



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 4, 2004

Mr. Andrew A. Chance
Ashcraft Law Firm
3900 Republic Center
325 North St. Paul Street
Dallas, Texas 75201

OR2004-8427

Dear Mr. Chance:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 210257.

North Central Texas College (the "college"), which you represent, received two requests for electronic communications sent by or to two named individuals that involve other named individuals and specified time intervals. You inform us that the college is releasing some of the requested information. You claim that other responsive information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.107, 552.109, 552.111, and 552.117 of the Government Code. We have considered the exceptions you claim and have reviewed the information you submitted. We also have considered the correspondence that we received from an individual to whom some of the submitted information pertains.¹

We first note that some of the submitted documents are not responsive to these requests for information. The present requests are for "electronic communications . . . sent by or to" two named individuals. The submitted documents include information that neither consists of nor is contained in an electronic communication, as well as a communication that was not sent by or to either of the named individuals. These documents, which we have marked, are not responsive to these requests. This decision does not address the public availability of the non-responsive documents, which need not be released to the requestor.

¹See Gov't Code § 552.304 (any person may submit written comments stating why information at issue in request for attorney general decision should or should not be released).

Next, we address your obligations under section 552.301 of the Act. This section prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(b) requires the governmental body to ask for the attorney general's decision and state the exceptions to disclosure that it claims not later than the tenth business day after the date of its receipt of the written request for information. *See* Gov't Code § 552.301(b). Section 552.301(e) requires the governmental body to submit to the attorney general, not later than the fifteenth business day after the date of its receipt of the request, (1) written comments stating why the governmental body's claimed exceptions apply to the information that it seeks to withhold; (2) a copy of the written request for information; (3) a signed statement of the date on which the governmental body received the request, or evidence sufficient to establish that date; and (4) the specific information that the governmental body seeks to withhold or representative samples of the information if it is voluminous. *See id.* § 552.301(e)(1)(A)-(D). If a governmental body does not request an attorney general decision as prescribed by section 552.301, the information requested in writing is presumed to be subject to required public disclosure and must be released, unless there is a compelling reason to withhold the information. *See id.* § 552.302.

You inform us that the college received these requests for information on July 12 and 13, 2004. Your request for this decision is meter-marked July 27, 2004. With respect to the request for information that the college received on July 13, you have complied with section 552.301 in seeking this decision. However, with respect to the request that the college received on July 12, you did not request this decision within the ten-business-period prescribed by section 552.301. Likewise, you did not timely comply with section 552.301(e) with respect to the July 12 request. The submitted information that is responsive to July 12 request is therefore presumed to be public and must be released, unless there is a compelling reason to withhold any of that information. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ).

The presumption that information is public under section 552.302 can generally be overcome when the information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982). Sections 552.103, 552.107, and 552.111 are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived. *See* Gov't Code § 552.007; *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 Gov't Code § 552.103); Open Records Decision Nos. 677 at 10 (2002) (attorney work product privilege under Gov't Code § 552.111 may be waived), 676 at 10-11 (2002) (attorney-client privilege under Gov't Code § 552.107(1) may be waived), 665 at 2 n.5 (discretionary exceptions generally), 542 at 4 (1990) (statutory predecessor to Gov't Code § 552.103 may be waived), 470 at 7 (1987) (statutory predecessor to Gov't Code § 552.111 may be waived). Likewise, the common-law informer's privilege protects a governmental body's interests and may be waived. *See* Open Records Decision No. 549 at 6 (1990). In failing to comply with section 552.301, the college has waived

sections 552.103, 552.107, and 552.111 and the common-law informer's privilege. *See* Open Records Decision No. 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions). Therefore, the college may not withhold any of the submitted information that is responsive to the July 12 request under sections 552.103, 552.107, and 552.111 or the common-law informer's privilege. On the other hand, the college's claims under sections 552.101, 552.102, 552.109, and 552.117 can provide compelling reasons for non-disclosure under section 552.302. Accordingly, we will consider your arguments under these exceptions with respect to the submitted information that is responsive to the July 12 request. We also will consider your other claims with respect to the information that is responsive to the July 13 request.

With respect to that information, section 552.103 is the most inclusive exception you claim. 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.

Gov't Code § 552.103(a), (c). The governmental body that raises section 552.103 has the burden of providing relevant facts and documents sufficient to establish the applicability of this exception to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate that: (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information *and* (2) the information at issue is related to the pending or anticipated 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* Open Records Decision No. 551 at 4 (1990) *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.*

Among other examples, this office has concluded that litigation was reasonably anticipated where the opposing party took the following objective steps toward litigation: (1) filed a complaint with the Equal Employment Opportunity Commission ("EEOC"), *see* Open Records Decision No. 336 (1982); (2) 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 (3) threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

You have submitted copies of grievances that the requestor has asserted against the college. You state that the information encompassed by the July 13 request relates to the grievances. You also state that the requestor has retained an attorney and has threatened several times to initiate litigation. Based on your representations and the submitted documentation, we find that you have demonstrated that the college reasonably anticipated litigation on the date of its receipt of the July 13 request. We also find that the information encompassed by that request is related to the anticipated litigation. We therefore conclude that the information that is responsive to the July 13 request is excepted from disclosure at this time under section 552.103. We have marked the information that the college may withhold under this exception.²

In reaching this conclusion, we assume that the opposing party in the anticipated litigation has not seen or had access to any of the marked 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). If the opposing party has seen or had access to information relating to anticipated litigation, through discovery or otherwise, then there is no interest in withholding that information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Furthermore, the applicability of section 552.103 ends once the related litigation concludes or is no longer reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Next, we address the information that is responsive to the July 12 request. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Your raise section 552.101 in conjunction with constitutional and common-law rights to privacy. Constitutional privacy protects two kinds of interests. *See Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); Open Records Decision Nos. 600 at 3-5 (1992), 478 at 4 (1987), 455 at 3-7 (1987). The first is the interest in independence in making certain important decisions related to the "zones of privacy" concerning marriage, procreation, contraception, family

²As our conclusion under section 552.103 encompasses all of the information that is responsive to the July 13 request, we do not address your claims under sections 552.107 and 552.111 and the informer's privilege.

relationships, and child rearing and education that the United States Supreme Court has recognized. *See Fadlo v. Coon*, 633 F.2d 1172 (5th Cir. 1981); Open Records Decision No. 455 at 3-7 (1987). The second constitutionally protected privacy interest is in freedom from public disclosure of certain personal matters. *See Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5th Cir. 1985); Open Records Decision No. 455 at 6-7 (1987). This aspect of constitutional privacy balances the individual's privacy interest against the public's interest in the information. *See* Open Records Decision No. 455 at 7 (1987). Constitutional privacy under section 552.101 is reserved for "the most intimate aspects of human affairs." *Id.* at 8 (quoting *Ramie*, 765 F.2d at 492).

Information must be withheld from the public under section 552.101 in conjunction with common-law privacy when the information 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 Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Common-law privacy protects the specific types of information that are held to be intimate or embarrassing in *Industrial Foundation*. *See id.* at 683 (information relating to sexual assault, pregnancy, mental or physical abuse in workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). This office has since concluded that other types of information also are private under section 552.101. *See* Open Records Decision No. 659 at 4-5 (1999) (summarizing information attorney general has held to be private), 470 at 4 (1987) (illness from severe emotional job-related stress), 455 at 9 (1987) (prescription drugs, illnesses, operations, and physical handicaps), 343 at 1-2 (1982) (references in emergency medical records to drug overdose, acute alcohol intoxication, obstetrical/gynecological illness, convulsions/seizures, or emotional/mental distress).

Section 552.102 excepts from public 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). This exception is applicable to information that relates to public officials and employees. *See* Open Records Decision No. 327 at 2 (1982) (anything relating to employee's employment and its terms constitutes information relevant to person's employment relationship and is part of employee's personnel file). The privacy analysis under section 552.102(a) is the same as the common-law privacy test under section 552.101. *See Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref'd n.r.e.) (addressing statutory predecessor).

Section 552.109 excepts from public disclosure "[p]rivate correspondence or communications of an elected office holder relating to matters the disclosure of which would constitute an invasion of privacy[.]" Gov't Code § 552.109. This office has held that the test to be applied to information under section 552.109 is the same as the test adopted in *Industrial Foundation* with regard to common-law privacy. *See* Open Records Decision No. 506 at 3 (1988). Accordingly, we will collectively address your privacy claims under sections 552.101, 552.102, and 552.109.

In this instance, the information that is responsive to the July 12 request relates to the official conduct of officials and employees of the college. As this office has often noted, the public has a legitimate interest in information that relates to the official conduct of public officials and employees. See Open Records Decision Nos. 562 at 10 (1990) (personnel file information does not involve most intimate aspects of human affairs, but in fact touches on matters of legitimate public concern), 542 at 5 (1990) (information in public employee's resume not protected by constitutional or common-law privacy under statutory predecessors to Gov't Code §§ 552.101 and 552.102), 470 at 4 (1987) (public employee's job performance does not generally constitute his or her private affairs), 444 at 3 (1986) (public has obvious interest in information concerning qualifications and performance of governmental employees), 405 at 2 (1983) (manner in which public employee performed his or her job cannot be said to be of minimal public interest), 400 at 5 (1983) (statutory predecessor to Gov't Code § 552.102 is "very narrow" and protects information only if release would lead to clearly unwarranted invasion of privacy). Therefore, having considered your arguments and reviewed the information in question, we conclude that the college may not withhold any of the information that is responsive to the July 12 request under sections 552.101, 552.102, or 552.109 in conjunction with constitutional or common-law privacy.

We next address your statement that you have redacted the personal information and e-mail addresses of officials or employees of the college. You do not inform us, and our review of our own records does not indicate, that the college has been granted a previous determination to withhold such information without seeking a ruling from this office. See Gov't Code § 552.301(a); Open Records Decision No. 673 (2001). Ordinarily, a governmental body's failure to provide this office with the opportunity to review responsive information deprives us of the ability to determine whether the information is excepted from public disclosure, leaving this office with no alternative other than to order that the information be released. See Gov't Code § 552.301(e)(1)(D) (governmental body must provide this office with copy of "specific information requested"). However, as we are able to discern the types of information that you have redacted, our inability to review the details of that information does not deprive us of the ability to rule on the information *in this specific instance*. Accordingly, we will rule on the redacted information, as well as information that appears in the documents that are subject to the July 12 request, under sections 552.117 and 552.137.

Section 552.117(a)(1) excepts from public disclosure the home address and telephone number, social security number, and family member information of a current or former official or employee of a governmental body who requests that the information be kept confidential under section 552.024. The determination of whether a particular item of information is protected by section 552.117(a)(1) must be made at the time of the governmental body's receipt of the request for the information. See Open Records Decision No. 530 at 5 (1989). Thus, the college may only withhold information under section 552.117(a)(1) on behalf of a current or former college official or employee who made a request for confidentiality under section 552.024 prior to the date of the college's receipt of the request for the information. The college may not withhold information under

section 552.117(a)(1) on behalf of a current or former college official or employee who did not make a timely election under section 552.024 to keep the information confidential.

We have marked personal information encompassed by the July 12 request that must be withheld under section 552.117(a)(1) if the information is the home address or telephone number of a current or former official of the college who timely elected under section 552.024 to keep the marked information confidential. We note that other information encompassed by the July 12 request might also be excepted from public disclosure under section 552.117(a)(1). In this instance, however, the latter information relates to the requestor. The requestor has a special right of access to his own section 552.117 information under section 552.023.³ Information to which the requestor has a right of access under section 552.023 may not be withheld from him under section 552.117.⁴

Section 552.137 is applicable to certain e-mail addresses. As amended by the 78th Legislature, this exception provides as follows:

(a) Except as otherwise provided by this section, 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.

(c) Subsection (a) does not apply to an e-mail address:

(1) provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent;

(2) provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor's agent;

³See Gov't Code § 552.023(a) (person or person's authorized representative has special right of access, beyond right of general public, to information held by governmental body that relates to person and is protected from public disclosure by laws intended to protect person's privacy interests); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning himself).

⁴Should the college receive another request for this information from a person who would not have a right of access to it, the college should resubmit this same information and request another decision. See Gov't Code §§ 552.301(a), .302.

(3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract; or

(4) provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public.

(d) Subsection (a) does not prevent a governmental body from disclosing an e-mail address for any reason to another governmental body or to a federal agency.

Gov't Code § 552.137.⁵ Section 552.137 excepts from public disclosure certain e-mail addresses of members of the public that are provided for the purpose of communicating electronically with a governmental body, unless the individual to whom the e-mail address belongs has affirmatively consented to its public disclosure. The types of e-mail addresses listed in section 552.137(c) may not be withheld under this exception. Likewise, section 552.137 is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees.

The information encompassed by the July 12 request includes the personal e-mail address of the interested person who submitted comments under section 552.304. The attachments to the individual's comments reflect that he does not wish to have his personal e-mail address withheld from the public. Therefore, the college may not withhold that e-mail address under section 552.137. To the extent that the redacted information includes any other personal e-mail address that an individual has provided for the purpose of communicating with the college, the college must withhold such an e-mail address under section 552.137, unless the owner of the e-mail address has affirmatively consented to its public disclosure. *See* Gov't Code § 552.137(a). To the extent, however, that the redacted information consists of an institutional e-mail address, an Internet website address, or an e-mail address that the college or another governmental entity maintains for one of its officials or employees, such information may not be withheld under section 552.137. Likewise, an e-mail address may not be withheld under section 552.137 if it is one of the types of e-mail addresses that are excluded from the protection of section 552.137 by section 552.137(c).

In summary: (1) the college may withhold the marked information that is excepted from disclosure under section 552.103; (2) the information that we have marked under section 552.117(a)(1) must be withheld if it is the current or former home address or

⁵We note that section 552.137 is a mandatory exception to disclosure that a governmental body may not waive. *See* Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001).

telephone number of a current or former official of the college who timely elected under section 552.024 to keep the information confidential; and (3) a personal e-mail address that an individual has provided for the purpose of communicating with the college must be withheld under section 552.137, unless the owner of the e-mail address has affirmatively consented to its public disclosure. 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).

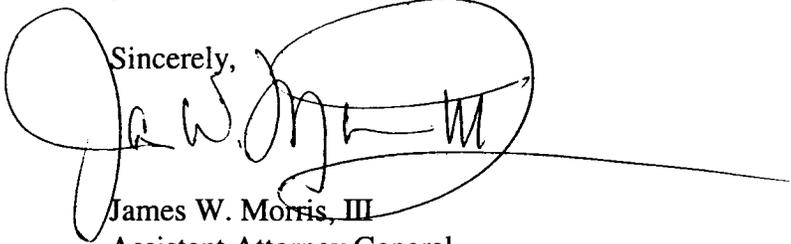
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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, 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 "James W. Morris, III". The signature is written in a cursive style with a large initial "J" and "M".

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/jev

Ref: ID# 210257

Enc: Submitted documents

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