



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 12, 2006

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OR2006-00405

Dear Mr. Thompson and Mr. Wilson:

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# 240095.

The Tarrant County Hospital District (the "district") received a request for (1) a named district employee's "calendar of meetings/schedules for [specified dates], as well as the names and titles of all persons who were summoned to any or all of the meetings related in any manner to the [district's] Police Department, or any of its personnel[;]" (2) "District Policy which allows for and/or grants permission or authority to [the named district employee] or any other Administrator to advise and/or threaten any employee with disciplinary action should they reveal the contents of any of the meetings[;]" and (3) "a copy of any and all written documents . . . including all emails" containing certain terms and sent

during a specified time period between three named district employees. You inform us that the district does not maintain some of the requested information.¹ You claim that the remaining requested information, which you have submitted for our review, is excepted from disclosure under section 552.103 of the Government Code.² We have considered the exception you claim and reviewed the submitted information.

Initially, we note that some of the information you seek to withhold was created after the district's receipt of the instant request for information. Because this information was created after the district's receipt of the request, it is not encompassed by the request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986) (governmental body not required to disclose information that did not exist at the time request was received). Accordingly, we do not address the availability of this non-responsive information, and the district need not release it in response to this request.

We next address your claim under section 552.103 of the Government Code for the remaining submitted information. This section provides in relevant part 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 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). A governmental body has the burden of providing relevant facts and documents to show that the section 552.103 exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date that the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law*

¹The Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

²Although you also raise sections 552.101 and 552.111 of the Government Code in the district's original brief to this office, you have provided no arguments in support of withholding information under these sections. We therefore assume the district is no longer claiming these exceptions. *See* Gov't Code §§ 552.301, .302; *see also* Open Records Decision No. 473 (1987) (governmental body may waive section 552.111).

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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103.

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). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See 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. *See* Open Records Decision No. 555 (1990); *see also* 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. *See* Open Records Decision No. 361 (1983).

You argue that the district reasonably anticipates litigation based on the following: (1) the requestor believes that the district and its employees have engaged in illegal activities; (2) the requestor has filed a formal grievance with the district; (3) the requestor has made six open records requests, one of which includes the statement that a “[f]ormal notice of ‘Intent to Sue’ . . . is forthcoming[;]” and (4) the requestor has hired two attorneys, one of which told a representative of the district that a lawsuit is forthcoming. You state that the formal grievance was filed on October 24, 2005 and that the letter discussing the notice of “Intent to Sue” was received by the district on November 4, 2005. Because both the filing of the grievance and receipt of the letter occurred subsequent to the district’s October 21, 2005 receipt of the instant request for information, neither supports the district’s claim that it reasonably anticipated litigation on the date it received this request for information. Further, because you do not inform us when the requestor’s attorney informed the district that a lawsuit was forthcoming, we are unable to determine whether that incident occurred prior to the district’s receipt of this request for information. As such, based upon our review of your arguments and the information you provided, we find that the district has not demonstrated that it reasonably anticipated litigation on the date it received the instant request for information. Accordingly, we conclude the district may not withhold any of the information at issue under section 552.103 of the Government Code.

We note, however, some of the information at issue is subject to sections 552.101, 552.117, and 552.137 of the Government Code.³ First, section 552.101 of the Government Code

³The Office of the Attorney General will raise mandatory exceptions like sections 552.101, 552.117, and 552.137 on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

excepts from public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This section encompasses the common-law right of privacy, which protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). The types 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 addition, this office has found that some kinds of medical information or information indicating disabilities or specific illnesses is protected by common-law privacy. See Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). We have marked the information that the district must withhold under section 552.101 in conjunction with common-law privacy.

Next, section 552.117(a)(1) of the Government Code 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 district must withhold the information we have marked under section 552.117(a)(1) if such information pertains to an employee who made a timely election under section 552.024.

Lastly, section 552.137 of the Government Code excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). See Gov’t Code § 552.137(a)-(c). Section 552.137 does not apply to a government employee’s work e-mail address because such an address is not that of the employee as a “member of the public,” but is instead the address of the individual as a government employee. The e-mail address we have marked does not appear to be of a type specifically excluded by section 552.137(c). As such, this e-mail address must be withheld under section 552.137 unless its owner has affirmatively consented to its release. See Gov’t Code § 552.137(b).

To conclude, the district must withhold the private information we have marked under section 552.101 of the Government Code. The department must also withhold the information we have marked under section 552.117(a)(1) of the Government Code if such information pertains to an employee who made a timely election for confidentiality. The email address we marked must be withheld under section 552.137 of the Government Code

unless its owner has affirmatively consented to its release. The remaining responsive information must be released to the requestor.⁴

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 ten 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); *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 Office of the Attorney General at (512) 475-2497.

⁴We note that the documents to be released include some information to which the requestor has a special right of access. See Gov't Code § 552.023 (person has a special right of access to information that is excepted from public disclosure under laws intended to protect that person's privacy interest). Because this information would not be releasable with respect to the general public, the district should again seek our decision if it receives another request for this information from a person other than the requestor or his authorized representative.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within ten calendar days of the date of this ruling.

Sincerely,



Robert B. Rapfogel
Assistant Attorney General
Open Records Division

RBR/krl

Ref: ID# 240095

Enc. Submitted documents

c: Mr. Paul D. Lilly
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(w/o enclosures)