



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 11, 2008

Ms. Jennifer Tharp
Chief Civil Prosecutor
Comal County Criminal District Attorney's Office
150 North Seguin Avenue, Suite 314
New Braunfels, Texas 78130

OR2008-16927

Dear Ms. Tharp:

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# 329815.

Comal County (the "county") received a request for the requestor's personnel file from the county's human resources department and sheriff's office. You claim that the submitted information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.¹

We note a portion of the submitted information, which we have marked, is not responsive to the instant request because it was created after the date the request was received. The county need not release nonresponsive information in response to this request and this ruling will not address that information.

Next, we note that some of the submitted information consists of agendas, minutes and recordings 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

¹Although you raised sections 552.102, 552.104 through 552.106, and 552.108 through 552.148 as exceptions to disclosure of the submitted information, you have provided no arguments regarding the applicability of these sections. Since you have not submitted arguments concerning these exceptions, we assume that you no longer raise them. See Gov't Code §§ 552.301(b), (e), .302.

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." Gov't Code § 551.022. The Open Meetings Act also provides that a governmental body shall give written notice of date, hour, place, and subject of each meeting. *See id.* § 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 chapter 552 of the Government Code. *See, e.g.*, Open Records Decision Nos. 544 (1990), 378 (1983), 161 (1977), 146 (1976). Thus, the county may not withhold the meeting agendas and minutes under any of the claimed exceptions and must release this information, which we have marked, to the requestor.

Next, we note that the submitted information includes the requestor's fingerprints. The public availability of fingerprints is governed by chapter 560 of the Government Code. *See* Gov't Code §§ 560.001(1) ("biometric identifier" means retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry), 560.003 (biometric identifier in possession of governmental body is exempt from disclosure under Act). Section 560.002 provides, however, that "[a] governmental body that possesses a biometric identifier of an individual . . . may not sell, lease, or otherwise disclose the biometric identifier to another person unless . . . the individual consents to the disclosure[.]" *Id.* § 560.002(1)(A). Thus, the requestor has a right of access to his own fingerprints under section 560.002(1)(A). *See* Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning herself). Although the county seeks to withhold the fingerprints under section 552.103 of the Government Code, the exceptions to disclosure found in the Act are generally not applicable to information that other statutes make public. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Therefore, the fingerprints that we have marked must be released to this requestor pursuant to section 560.002 of the Government Code.

Next, we note that some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides, in pertinent part, as follows:

(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;

...

(17) a settlement agreement to which a governmental body is a party[.]

Gov't Code § 552.022(a)(1), (18). The submitted information includes performance evaluations pertaining to the requestor and a settlement agreement to which the county is a party. Therefore, as prescribed by section 552.022, the county must release this information unless it is confidential under other law. You argue that the information at issue is excepted from disclosure under section 552.103 of the Government Code. However, this section 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); see also Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Accordingly, the county may not withhold this information under section 552.103 of the Government Code. As you raise no other exceptions against the disclosure of the information subject to section 552.022, this information must be released to the requestor. We will now address your arguments under section 552.103 for the information not subject to section 552.022 of the Government Code.

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

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). The question of whether litigation

is reasonably anticipated must be determined on a case-by-case basis. *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.² 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). 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. Open Records Decision No. 361 (1983).

You state that the requestor is a former employee of the county who entered into an settlement agreement detailing the terms of his resignation. You inform us that within this agreement, the requestor accepted a "severance payment" in exchange for his fully releasing the county from future claims and that the county and requestor mutually agreed to refrain from disparaging the other party. You further inform us that during the period of the requestor's departure from employment, the county sent a pre-claim notice to the Texas Association of Counties and that the Texas Association of Counties has designated an attorney to assist the county concerning employment related issues pertaining to the requestor. You assert that the requestor has stated that "he will file a lawsuit if he is not happy with what he finds in his file" and that he "has made threats to file suit against the county to several county representatives." However, we determine that you have failed to demonstrate that the requestor has taken concrete steps toward the initiation of litigation. *See* Open Records Decision No. 331 (1982). Thus, you have not established that the county reasonably anticipated litigation when it received the request for information. Accordingly, none of the submitted information may be withheld under section 552.103.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. Gov't Code § 552.107(1). When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity

²Among 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).

other than that of providing or facilitating professional legal services to the client governmental body. *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication, *id.*, meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5).

Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You explain that Exhibit 7 consists of confidential communication between attorneys working on behalf of the county and representatives of the county made in furtherance of the rendition of professional legal services. You also assert the communications were intended to be confidential and that their confidentiality has been maintained. After reviewing your arguments and the submitted information, we agree the submitted information in Exhibit 7 constitutes privileged attorney-client communications that the county may withhold under section 552.107.

Next, we consider whether the remaining submitted information is otherwise excepted from disclosure. 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 of the Government Code also encompasses federal law. Prior decisions of this office have held that section 6103(a) of title 26 of the United States Code renders tax return information confidential. Attorney General Opinion H-1274(1978) (tax returns); Open Records Decision Nos. 600 (1992) (W-4 forms), 226 (1979) (W-2 forms). Section 6103(b) defines the term “return information” as “a taxpayer’s identity, the nature, source, or amount of income, payments, tax withheld, deficiencies, overassessments or tax payments . . . or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary [of the Internal Revenue Service] with respect

to a return . . . or the determination of the existence, or possible existence, of liability . . . for any tax, . . . penalty, . . . , or offense[.]” See 26 U.S.C. § 6103(b)(2)(A). Federal courts have construed the term “return information” expansively to include any information gathered by the Internal Revenue Service regarding a taxpayer’s liability under title 26 of the United States Code. See *Mallas v. Kolak*, 721 F. Supp 748, 754 (M.D.N.C. 1989), *aff’d in part*, 993 F.2d 1111 (4th Cir. 1993).

Subsections (c) and (e) of section 6103 are exceptions to the confidentiality provisions of section 6103(a) and provide for disclosure of tax information to the taxpayer or the taxpayer’s designee. See 26 U.S.C. § 6103(c), (e)(1)(A)(i) (tax return information may be disclosed to taxpayer), (e)(7) (information may be disclosed to any person authorized by subsection (e) to obtain such information if Secretary of Treasury determines such disclosure would not seriously impair tax administration); see also *Lake v. Rubin*, 162 F.3d 113 (D.C. Cir. 1998) (26 U.S.C. § 6103 represents exclusive statutory route for taxpayer to gain access to own return information and overrides individual’s right of access under the federal Freedom of Information Act). Section 6103(c) provides that, unless the Secretary of Treasury determines that disclosure would seriously impair tax administration, tax record information may be released to any person or persons as the taxpayer may designate in a consent to such disclosure. See 26 U.S.C. § 6103(c). The submitted information contains the requestor’s W-4 forms; therefore, pursuant to section 6103(c) of title 26 of the United States Code, the county must release these forms to the requestor if the Secretary of Treasury determines that such disclosure would not seriously impair federal tax administration. Otherwise, the submitted W-4 forms are confidential under section 6103 of title 26 of the United States Code and must be withheld under section 552.101 of the Government Code.

The submitted information contains the requestor’s L-3 (Declaration of Psychological and Emotional Health) form. Section 1701.306 of the Occupations Code provides as follows:

(a) The [Texas Commission on Law Enforcement Officer Standards and Education] may not issue a license to a person as an officer or county jailer unless the person is examined by:

(2) a licensed physician who declares in writing that the person does not show any trace of drug dependency or illegal drug use after a physical examination, blood test, or other medical test.

(b) An agency hiring a person for whom a license as an officer or county jailer is sought shall select the examining physician[.] The agency shall prepare a report of [the] declaration required by Subsection (a) and shall maintain a copy of the report on file in a format readily accessible to the commission. A declaration is not public information.

Occ. Code § 1701.306(a)(2), (b). Upon review, we determine that the submitted L-3 declaration is confidential under section 1701.306 and must be withheld under section 552.101 of the Government Code.

The submitted information also contains F-5 Report of Separation of License Holder forms, which are generally made confidential by section 1701.454 of the Occupations Code. Section 552.101 also encompasses section 1701.454, which provides in relevant part that “[a] report or statement submitted to the TCLEOSE under this subchapter is confidential and is not subject to disclosure under Chapter 552, Government Code, unless the person resigned or was terminated due to substantiated incidents of excessive force or violations of the law other than traffic offenses.” *Id.* § 1701.454(a). In this instance, it does not appear that the named officer resigned due to substantiated incidents of excessive force or violations of the law other than traffic offenses. Therefore, the county must withhold the F-5 forms we have marked pursuant to section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code.

The submitted information also contains a ST-3 accident report that appears to have been completed pursuant to chapter 550 of the Transportation Code. *See* Transp. Code § 550.064 (officer’s accident report). Section 552.101 also encompasses section 550.065(b), which states that, except as provided by subsection (c), ST-3 accident reports are privileged and confidential. Section 550.065(c)(4) provides for the release of accident reports to a person who provides two of the following three pieces of information: (1) date of the accident; (2) name of any person involved in the accident; and (3) specific location of the accident. *Id.* § 550.065(c)(4). Under this provision, a governmental entity is required to release a copy of an accident report to a person who provides the agency with two or more pieces of information specified by the statute. *Id.* Here, the requestor has not provided the county with two of the required pieces of information. Thus, the county must withhold the marked ST-3 accident report under section 552.101 in conjunction with section 550.065(b) of the Transportation Code.

We note the remaining information contains Texas motor vehicle information. Section 552.130 excepts from public disclosure information that relates to:

- (1) a motor vehicle operator’s or driver’s license or permit issued by an agency of this state; [or]
- (2) a motor vehicle title or registration issued by an agency of this state[.]

Gov’t Code § 552.130(a). Accordingly, the county must withhold the Texas motor vehicle record information we have marked under section 552.130.

In summary, the county must release the submitted meeting agendas and minutes in accordance with the Open Meetings Act, the requestor’s fingerprints pursuant to section 560.002 of the Government Code, the requestor’s performance evaluations, which

we have marked, under section 552.022(a)(1) of the Government Code and the settlement agreement, which we have marked, under section 552.022(a)(18) of the Government Code. The county may withhold exhibit 7 under section 552.107 of the Government Code as privileged attorney-client communications. The county must release the requestor's W-4 forms pursuant to section 6103(e)(7) of title 26 of the United States Code if such disclosure would not seriously impair federal tax administration; otherwise the county must withhold the tax forms under section 552.101 in conjunction with section 6103. The county must withhold the submitted L-3 declaration pursuant to section 1701.306 of the Occupations Code, the F-5 forms we have marked pursuant to section 1701.454 of the Occupations Code, the marked ST-3 accident report under section 550.065(b) of the Transportation Code, and the motor vehicle information we have marked under section 552.130 of the Government Code. The remaining information must be released.³

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).

³We note that because the requestor has a right of access to information within the submitted documents pursuant to section 552.023 of the Government Code, the county must again seek a decision from this office if it receives a request for this information from a different requestor.

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,



Jonathan Miles
Assistant Attorney General
Open Records Division

JM/ma

Ref: ID# 329815

Enc. Submitted documents

c: Requestor
(w/o enclosures)