



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

November 4, 2009

Ms. Candice M. De La Garza  
Assistant City Attorney  
City of Houston  
P.O. Box 368  
Houston, Texas 77001-0368

OR2009-12230A

Dear Ms. De La Garza:

This office issued Open Records Letter No. 2009-12230 (2009) on August 31, 2009. We have examined this ruling and determined that Open Records Letter No. 2009-12230 is incorrect. Where this office determines that an error was made in the decision process under sections 552.301 and 552.306, and that error resulted in an incorrect decision, we will correct the previously issued ruling. Consequently, this decision serves as the correct ruling and is a substitute for Open Records Letter No. 2009-12230. *See generally* Gov't Code § 552.011 (providing that Office of the Attorney General may issue a decision to maintain uniformity in application, operation, and interpretation of the Public Information Act (the "Act")). This ruling was assigned ID# 363770.

The Houston Police Department (the "department") received a request for the requestor's entire file, including information pertaining to every hiring attempt the requestor has made with the department and information pertaining to when the requestor was employed as a jailer with the department. You claim that the requested information is excepted from disclosure under section 552.103 of the Government Code.<sup>1</sup> We have considered the exception you claim and reviewed the submitted information.

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<sup>1</sup>Although you raise sections 552.107 and 552.111 of the Government Code as exceptions to disclosure of the submitted information, you have provided no arguments regarding the applicability of these sections. Therefore, we assume you have withdrawn these exceptions.

Initially, we note that some of the submitted information falls within the scope of section 552.022 of the Government Code. Section 552.022(a)(1) provides for required public disclosure of “a completed report, audit, evaluation, or investigation made of, for, or by a governmental body,” unless the information is expressly confidential under other law or excepted from disclosure under section 552.108 of the Government Code. Gov’t Code § 552.022(a)(1). Thus, the completed investigation report must be released pursuant to section 552.022(a)(1) unless it contains confidential information. Although you seek to withhold the completed investigation report under section 552.103 of the Government Code, that section is a discretionary exception to disclosure that protects a governmental body’s interests and may be waived. *See id.* § 552.007; *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (Gov’t Code § 552.103 may be waived); Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.103 is not other law that makes information confidential for the purposes of section 552.022. Therefore, the completed investigation report may not be withheld under section 552.103. We note, however, that a portion of the completed investigation report is subject to section 552.101 of the Government Code.<sup>2</sup> Accordingly, we will address the applicability of this section to the completed investigation report.

Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This section encompasses information protected by other statutes. Section 1703.306 of the Occupations Code provides in relevant part the following:

(a) A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person other than:

(1) the examinee or any other person specifically designated in writing by the examinee[.]

...

(b) The board or any other governmental agency that acquires information from a polygraph examination under this section shall maintain the confidentiality of the information.

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<sup>2</sup>The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Occ. Code § 1703.306(a)(1), (b). The completed investigation report contains information acquired from a polygraph examination of the requestor. Thus, the department has the discretion to release such information, which we have marked, pursuant to section 1703.306(a)(1). *See* Open Records Decision No. 481 at 9 (1987) (predecessor to section 1703.306 permits, but does not require, examination results to be disclosed to examinees). Otherwise, the department must withhold the marked polygraph information under section 552.101 in conjunction with section 1703.306(a) of the Occupations Code.

Section 552.101 also encompasses criminal history record information (“CHRI”) generated by the National Crime Information Center or by the Texas Crime Information Center, which is confidential under federal and state law. CHRI means “information collected about a person by a criminal justice agency that consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions.” *Id.* § 411.082(2). Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. *See* Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* at 10-12. Section 411.083 of the Government Code deems confidential CHRI that the Texas Department of Public Safety (“DPS”) maintains, except that DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See* Gov’t Code § 411.083. Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *See id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* § 411.090-.127. Furthermore, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with chapter 411, subchapter F. The department must withhold the CHRI we have marked pursuant to section 552.101 of the Government Code in conjunction with federal law and chapter 411 of the Government Code.

Section 552.101 also encompasses section 611.002 of the Health and Safety Code, which is applicable to mental health records and provides in pertinent part:

(a) Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.

(b) Confidential communications or records may not be disclosed except as provided by Section 611.004 or 611.0045.

Health & Safety Code § 611.002(a)-(b); *see id.* § 611.001 (defining “patient” and “professional”). Sections 611.004 and 611.0045 of the Health and Safety Code provide for

access to information that section 611.002 makes confidential only by certain individuals. *See id.* §§ 611.004, .0045; Open Records Decision No. 565 (1990). We have marked mental health records in the completed report and the remaining information that the department must withhold under section 552.101 in conjunction with section 611.002 of the Health and Safety Code, unless the requestor is authorized to obtain that information under sections 611.004 and 611.0045.

We next address your argument under section 552.103 of the Government Code for the remaining information. Section 552.103 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 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 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). 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.* 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.<sup>3</sup> Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). 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). 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).

You have submitted documentation to this office showing that, prior to the department's receipt of the request for information, a charge of discrimination was filed with the EEOC. You further state that as of the date the department received the instant request, this charge remained pending with the EEOC. Based on your representations and our review of the submitted information, we find you have demonstrated that litigation was reasonably anticipated when the department received the request for information. Further, we note that the submitted information is directly related to the anticipated litigation. Accordingly, we agree that the department may withhold the remaining information under section 552.103 of the Government Code.

We note, however, that once the information has been obtained by all parties to the pending litigation, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). We also note that the applicability of section 552.103(a) ends when the litigation has concluded. Attorney General Opinion MW-575 (1982) at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2 (1982).

In summary, within the completed investigation report that is subject to section 552.022, the department: (1) has the discretion to release the requestor's polygraph information, which we have marked, pursuant to section 1703.306(a)(1) of the Occupations Code; otherwise, the marked polygraph information is confidential under section 1703.306 and must be withheld under section 552.101 of the Government Code; (2) must withhold the CHRI we have marked pursuant to section 552.101 of the Government Code in conjunction with federal law and chapter 411; (3) must withhold the information we have marked under section 552.101 in conjunction with section 611.002 of the Health and Safety Code, unless the requestor is authorized to obtain that information under sections 611.004 and 611.0045. The remainder of the completed report, which we have marked, must be released pursuant to

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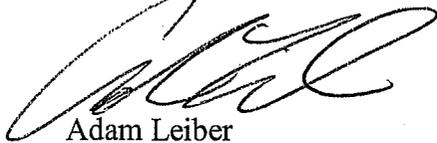
<sup>3</sup>In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

section 552.022(a)(1).<sup>4</sup> The department must also withhold the remaining information we have marked under section 552.101 in conjunction with section 611.002, unless the requestor is authorized to obtain that information. The department may withhold the remaining information under section 552.103 of the Government Code.

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](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, toll free, at (888) 672-6787.

Sincerely,



Adam Leiber  
Assistant Attorney General  
Open Records Division

ACL/rl

Ref: ID# 363770

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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<sup>4</sup>We note that the information being released contains confidential information to which the requestor has a right of access. See Gov't Code § 552.023(a); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual asks governmental body to provide him with information concerning himself). However, if the department receives another request for this particular information from a different requestor, then the department should again seek a decision from this office.