



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 20, 2004

Ms. Chris G. Elizalde
Walsh, Anderson, Brown, Schulze & Aldridge, P.C.
P.O. Box 2156
Austin, Texas 78768

OR2004-6009

Dear Ms. Elizalde:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 205624.

The Lockhart Independent School District (the "district"), which you represent, received a request for information pertaining to pending actions involving the district and three named individuals. You advise that the district is withholding some information pursuant to a previous determination issued in Open Records Letter No. 2004-3643 (2004). *See* Gov't Code § 552.301(a) (allowing governmental body to withhold information subject to previous determination); Open Records Decision No. 673 (2001). You claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.103, and 552.135 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that member of public may submit comments stating why information should or should not be released).

¹ We note that you raise section 552.305 of the Government Code as an exception to disclosure. Section 552.305 states in relevant part that "[i]n a case in which information is requested under this chapter and a person's privacy or property interests may be involved . . . a governmental body may decline to release the information *for the purpose of requesting an attorney general decision.*" Gov't Code § 552.305 (emphasis added). Thus, section 552.305 is not an exception to disclosure under the Public Information Act (the "Act"). Rather, section 552.305 is a procedural provision permitting a governmental body to withhold information that may be private while the governmental body is seeking an attorney general's decision under the Act. Because you believe the present request implicates the privacy interests of third parties, we consider your privacy arguments pursuant to section 552.101 of the Government Code.

Initially, we note that a portion of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 makes certain information public, unless it is expressly confidential under other law. *See* Gov't Code § 552.022(a). One category of public information under section 552.022 is "a settlement agreement to which a governmental body is a party[.]" *Id.* § 552.022(a)(18). The submitted information includes a settlement agreement to which the district is a party that must be released unless it is 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 is therefore not other law that makes information expressly confidential for purposes of section 552.022(a). *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); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Thus, the district may not withhold the information subject to section 552.022(a)(18) pursuant to section 552.103. We will, however, consider your claims regarding sections 552.101, 552.102, and 552.135, which do constitute other law for purposes of section 552.022.

You claim that the submitted information is excepted from disclosure under sections 552.101 and 552.102 of the Government Code. Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision" and encompasses the doctrine of common-law privacy. Section 552.102(a) 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. Accordingly, we will consider your section 552.101 and section 552.102 claims together.

Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) the information 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. Upon review, we find that the submitted information is not highly intimate or embarrassing. Additionally, the public has a legitimate interest in this information. *See* Open Records Decision Nos. 444 at 5-6 (1986) (public has interest in public employee's qualifications and performance and the circumstances of resignation or termination), 405 at 2-3 (1983) (public has interest in manner in which public employee performs job), 329 at 2 (1982) (information relating to complaints against public employees and discipline resulting therefrom is not protected under former

section 552.101 or 552.102), 208 at 2 (1978) (information relating to complaint against public employee and disposition of the complaint is not protected under either the constitutional or common-law right of privacy). Accordingly, we find that none of the submitted information may be withheld under common-law privacy.

You also claim that the submitted information is excepted from disclosure under section 552.135 of the Government Code. Section 552.135 provides:

- (a) "Informer" means a student or former student or an employee or former employee of a school district who has furnished a report of another person's or persons' possible violation of criminal, civil, or regulatory law to the school district or the proper regulatory enforcement authority.
- (b) An informer's name or information that would substantially reveal the identity of an informer is excepted from [required public disclosure].
- (c) Subsection (b) does not apply:
 - (1) if the informer is a student or former student, and the student or former student, or the legal guardian, or spouse of the student or former student consents to disclosure of the student's or former student's name; or
 - (2) if the informer is an employee or former employee who consents to disclosure of the employee's or former employee's name; or
 - (3) if the informer planned, initiated, or participated in the possible violation.
- (d) Information excepted under Subsection (b) may be made available to a law enforcement agency or prosecutor for official purposes of the agency or prosecutor upon proper request made in compliance with applicable law and procedure.
- (e) This section does not infringe on or impair the confidentiality of information considered to be confidential by law, whether it be constitutional, statutory, or by judicial decision, including information excepted from the requirements of Section 552.021.

Gov't Code § 552.135. Because the legislature limited the protection of section 552.135 to the identity of a person who reports a possible violation of "law," a school district that seeks to withhold information under section 552.135 must clearly identify to this office the specific civil, criminal, or regulatory law that is alleged to have been violated. *See* Gov't

Code § 552.301(e)(1)(A). Upon review of your arguments and the submitted information, we find that the district has not demonstrated that the named employee reported a violation of the law. Accordingly, we determine that the district may not withhold any portion of the submitted information under section 552.135. As you claim no other exceptions for the information that is subject to section 552.022, it must be released to the requestor.

You assert that the remaining submitted information is excepted from disclosure under section 552.103 of the Government Code. 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). 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 Univ. of Tex. Law Sch. v. Tex. 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.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See also* Open Records Decision No. 551 at 4 (1990).

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.* Among other instances, this office has concluded that litigation is reasonably anticipated where the prospective opposing party has filed a complaint with the Equal Employment Opportunity Commission ("EEOC"). *See* Open Records Decision No. 336 (1982). In this instance, you state, and provide documentation showing, that prior to the date the district received the present request, a complaint was filed against the district

with the Texas Commission on Human Rights (the "TCHR").² 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. You also state that the remaining submitted information relates to this complaint. Based on your representations and our review of the submitted documents, we find that the district reasonably anticipated litigation on the date it received the present request. We also find that portions of the remaining submitted information relate to the anticipated litigation. We therefore conclude that the district may withhold this information, which we have marked, pursuant to 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 party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. 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).

We note that the remaining submitted documents contain information that is subject to 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 timely elect to keep this information confidential pursuant to 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 received by the governmental body. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the district may only withhold information under section 552.117(a)(1) on behalf of current or former officials or employees who elected to keep information confidential pursuant to section 552.024 prior to the date the district received the present request. Consequently, if the employees at issue timely elected to keep their home addresses, home telephone numbers, and family member information confidential, the district must withhold this information under section 552.117(a)(1). If the employees did not timely elect to keep this information confidential, the district may not withhold the information under section 552.117.

In summary, the district may withhold the information we have marked pursuant to section 552.103. The district may be required to withhold the information we have marked under section 552.117. The remaining submitted information, including the submitted settlement agreement that is public under section 552.022(a)(18), must be released to the requestor.

²We note that the TCHR has been abolished and that its duties are now performed by the Civil Rights Division of the Texas Workforce Commission. *See* Act of May 28, 2003, 78th Leg., R.S., ch. 302, § 1, 2003 Tex. Sess. Law Serv. 1279.

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 "Amy Peterson". The signature is fluid and cursive, with the first name "Amy" written in a larger, more prominent script than the last name "Peterson".

Amy D. Peterson
Assistant Attorney General
Open Records Division

ADP/sdk

Ref: ID# 205624

Enc. Submitted documents

c: Mr. John Manning
1011 Lovers Lane
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(w/o enclosures)