



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 14, 2009

Ms. Jeri Yenne
Criminal District Attorney
Brazoria County
111 East Locust, Suite 408A
Angleton, Texas 77515

OR2009-14553

Dear Ms. Yenne:

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# 356880.

The Brazoria County District Attorney's Office (the "county") received a request for the e-mails of a named county official contained on two hard drives. You claim some of the requested information is no longer in the county's possession. Alternatively, you claim the requested information is not subject to the Act. You also claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.111 and 552.137 of the Government Code. We have considered your arguments and reviewed the submitted information.

Initially, you inform this office that a portion of the submitted information is currently at issue in a lawsuit pending against the Office of the Attorney General: *Jeri Yenne, Criminal Dist. Attorney of Brazoria County, Tex. v. Greg Abbott, Attorney Gen. of Tex.*, No. D-1-GV-08-002599 (345th Dist. Ct., Travis County, Tex.). We will not address whether the information at issue in the lawsuit is excepted under the Act, but will instead allow the trial court to determine whether this information must be released to the public.

Next, you inform us that information that is currently at issue was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2008-16321 (2008). In that decision, in relevant part, we ruled that the county need not release the information that had been deleted from the file allocation table of the hard disks

and had not been recovered, but that, with the exception of e-mail addresses which must be withheld in accordance with section 552.137, the county must release the information which had been recovered from the hard disks. *See* Open Records Decision No. 673 (2001) (explaining circumstances under which the first type of previous determination exists). As you do not inform us that the laws, facts and circumstances have changed for this information since the issuance of Open Records Letter No. 2008-16321, you must continue to rely on that ruling as a previous determination with regard to the information ruled upon in Open Records Letter No. 2008-16321. To the extent you have submitted or recovered information that is not encompassed by our ruling in Open Records Letter No. 2008-16321, we will address your arguments.

You claim that some of the submitted records are personal e-mails that are not subject to the Act. The Act is only applicable to "public information." *See* Gov't Code § 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 largely consists of personal e-mail messages that do not relate to the transaction of official business. However, we note that the county collected the requested e-mails during an investigation of charges of official oppression filed against the judge at issue. Accordingly, the county collected the e-mails in the course of conducting its official business, and therefore, the e-mails are public information subject to the Act.

You also argue that some of the requested records are not subject to the Act because they "deal with judicial matters which transcend the operations of the Brazoria County Juvenile Board," and thus are records of the judiciary. The Act generally requires the disclosure of information maintained by a "governmental body." *See* Gov't Code § 552.021. While the Act's definition of a "governmental body" is broad, it specifically excludes "the judiciary." *See id.* § 552.003(1)(A), (B). In Open Records Decision No. 646 (1996), this office determined that a community supervision and corrections department is a governmental body for purposes of the Act, and that its administrative records, such as personnel records and other records reflecting day-to-day management decisions, are subject to the Act. *Id.* at 5. On the other hand, we also ruled that specific records regarding individuals on probation and subject to the direct supervision of a court that are held by a community supervision and corrections department are not subject to the Act because such records are held on behalf of the judiciary. *Id.*; *see* Gov't Code § 552.003.

We note that some of the submitted records pertain to juveniles who are under the supervision of the Brazoria County Probation Department. We note that records held by the

Brazoria County Juvenile Probation Department that pertain to juveniles subject to the direct supervision of the court are judicial records. *See* ORD 646 at 2-3; *Benavides v. Lee*, 665 S.W.2d 151 (Tex. App.—San Antonio 1983, no writ) (in determining whether governmental entity falls within judiciary exception, this office looks to whether governmental entity maintains relevant records as agent of judiciary with regard to judicial, as opposed to administrative, functions). You inform us that some of the remaining records concern matters of the Brazoria County Juvenile Board (the “board”). Although the board is not part of the judiciary for the purposes of section 552.003, if the board holds records that pertain to individuals subject to direct supervision of a court, those records are judicial records and are subject to the judicial exception. Open Records Decision No. 671 (2001). Accordingly, we find that the information we have marked constitutes records of the judiciary and is not subject to disclosure under the Act. However, we find that the remaining information either does not constitute judicial records for purposes of the Act.

We note the remaining information includes notices, agendas, and minutes of public meetings. Notices, agendas, and minutes of a governmental body’s public meetings are specifically made public under provisions of the Open Meetings Act, chapter 551 of the Government Code. *See* Gov’t Code §§ 551.022 (minutes and tape recordings of open meeting are public records and shall be available for public inspection and copying upon request), .041 (governmental body shall give written notice of date, hour, place, and subject of each meeting), .043 (notice of meeting of governmental body must be posted in place readily accessible to general public for at least 72 hours before scheduled time of meeting). As a general rule, the exceptions to disclosure found in the Act do not apply to information that other statutes make public. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Therefore, the meeting notices we have marked must be released.

We next address your claim under section 552.103 of the Government Code, which provides in relevant part:

(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 is subject to claims before the U.S. Equal Employment Opportunity Commission (the "EEOC") regarding allegations of sexual harassment from six different county employees or former employees. You indicate the claims were pending when the county received this request. 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 request for information. However, we find that you have failed to demonstrate that the information at issue is related to the anticipated litigation. Accordingly, the county may not withhold any of the information that is subject to the Act under section 552.103 of the Government Code.

You also raise section 552.101 of the Government Code, which 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 the doctrine of common-law privacy. 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. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. Additionally, this office has found some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. See Open Records Decision Nos. 470 (1987) (information pertaining to illness from severe emotional and job-related stress protected by common-law privacy), 455 (1987) (information pertaining to prescription drugs, specific illnesses, operations and procedures, and physical disabilities protected from disclosure). Upon review, we find that the information we have marked is highly intimate or embarrassing and not of legitimate public concern. Therefore, the county must withhold this information pursuant to section 552.101 of the Government Code in conjunction with common-law privacy.

Next, you assert that the remaining information is excepted from disclosure under the deliberative process privilege encompassed by section 552.111 of the Government Code. See Open Records Decision No. 615 at 2 (1993). Section 552.111 excepts from disclosure

“an interagency memorandum or letter that would not be available by law to a party in litigation with the agency.” Gov’t Code § 552.111. The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615, this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined that section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* ORD 615 at 5. A governmental body’s policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; *see also City of Garland v. Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body’s policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body’s policy mission. *See* Open Records Decision No. 631 at 3 (1995). Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); ORD 615 at 4-5.

You generally assert the remaining information constitutes inter-agency or intra-agency memoranda or letters that would not be available by law to a party engaged in litigation with the agency. However, you have failed to explain how the remaining information in these exhibits constitutes advice, recommendations, opinions, or material reflecting the policymaking processes of the county. Therefore, we conclude that you may not withhold any of the remaining information under section 552.111.

We note that section 552.117 of the Government Code may be applicable to some of the remaining information.¹ Section 552.117(a)(1) excepts from disclosure the current and former home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Whether information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). The submitted information does not reflect whether the county employees whose personal information is

¹ The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos 481 (1987), 480 (1987), 470 (1987).

at issue elected to keep their information confidential pursuant to section 552.024 of the Government Code prior to the county's receipt of the request for information. Nevertheless, to the extent the employees whose information is at issue timely requested confidentiality for the information we have marked, the county must withhold that information under section 552.117(a)(1). To the extent the employees did not make timely elections under section 552.024, the marked information may not be withheld under section 552.117(a)(1).

We note a portion of the remaining information contains information subject to section 552.117(a)(2) of the Government Code. Section 552.117(a)(2) excepts from public disclosure a peace officer's home address and telephone number, social security number, and family member information regardless of whether the peace officer made an election under section 552.024 of the Government Code. Gov't Code § 552.117(a)(2). Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. Accordingly, the county must withhold the information we have marked under section 552.117(a)(2) 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). 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. *Id.* § 552.137(c). 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.

We note portions of the remaining information appear to be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

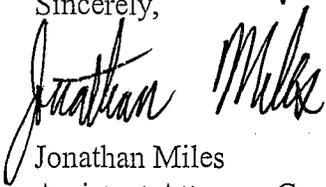
In summary, we decline to issue a decision regarding the information at issue in the pending litigation between the county and our office, but will instead allow the trial court to determine whether this information must be released to the public. You must continue to rely on Open Records Letter No. 2008-16321 as a previous determination with regard to the information at issue in that ruling. The information we have marked as judicial records is not subject to the Act and need not be released. The county must release the marked meeting notices, agendas, and minutes pursuant to the Open Meetings Act. You must withhold the information we have marked under common-law privacy in conjunction with section 552.101 of the Government Code. To the extent the county employees made timely elections under

section 552.024, the county must withhold the information we have marked pursuant to section 552.117(a)(1) of the Government Code. The county must withhold the information we have marked pursuant to section 552.117(a)(2) of the Government Code. The county must withhold the e-mail addresses we have marked under section 552.137 of the Government Code unless the owners of the e-mail addresses consent to their release. The remaining information must be released, but any copyrighted information may only be released in accordance with copyright law.

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

Sincerely,



Jonathan Miles
Assistant Attorney General
Open Records Division

JM/cc

Ref: ID# 356880

Enc. Submitted documents

c: Requestor
(w/o enclosures)