



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 2, 2007

Ms. Helen Valkavich
Assistant City Attorney
City of San Antonio
P. O. Box 839966
San Antonio, Texas 78283-3966

OR2007-12844

Dear Ms. Valkavich:

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# 292986.

The City of San Antonio (the "city") received three requests for information from a city employee and her husband (collectively, the "requestor"),¹ including (1) all communications within the last 24 months between other named city employees regarding the requestor and (2) "a breakdown of the call tapes reviewed at 311 call center by date and call center rep, that were reviewed since 7/1/07."² You claim that the requested information is excepted from disclosure under section 552.103 of the Government Code. We have considered the

¹See Gov't Code § 552.023(a) ("a person or a person's authorized representative has a special right of access, beyond the right of the general public, to information held by a governmental body that relates to the person and that is protected from public disclosure by laws intended to protect that person's privacy interests."); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning herself).

²The third request for information has two categories of requested information. You inform us that the city does not have any information responsive to the first category, and that the second category is identical to the information requested in the first request for information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex.App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

exceptions you claim and reviewed the submitted representative sample of information.³ We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we note that the city did not submit the requested call tape reviews. We assume that, to the extent any information responsive to this request existed when the city received the request for information, you have released it to the requestor. If not, then you must do so immediately. *See* Gov't Code §§ 552.006, 552.301, 552.302; Open Records Decision No. 664 (2000).

We next note that some of the communications that you submitted as responsive to the first request either were created after the city received the request for information or do not fall within the requested time period. The submitted recording is also not responsive to the request for information. This ruling does not address the public availability of any information that is not responsive to the requests for information, and the city is not required to release this information, which we have marked, in response to these requests. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. App.—San Antonio 1978, writ dismissed).

The submitted information includes the agenda of an open meeting. Section 551.022 of the Open Meetings Act, chapter 551 of the Government Code, expressly provides that the “minutes and tape recordings of an open meeting are public records and shall be available for public inspection and copying on request to the governmental body's chief administrative officer or the officer's designee.” The Open Meetings Act also provides that a governmental body shall give written notice of the date, hour, place, and subject of each meeting. *See Gov't Code* § 551.041. Information that is specifically made public by statute may not be withheld from the public under any of the exceptions to public disclosure under the Act. *See, e.g.,* Open Records Decision Nos. 544 (1990), 378 (1983), 161 (1977), 146 (1976). Thus, the city may not withhold the meeting agenda under any of the claimed exceptions, but must instead release this information, which we have marked, to the requestor.

The submitted information also includes a high school transcript. The United States Department of Education Family Policy Compliance Office (the “DOE”) has informed this office that the Family Educational Rights and Privacy Act (“FERPA”), section 1232g of title 20 of the United States Code, does not permit state and local educational authorities to disclose to this office, without parental or an adult student's consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the

³We assume that the “representative sample” of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

open records ruling process under the Act.⁴ Consequently, education records that are responsive to a request for information under the Act should not be submitted to this office in unredacted form, that is, in a form in which “personally identifiable information” is disclosed. *See* 34 C.F.R. § 99.3 (defining “personally identifiable information”). Because our office is prohibited from reviewing education records to determine whether appropriate redactions have been made under FERPA, we will not address the applicability of FERPA to the transcript. Such determinations under FERPA must be made by the educational authority from which you obtained the transcript. Thus, the city should contact the educational authority from which the transcript was obtained and the DOE regarding the applicability of FERPA to the transcript.

We next note that the submitted information contains completed evaluations, including 311 Quality Customer First Telephone Monitoring forms, Performance and Development Plans, Quarterly Performance Progress Reports, and the city’s Municipal Civil Service Rules and that are subject to section 552.022 of the Government Code. Under section 552.022(a)(1), a completed report, audit, evaluation, or investigation made of, for, or by a governmental body is expressly public unless it either is excepted under section 552.108 of the Government Code or is expressly confidential under other law. Similarly, under section 552.022(a)(10), “a substantive rule of general applicability adopted or issued by an agency as authorized by law, and a statement of general policy or interpretation of general applicability formulated and adopted by an agency” is expressly public unless it either is excepted under section 552.108 of the Government Code or is expressly confidential under other law. Section 552.103 of the Government Code is a discretionary exception under the 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, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived). Accordingly, the city may not withhold these documents, which we have marked, under section 552.103.

We next address the requestor’s assertion that she has a right of access to the requested information under section 552.102 of the Government Code. In support of this assertion, the requestor relies on a sentence in section 552.102(a) stating, in part, that “all information in the personnel file of an employee of a government body is to be made available to that employee or the employee’s designated representative as public information is made available under [the Act].” Gov’t Code § 552.102(a). Section 552.102 excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]” *Id.* 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*

⁴A copy of this letter may be found on the Office of the Attorney General’s website: http://www.oag.state.tx.us/opinopen/og_resources.shtml.

Industrial Accident Board for information claimed to be protected under the doctrine of common-law privacy. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976). The language in section 552.102(a) on which the requestor relies is intended to allow a person or person's authorized representative a right of access to information relating to the person that is protected from public disclosure for the purpose of protecting that person's privacy interests. *See Gov't Code* § 552.102(a); *see also id.* § 552.023.

Because the requestor has a special right of access to information implicating her privacy interests, the city would not be able to withhold such information on the basis of common-law privacy under section 552.102. In this instance, however, the city is claiming that this information is excepted from disclosure under section 552.103 of the Government Code. The purpose of section 552.103 is not to protect the privacy interests of any individual, but rather to protect a governmental body's interests in situations involving litigation. *See id.* § 552.103. Access provisions that apply to information subject to laws intended to protect a person's privacy interests (including the language in section 552.102(a) on which the requestor relies) are not relevant in determining whether information is excepted from required public disclosure under section 552.103. As such, we will address the city's arguments regarding this exception.

Section 552.103 of the Government Code provides in 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 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 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 on the date the governmental body received the request for information 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 governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

The mere chance of litigation will not trigger section 552.103(a). Open Records Decision No. 452 at 4 (1986). To demonstrate that litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986).

This office has stated that a pending complaint with the Equal Employment Opportunity Commission (the "EEOC") indicates litigation is reasonably anticipated. Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982). You have provided documentation reflecting that, prior to the city's receipt of the request for information, the requestor filed a complaint against the city with the EEOC. Based on your representations and documentation, we find you have demonstrated that litigation was reasonably anticipated when the city received the requests for information. Our review of the remaining information shows that it is related to the anticipated litigation for purposes of section 552.103(a). Thus, section 552.103 is applicable to the remaining information.

We note, however, that the requestor, as opposing party to the litigation, has already seen or had access to most of the remaining 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). Thus, if the opposing party to anticipated litigation has already seen or had access to information that relates to the litigation, through discovery or otherwise, there is no interest in now withholding such information under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Therefore, the remaining information that the requestor has already seen or had access to is not excepted under section 552.103. However, the city may withhold the remaining information under section 552.103.

We note that section 552.101 of the Government Code is applicable to some of the information that is not excepted under section 552.103. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision" and encompasses information protected by other statutes. The Americans with Disabilities Act (the "ADA"), 42 U.S.C. §§ 12101 *et seq.*, provides for the confidentiality of certain medical records of employees and applicants. Specifically the ADA provides that information about the medical conditions and medical histories of applicants or employees must be (1) collected and maintained on separate forms, (2) kept in separate medical files, and (3) treated as a confidential medical record. In addition, an employer's medical examination or inquiry into the ability of an employee to perform job-related functions is to be treated as a confidential medical record. 29 C.F.R. § 1630.14(c); *see also* Open Records Decision No. 641 (1996). The Equal Employment Opportunity Commission

(the "EEOC") determined that medical information for the purposes of the ADA includes "specific information about an individual's disability and related functional limitations, as well as, general statements that an individual has a disability or that an ADA reasonable accommodation has been provided for a particular individual." *See* Letter from Ellen J. Vargyas, Legal Counsel, EEOC, to Barry Kearney, Associate General Counsel, National Labor Relations Board, 3 (Oct. 1, 1997).

The information at issue contains documents that are subject to the ADA. There does not appear to be a provision of the ADA permitting the release of this information to the requestor; therefore, the city may withhold the information we have marked under section 552.101 in conjunction with the ADA.

Finally, we note that some of the remaining information is excepted under section 552.137 of the Government Code. Section 552.137 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 addresses at issue do not appear to be of a type specifically excluded by section 552.137(c). You do not inform us that a member of the public has affirmatively consented to the release of any e-mail address contained in the submitted materials. Therefore, the city must withhold the e-mail addresses we have marked under section 552.137.

To conclude, the city should contact the educational authority from which the submitted transcript was obtained and the DOE regarding the applicability of FERPA to the transcript. The city must release the information marked under section 552.022 and any information that the requestor has already seen or had access to, with the exception of the marked information that the city must withhold under section 552.101 of the Government Code in conjunction with the ADA and section 552.137 of the Government Code.⁵ The city may withhold the remaining information under section 552.103 of the Government Code.

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

⁵We note that the requestor has a right of access to information in the submitted documents that otherwise would be excepted from release under the Act. *See* Gov't Code § 552.023. Thus, the city must again seek a decision from this office if it receives a request for this information from a different requestor.

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).

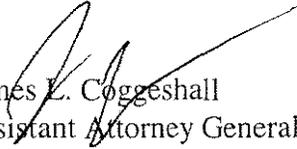
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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.

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 10 calendar days of the date of this ruling.

Sincerely,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/jh

Ref: ID# 292986

Enc. Submitted documents

c: Ms. Tina Jones-Keels
Mr. Bruce Keels
9806 Trendwood
San Antonio, Texas 78250
(w/o enclosures)