimate interest to the public.” Open Records Decision No. 470 at 4 (1987); *see also* Open Records Decision No. 464 (1987). The public has a genuine interest in information concerning a public employee’s job performance and the reasons for dismissal, demotion, or promotion. Open Records Decision No. 444 at 5-6 (1986); *see also* Open Records Decision No. 208 (1978) (disciplinary action against public employee available to public). In this instance, we conclude upon reviewing the information that is subject to section 552.022 that it is not the type of information considered highly intimate or embarrassing for purposes of common-law privacy. Therefore,

the information that is subject to section 552.022 may not be withheld under sections 552.101 or 552.102.

We now turn to your arguments with respect to the information that is not subject to section 552.022. Because your claim regarding section 552.103 is the broadest, we address it first. This section provides:

(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.

The county 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, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. 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). The county 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. 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). In this instance, you state that the employee whose information is at issue has hired an attorney to represent her. You further state that the attorney has

indicated that his client "is holding off on litigation" while an investigation is being conducted.. However, we conclude that you have not adequately demonstrated that the employee has taken objective steps toward filing suit. Therefore, you have not shown that litigation was reasonably anticipated or pending at the time you received the request for information. You may not withhold the information under section 552.103.

You have also argued that sections 552.101 and 552.102 apply to portions of the information that are not subject to section 552.022. However, upon review of the information we conclude that it does not contain information that is highly intimate or embarrassing for purposes of section 552.101. Therefore, you may not withhold any of the submitted information under sections 552.101 and 552.102.

However, we note that some of the submitted information may be confidential under section 552.117 of the Government Code. 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, the county 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 made. To the extent that the current or former employee or official at issue timely elected to keep the individual's personal information confidential, the county must withhold the information we have marked under section 552.117. The county may not withhold this information under section 552.117 if the current or former employee or official did not make a timely election to keep the information confidential.

We note that if a social security number is not excepted under section 552.117, it may be withheld in some circumstances under section 552.101 of the Government Code. A social security number or "related record" may be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained or maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that the social security numbers in the document are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Public Information Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number, you should ensure that no such information was obtained or is maintained by the county pursuant to any provision of law, enacted on or after October 1, 1990.

In summary, we have marked completed evaluations that must be released under section 552.022. To the extent that a timely section 552.024 election was made, you must withhold the information we have marked under section 552.117(a)(1). A social security number that is not protected under section 552.117(a)(1) may be confidential under federal law. You must release the remaining information to the requestor.

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).

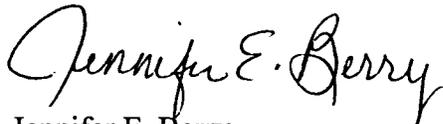
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following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



Jennifer E. Berry
Assistant Attorney General
Open Records Division

JEB/sdk

Ref: ID# 188123

Enc: Submitted documents

c: Mr. Stacy Trotter
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