



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

January 15, 2009

Ms. Nancy Nelson
Associate Vice President
El Paso Community College
P.O. Box 20500
El Paso, Texas 79998-0500

OR2009-00668

Dear Ms. Nelson:

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# 332315.

The El Paso County Community College District (the "district") received a request for a named individual's personnel file. We understand that you have redacted portions of the submitted information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g.¹ You claim that the submitted personnel file is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments received from the requestor and the individual named in the request. See Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we note that some of the submitted information, which we have marked, is not responsive to the instant request for information because it was created after the request was received. This ruling does not address the public availability of any information that is not responsive to the request and the district is not required to release that information in response to the request.

¹We note that our office is prohibited from reviewing these education records to determine whether appropriate redactions under FERPA have been made; therefore, we will not address the applicability of FERPA to any of the submitted records.

Next, we note that the submitted personnel file includes information that is subject to section 552.022 of the Government Code, which provides in pertinent 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;

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(1), (3). The submitted documents contain information subject to sections 552.022(a)(1) and 552.022(a)(3) of the Government Code, which we have marked. Therefore, the district may only withhold this information if it is confidential under "other law." Although you argue that this information is excepted under section 552.103 of the Government Code, this section is a discretionary exception and, as such, is not "other law" for purposes of section 552.022. *See* Open Records Decision Nos. 665 at 2 n.5 (discretionary exceptions generally), 542 at 4 (1990) (statutory predecessor to section 552.103 subject to waiver). Therefore, the information we have marked as subject to section 552.022 may not be withheld under section 552.103.

We next address your argument under section 552.103 of the Government Code with regards to the remaining responsive information. Section 552.103 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 *réf'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 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). This office has concluded litigation was reasonably anticipated when the potential opposing party filed a complaint with the Equal Employment Opportunity Commission (the "EEOC"). See Open Records Decision No. 336 (1982).

You inform this office that the individual named in the present request filed a discrimination claim with the EEOC against the district before the present request for information was made. Thus, based on your representations and the submitted documentation, we find the district reasonably anticipated litigation on the date it received the present request for information. We also find that the submitted information relates to this anticipated litigation.

We note, however, that some of the documents you seek to withhold, including forms completed by the individual named in the request and communications sent to or received from the same individual, have been seen by the potential opposing party. If a potential opposing party has seen or had access to information that is related to anticipated litigation, through discovery or otherwise, then there is no interest in withholding such information from public disclosure under section 552.103. See Open Records Decision Nos. 349 (1982), 320 (1982). Therefore, the district may not withhold the information that we have marked for release under section 552.103 of the Government Code. However, because we have no indication that the remaining information at issue has been seen or obtained by the opposing party, these documents may be withheld under section 552.103.²

We now address the information that has been seen by the individual named in the request, as well as the information subject to section 552.022. The employee named in the request asserts that his medical history and the medical histories of his family members are subject to the Americans with Disabilities Act (the "ADA"). Section 552.101 excepts from

²We note that the applicability of section 552.103(a) ends once the litigation has concluded. See Attorney General Opinion MW-575 (1982); see also Open Records Decision No. 350 (1982).

disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses information protected by the ADA, which 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). Upon review, we find that the submitted documents do not contain medical histories of the named employee or his family members. Thus, no information may be withheld under section 552.101 and the ADA.

The district and the employee named in the request both assert that some the remaining information at issue is subject to common-law privacy as encompassed by sections 552.101 and 552.102 of the Government Code. Section 552.101 encompasses the doctrine of common-law privacy, while section 552.102(a) excepts from public 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). Section 552.102 is applicable to information that relates to public officials and employees. *See* Open Records Decision No. 327 at 2 (1982) (anything relating to employee's employment and its terms constitutes information relevant to person's employment relationship and is part of employee's personnel file). 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(a) is the same as the common-law privacy test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976). Accordingly, we will consider your section 552.101 and section 552.102(a) privacy claims together.

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.* at 685. To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. We agree that the some of the remaining information contains potentially intimate or embarrassing information. However, there is a legitimate public interest in the conduct of a district employee that occurs within the scope of his employment. *See generally* Open Records Decision Nos. 470 at 4 (1987) (public has legitimate interest in job performance of public employees), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees), 423 at 2 (1984) (scope of public employee privacy is narrow). Because we find that there is a legitimate public interest in the remaining documents, this information is not subject to common-law privacy. Thus, no information may be withheld under section 552.101 in conjunction with common-law privacy.

We note that the remaining documents contain information that may be excepted from disclosure under section 552.117(a)(1) of the Government Code.³ Section 552.117(a)(1) excepts from public disclosure the home address and telephone number, social security number, and family member information of a current or former official or employee of a governmental body who requests that this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who did not timely request confidentiality under section 552.024 for their information. Accordingly, to the extent that the employee at issue timely elected confidentiality under section 552.024, the district must withhold the information we have marked under section 552.117(a)(1). If the employee at issue did not timely elect confidentiality for his information, then the information we marked may not be withheld under section 552.117(a)(1).

To the extent the employee named in the request did not timely elect confidentiality under section 552.024, he claims his social security number is excepted from disclosure under section 552.147(b) of the Government Code, which provides that "[t]he social security number of a living person is excepted from" required public disclosure under the Act. *Id.* § 552.147. Accordingly, to the extent this information is not subject to section 552.117(a)(1), the district may withhold the marked social security numbers under section 552.147.

The remaining information at issue also contains e-mail addresses subject to section 552.137 of the Government Code. 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). Accordingly, unless it received consent for their release, the district must withhold the e-mail addresses we have marked under section 552.137.

In summary, except where marked otherwise, the district may withhold the submitted information under section 552.103 of the Government Code. Regarding the remaining

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

information at issue, to the extent that the employee at issue timely elected confidentiality under section 552.024, the district must withhold the information we have marked under section 552.117(a)(1). If section 552.117(a)(1) is not applicable to the marked social security numbers, they may be withheld under section 552.147. Unless it receives consent for their release, the district must withhold the information we marked under section 552.137 of the Government Code. The remaining information must be released to the requestor.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Reg Hargrove
Assistant Attorney General
Open Records Division

RJH/eeg

Ref: ID# 332315

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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(w/o enclosures)