



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 6, 2005

Mr. R. Kevin Rhyne
Henslee, Fowler, Hepworth & Schwartz, LLP
110 North College Avenue, Suite 1116
Tyler, Texas 75702

OR2005-04819A

Dear Mr. Rhyne:

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# 225292.

On behalf of the Chapel Hill Independent School District (the "district"), which you represent, you ask this office to examine Open Records Letter No. 2005-04819 (2005). We note that section 552.301 of the Government Code provides that a governmental body is prohibited from asking for a reconsideration of the attorney general's decision. *See* Gov't Code § 552.301(f). However, where this office determines that the decisional process under sections 552.301 and 552.306 has resulted in an incorrect ruling, we will correct the previously issued ruling. As we have determined that Open Records Letter No. 2005-04819 is incorrect, we hereby withdraw the prior ruling. This decision is substituted for Open Records Letter No. 2005-04819 and serves as the correct ruling.

The district received a request for the following: (1) information regarding the reassignment of two named district employees; (2) information concerning the relationship or transactions between the district and "Lock and Load" for a specified time period; (3) a copy of the district's police department policy; (4) information regarding two weapons donations; and (5) information regarding the outcome of an investigation conducted by the "ATF." You state that the district has made some information available to the requestor, but that the

district does not possess information responsive to item number five of the request.¹ You claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.103, and 552.107 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted information.

Initially, we must address the district's obligations under the Act. Section 552.301 of the Government Code prescribes procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301 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).*

You inform us that the district received the request for information on March 10, 2005. However, you did not raise section 552.107 as an exception to disclosure until June 17, 2005. Consequently, you failed to claim this exception to disclosure within the ten-business-day period mandated by section 552.301(b) of the Government Code. In failing to comply with section 552.301, the district has waived its claim under section 552.107(1). *See Gov't Code § 552.301; Open Records Decision Nos. 676 (2002) (governmental body may waive section 552.107), 630 at 4-5 (1994) (governmental body may waive statutory predecessor to section 552.107), 522 at 4 (1989) (discretionary exceptions in general); see also Open Records Decision No. 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions).* Therefore, the district may not withhold any portion of the submitted information under section 552.107(1).

Next, we note that the submitted documents contain certain information that must be released under section 522.022(a). Section 552.022(a) provides in relevant part:

(a) 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[.]

¹ We note that the Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

² Section 552.107, not section 552.101, is the proper exception for claiming the attorney-client privilege. Open Records Decision No. 676 (2002).

Gov't Code § 552.022(a)(1). Some of the submitted information, which we have marked, consists of a completed evaluation that is subject to section 552.022(a)(1). You claim that all of the submitted information may be withheld under section 552.103. This section is a discretionary exception and is not "other law" for the purpose of section 552.022. *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 Nos. 663 (1999) (governmental body may waive section 552.103), 522 at 4 (1989) (discretionary exceptions in general). Therefore, the completed evaluation may not be withheld on that basis. However, sections 552.101 and 552.102 do constitute such "other law" for purposes of section 552.022. Therefore, we must consider whether sections 552.101 and 552.102 are applicable to this information.

Because the applicability of section 552.103 is potentially the broadest, we consider your arguments under this exception first for the remaining submitted information. In relevant part, 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 district 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 district must meet both prongs of this test for information to be excepted under section 552.103(a).

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.* 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.³ 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).

In this instance, you state, and the remaining submitted information reflects, that the underlying matter involves a pending employee grievance proceeding that one of the two employees whose records are the subject of the instant request has initiated against the district alleging wrongful evaluation and reassignment. Further, you have provided correspondence from an attorney for the district employee, in which he states that "[f]ailure to comply with our requests will result in [the district employee] pursuing all legal remedies he has against [the district], including filing suit pursuant to the Texas Whistleblower Act" unless his client is reinstated to his former position with the district and certain references are removed from his evaluation. The remaining submitted information reflects that the employee's attorney has provided the district with a "Notice of Appeal to the Board at Level Three." Based on our review of your representations and the information at issue, we find that the district has established through concrete evidence that litigation was reasonably anticipated on the date that it received the present request for information. Further, based on your arguments and our review, we also find that the information at issue relates to the pending litigation. Accordingly, we conclude that the district may withhold most of the remaining submitted information under section 552.103 of the Government Code.⁴

We note, however, that the employee, who is the opposing party in the anticipated litigation, has already seen or had access to some of the remaining submitted 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 that relates to anticipated litigation, through discovery or otherwise, then there is no interest in withholding the information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, to the extent that the opposing party in the anticipated litigation has seen or had access to any of the remaining submitted information, the district may not withhold any such information

³ In 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, *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).

⁴ As our ruling for this information is dispositive, we need not consider your remaining arguments against disclosure.

under section 552.103. With the exception of any such information, the remaining submitted information is excepted from disclosure at this time. We note that the applicability of this exception under section 552.103 ends when the related litigation concludes or is no longer reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

You claim that section 552.101 of the Government Code is applicable to the information that the opposing party in the anticipated litigation has seen or to which he has had access. 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. This section encompasses information protected by other statutes. Section 21.355 of the Education Code provides that "[a] document evaluating the performance of a teacher or administrator is confidential." Educ. Code § 21.355. This office has interpreted section 21.355 to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or an administrator. *See* Open Records Decision No. 643 (1996). In Open Records Decision No. 643, we determined that for purposes of section 21.355, the word "teacher" means a person who is required to and does in fact hold a teaching certificate under subchapter B of chapter 21 of the Education Code or a school district teaching permit under section 21.055 and who is engaged in the process of teaching, as that term is commonly defined, at the time of the evaluation. *See* Open Records Decision No. 643 at 4. We also determined that the word "administrator" in section 21.355 means a person who is required to and does in fact hold an administrator's certificate under subchapter B of chapter 21 of the Education Code and is performing the functions of an administrator, as that term is commonly defined, at the time of the evaluation. *Id.*

You contend that the submitted documents that were utilized in the preparation of the evaluation of the employee, as well as the submitted evaluation itself, are confidential under section 21.355. You do not indicate, however, and it is not otherwise clear, whether the employee held a teacher's certificate or permit or an administrator's certificate under subchapter B of chapter 21 of the Education Code and was performing the functions of a teacher or administrator at the time of the evaluation. Therefore, we are unable to conclude that section 21.355 is applicable in this instance. To the extent, however, that the employee held a teacher's certificate or permit or an administrator's certificate and was performing the functions of a teacher or administrator at the time of the evaluation, the evaluation itself is confidential under section 21.355 of the Education Code and must be withheld from the requestor under section 552.101 of the Government Code. *See* Open Records Decision No. 643 at 4. To the extent that the evaluation does not satisfy these criteria, it is not confidential under section 21.355 and may not be withheld under section 552.101. Further, we find that the remaining submitted documents at issue do not consist of the type of records made confidential by section 21.355. We therefore determine that the district may not withhold any of the remaining submitted information pursuant to section 552.101 in conjunction with section 21.355 of the Education Code.

You claim that the submitted information that you have labeled Exhibit E may include criminal history information excepted from disclosure under section 552.101 in conjunction with Chapter 411 of the Government Code. Criminal history record information (“CHRI”) generated by the National Crime Information Center or by the Texas Crime Information Center is confidential under federal law. Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety (“DPS”) maintains, except that the DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See* Gov’t Code § 411.083.

Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090-411.127. Thus, any CHRI generated by the federal government or another state may not be made available to the requestor except in accordance with federal regulations. *See* Open Records Decision No. 565 (1990). However, we note that driving record information is not made confidential by the confidentiality provisions that govern CHRI. *See* Gov’t Code § 411.082(2)(B) (definition of CHRI does not include driving record information). Therefore, the district must withhold any CHRI in the information at issue obtained from DPS or any other criminal justice agency under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F.

You also claim that section 552.102 of the Government Code is applicable to the remaining information that the opposing party in the anticipated litigation has seen or to which he has had access. 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* for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the Government Code. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976). Accordingly, we will consider your section 552.102 claim in the context of common-law privacy under section 552.101 of the Government Code.

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.*, 540 S.W.2d

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.

In this case, the remaining submitted information you seek to withhold relates solely to the work conduct and job performance of public employees and it is therefore subject to a legitimate public interest. *See* Open Records Decision Nos. 470 (1987) (public employee's job performance does not generally constitute employee's private affairs), 455 (1987) (public employee's job performance or abilities generally not protected by privacy), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employee), 423 at 2 (1984) (scope of public employee privacy is narrow). Furthermore, the information at issue does not contain any information of a highly intimate or embarrassing nature. Thus, based on our review of the information at issue, we determine that none of the submitted information is protected by common-law privacy and it is not excepted from disclosure on that basis.

We note, however, that the information at issue includes employees' home addresses. Section 552.117(a)(1) of the Government Code excepts from disclosure the current and former home addresses and telephone 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 552.024.⁵ 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). Section 552.117(a)(2) excepts from disclosure this same information regarding a peace officer, as defined by article 2.12 of the Texas Code of Criminal Procedure, regardless of whether the officer elected under section 552.024 or 552.1175 of the Government Code to keep such information confidential. We have marked the information of a district police officer that the district must withhold under section 552.117(a)(2). Pursuant to section 552.117(a)(1), the district must also withhold the information that we have marked pertaining to a district employee if the employee elected to keep such information confidential prior to the district's receipt of the request for information.

We also note that the information that the opposing party in the anticipated litigation has seen or to which he has had access contains several references to a Texas driver's license number. Section 552.130 of the Government Code provides in relevant part:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

⁵ The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

(1) a motor vehicle operator's or driver's license or permit issued by an agency of this state[.]

You must withhold the Texas driver's license number, which we have marked, under section 552.130.

Finally, we note that the information at issue contains social security numbers. Section 552.147 of the Government Code⁶ provides that "[t]he social security number of a living person is excepted from" required public disclosure under the Act. Therefore, the district must withhold the social security numbers contained in the submitted information under section 552.147.⁷

In summary, with the exception of the information that the district employee has previously seen or to which he has had access, the district may withhold the submitted information under section 552.103 of the Government Code. To the extent the district employee has seen or had access to the submitted information: (1) if the district employee held a teacher's certificate or permit or an administrator's certificate and was performing the functions of a teacher or administrator at the time the submitted evaluation was performed, the submitted evaluation, which we have marked, must be withheld under section 552.101 in conjunction with section 21.355 of the Education Code; (2) the district must withhold any CHRI in the information at issue obtained from DPS or any other criminal justice agency under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F; (3) the information that we have marked under section 552.117(a)(1) is excepted from disclosure if the employee timely requested confidentiality for the information under section 552.024; (4) the information that we have marked under section 552.117(a)(2) must be withheld from disclosure; (5) the district must withhold the marked driver's license number under section 552.130; (6) the marked social security numbers must be withheld under section 552.147; and (7) 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

⁶ Added by Act of May 23, 2005, 79th Leg., R.S., S.B. 1485, § 1, sec. 552.147(a) (to be codified at Tex. Gov't Code § 552.147).

⁷ We note that section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

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).

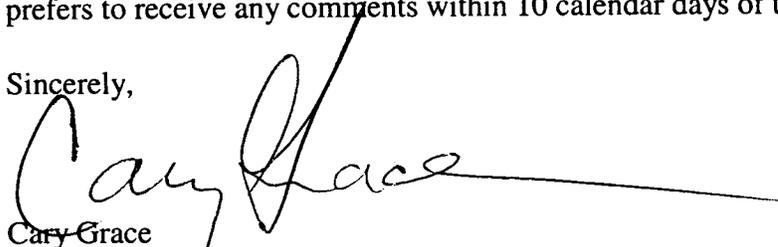
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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); *Tex. 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 that reads "Cary Grace". The signature is written in a cursive style with a long horizontal line extending to the right.

Cary Grace
Assistant Attorney General
Open Records Division

ECG/jev

Ref: ID# 225292

Enc. Submitted documents

c: Ms. Keri Bellacosa
CBS 19 KYTX
2211 ESE
Tyler, Texas 75701
(w/o enclosures)