



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 1, 2008

Mr. Henry W. Prejean
Assistant District Attorney
Brazoria County
111 East Locust, Suite 408A
Angleton, Texas 77515

OR2008-16321

Dear Mr. Prejean:

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# 328866.

The Brazoria County District Attorney's Office (the "county") received two requests for the contents of the hard drives on two computers used by a named county employee. You claim the requested information is not subject to the Act. Alternatively, you claim some of the requested information is no longer in the county's possession. You also claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.137 of the Government Code. We have considered your arguments and reviewed the submitted representative sample of information.¹

Initially, we must address your comments regarding the information that is no longer in the county's possession. The Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dism'd); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983). You indicate that the responsive information no longer exists on the county employee's hard drives.

¹ We 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.

In general, computer software programs keep track of the location of files by storing the location of data in the "file allocation table" (FAT) of a computer's hard disk. The software then displays the file as being in a specific storage location. Usually, but not always, when a file is "deleted," it is not actually deleted, but the display of the location is merely shown to be moved to a "trash bin" or "recycle bin." Later, when files are "deleted" or "emptied" from these "trash bins," the data is usually not deleted, but the location of the data is deleted from the FAT. Some software programs immediately delete the location information from the FAT when a file is deleted. Once the location reference is deleted from the FAT, the data may be overwritten and permanently removed.

You state that the District Court ordered that "the computer and the laptop computer taken into possession for safekeeping . . . be cleaned in the normal manner of all personal information, programs and data[.]" Based on your representation that the locations of the files have been deleted from the FAT system, we find that the deleted information is no longer being "maintained" by the county at the time of the request, and is not public information subject to disclosure under the Act. *Econ. Opportunities* at 266; see also Gov't Code §§ 552.002, 552.021 (public information consists of information collected, assembled, or maintained by or for governmental body in connection with transaction of official business). Accordingly, we conclude the Act does not require the county to release the requested information that has not been recovered. However, as you have identified and submitted recovered documents that contain information the requestors seek, we will address whether you must release this information

Next, we note that the information in Exhibit K was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2008-14691 (2008). In that decision, we ruled that with the exception of e-mail addresses, the county must release the submitted information. See Open Records Decision No. 673 (2001) (explaining circumstances under which the first type of previous determination exists). You indicate that circumstances have changed since the issuance of our previous ruling. You claim the information subject to the prior ruling, as well as the remaining information, is now protected by a court order. Section 552.107(2) of the Government Code excepts from required public disclosure information if "a court by order has prohibited disclosure of the information." Gov't Code § 552.107(2). You have submitted a copy of the court order, which only states that the county employee's computer be "taken into possession for safekeeping . . . [and] cleaned in the normal manner." The court order does not prohibit disclosure of the requested information. Accordingly, the county may not withhold the submitted information under section 552.107(2) of the Government Code. Therefore, as the relevant facts and circumstances have not changed since the issuance of Open Records Letter No. 2008-14691, you must continue to rely on that ruling as a previous determination with regard to the information in Exhibit K. As our ruling for this portion of the submitted information is dispositive, we need not reach your arguments for this information other than to note that information that was previously released to the public may not now be withheld

under section 552.103 of the Government Code. *See id.* § 552.007(b). We will, however, address your arguments for the remaining information that was not subject to the prior ruling.

You claim that the remaining information is not subject to the Act. The Act is only applicable to "public information." *See id.* § 552.021. Section 552.002(a) defines public information as "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business: (1) by a governmental body; or (2) for a governmental body and the governmental body owns the information or has a right of access to it." *Id.* § 552.002(a). Information that is collected, assembled, or maintained by a third party may be subject to disclosure under the Act if it is maintained for a governmental body, the governmental body owns or has a right of access to the information, and the information pertains to the transaction of official business. *See* Open Records Decision No. 462 (1987).

You argue that the information at issue consists of "personal e-mail messages that do not contain information collected, assembled, or maintained in connection with the transaction of official business." However, we note, and you acknowledge, that the information requested in this instance all pertains to recent charges of official oppression filed by the county against the judge at issue. Accordingly, the county collected the e-mails at issue in the course of conducting its official business, and therefore, the e-mails are public information subject to the Act.

We now address your claim under section 552.103 of the Government Code for the information in Exhibit L. Section 552.103 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). The county 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 county must meet both prongs of this test for information to be excepted under section 552.103(a).

You state the county received a notice of charges letter from the U.S. Equal Employment Opportunity Commission (the "EEOC") regarding allegations of sexual harassment from five different county employees prior to the county's receipt of the requests. This office has stated that a pending EEOC complaint indicates that litigation is reasonably anticipated. *See* Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982). Thus, we agree that the county reasonably anticipated litigation on the date it received the present requests for information. However, we find that you have failed to demonstrate how Exhibit L is related to the anticipated litigation. Accordingly, the county may not withhold Exhibit L under section 552.103 of the Government Code.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses section 58.007 of the Family Code. Juvenile law enforcement records relating to conduct that occurred on or after September 1, 1997 are confidential under section 58.007. Section 58.007(c) provides as follows:

Except as provided by Subsection (d), law enforcement records and files concerning a child and information stored, by electronic means or otherwise, concerning the child from which a record or file could be generated may not be disclosed to the public and shall be:

- (1) if maintained on paper or microfilm, kept separate from adult files and records;
- (2) if maintained electronically in the same computer system as records or files relating to adults, be accessible under controls that are separate and distinct from controls to access electronic data concerning adults; and
- (3) maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subchapter B.

Fam. Code § 58.007(c). For purposes of section 58.007, a "child" is defined as a person ten years of age or older and under seventeen years of age. *Id.* § 51.02(2)(A). Section 58.007 is not applicable to information that relates to a juvenile as a complainant, victim, witness, or other involved party; it is only applicable to juveniles listed as suspects or offenders. *See id.* §§ 58.007, 51.03 (defining "delinquent conduct" and "conduct indicating a need for supervision" for purposes of section 58.007). Although you state that a portion of Exhibit L consists of law enforcement records concerning a juvenile, you have not informed us of,

nor are we able to determine, the age of the suspect in the submitted documents. We find that the county has not demonstrated that Exhibit K involves an identified juvenile suspect for purposes of section 58.007(c). Therefore, we conclude you have not demonstrated the applicability of section 58.007(c) of the Family Code to the information you have marked, and the county may not withhold it under section 552.101 on that basis.

You also claim that the information you have marked must be withheld pursuant to section 552.101 of the Government Code in conjunction with section 58.106 of the Family Code. We note that subchapter B of chapter 58 of the Family Code, which contains section 58.106, pertains to the administration of the juvenile justice information system by the Texas Department of Public Safety. Because the records at issue were not requested from the Texas Department of Public Safety, we conclude that section 58.106 of the Family Code is not applicable in this instance.

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). Gov't Code § 552.137(a)-(c). The e-mail addresses we have marked are not a type specifically excluded by section 552.137(c) of the Government Code. Therefore, the county must withhold the marked e-mail addresses in accordance with section 552.137 unless the owners of the e-mail addresses have consented to their release.

In summary, the county must continue to rely on our ruling in Open Records Letter No. 2008-14691 as a previous determination and withhold or release Exhibit K in accordance with that decision. The county must withhold the information we have marked in Exhibit L under section 552.137 of the Government Code. The remaining 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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3). If the governmental body does not file suit over 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 challenge 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).

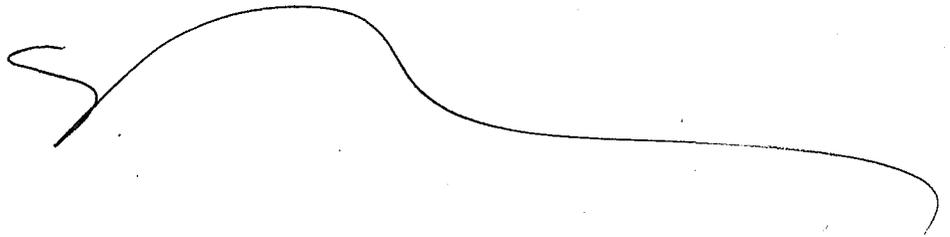
Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging 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,



Chris Schulz
Assistant Attorney General
Open Records Division



CS/ma

Ref: ID# 328866

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)