



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

October 28, 2009

Ms. Cathy Cunningham  
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Irving, Texas 75062-2763

OR2009-15339

Dear Ms. Cunningham:

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# 359619.

The Town of Westlake (the "town"), which you represent, received a request for four specified e-mails, any correspondence to the Cordell Hull Foundation, a named employee's contract, and a specified settlement offer. You state that the town will release some of the requested information. You claim that the submitted information is excepted from disclosure under sections 552.102 and 552.103 of the Government Code.<sup>1</sup> You also state that the town believes the submitted information may involve the proprietary interests of third parties. Accordingly, you inform us, and provide documentation showing, that pursuant to section 552.305 of the Government Code, the town has notified the interested third parties, Ms. Claudia Simonetti and Mr. Mark Rosevear, of the request and of their right to submit arguments to this office explaining why this information should not be released. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in certain

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<sup>1</sup>Although the town also raises sections 552.101 of the Government Code, the town has provided no arguments explaining how this exception is applicable to the submitted information. Therefore, we assume that the town no longer asserts these sections. *See* Gov't Code §§ 552.301, .302.

circumstances). We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See Gov't Code* § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from any of the third parties explaining why their submitted information should not be released. Therefore, we have no basis to conclude that any of these third parties have a protected proprietary interest in the submitted information. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. Accordingly, the town may not withhold any portion of the submitted information based upon the proprietary interests of the third parties.

Next, you inform us that the one of the submitted e-mails was the subject of a previous request for information in response to which this office issued Open Records Letter No. 2009-12868 (2009). In that decision, our office ruled the town must release the requested e-mail. As we have no indication that the law, facts, and circumstances on which this prior ruling was based have changed, the town must continue to rely on this ruling as a previous determination and dispose of the subject e-mail in accordance with Open Records Letter No. 2009-12868. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

Next, we note Exhibit 5 falls within the scope of section 552.022 of the Government Code. Section 552.022(a)(3) provides for required public disclosure of "information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body," unless the information is expressly confidential under other law. *Gov't Code* § 552.022(a)(3). Exhibit 5 consists of an executed employment contract that relates to the expenditure of public funds. You claim this information is excepted from disclosure under sections 552.102 and 552.103 of the Government Code. Section 552.103 is a discretionary exception that protects a governmental body's interests and is therefore not "other law" for purposes of section 552.022(a)(3). *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); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally); 663 (1999) (governmental body may waive section 552.103). Therefore, the information subject to section 552.022(a)(3) may not be withheld under section 552.103. However, 552.102, is considered "other law" for the purposes of 552.022;

therefore, we will consider the applicability of this section to the contract made public under section 552.022(a)(3), as well as the remaining submitted information.

Section 552.102(a) of the Government Code excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 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 test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976) for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101.

Common-law privacy protects information that (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found.*, 540 S.W.2d at 685. The types of information considered intimate or embarrassing by the Texas Supreme Court in *Industrial Foundation* include 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. Information pertaining to the work conduct and job performance of public employees is subject to a legitimate public interest and therefore generally not protected from disclosure under common-law privacy. *See* Open Records Decision Nos. 444 at 5-6 (1986) (public has interest in public employee's qualifications and performance and the circumstances of public employee's resignation or termination), 423 at 2 (1984) (explaining that because of greater legitimate public interest in disclosure of information regarding public employees, employee privacy under section 552.102 is confined to information that reveals "intimate details of a highly personal nature"); *see also* Gov't Code § 552.022(a)(2) (name, sex, ethnicity, salary, title, and dates of employment of each employee and officer of governmental body are public information). Upon review, we find that none of the remaining information is the type of information considered highly intimate or embarrassing by the court in *Industrial Foundation*. Therefore, the town may not withhold the remaining information on the basis of section 552.102 of the Government Code.

Next, we address your claim under section 552.103 of the Government code for the remaining information not subject to section 552.022 of the Government Code. Section 552.103 provides in 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 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 town 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) that litigation was pending or reasonably anticipated on the date of the receipt of the request for information and (2) that the information at issue is related to the pending or anticipated 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 [1<sup>st</sup> Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The town must meet both prongs of this test for information to be excepted under section 552.103(a).

To establish that litigation is reasonably anticipated for purposes of section 552.103, a governmental body must provide this office with “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” Open Records Decision No. 452 at 4 (1986). When the governmental body is the prospective plaintiff or prosecutor in the anticipated litigation, the concrete evidence must at least reflect that litigation is “realistically contemplated.” See Open Records Decision No. 518 at 5 (1989); see also Attorney General Opinion MW-575 (1982) (finding that investigatory file may be withheld if governmental body attorney determines that it should be withheld pursuant to section 552.103 and that litigation is “reasonably likely to result”). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. See Open Records Decision No. 452 at 4 (1986).

You state that the town anticipates litigation related to employment disputes with the two named employees at issue. You further state that the town is involved in settlement negotiations with attorneys representing the two named employees. In addition, you inform us that the requested information concerns the subject of the anticipated litigation. Based on your representations, we find that you have demonstrated that litigation was reasonably anticipated when the town received the present request for information.

We note, however, that the remaining submitted information consists of communications between the town and the named employees. Thus, the opposing parties have already seen or had access to all of the information you seek to withhold under section 552.103. The purpose of this exception is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. See ORD 551 at 4-5. If the opposing party has seen or had access to information relating to litigation, through discovery or otherwise, then there is no interest in withholding such

information from the public under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). We therefore conclude that the town may not withhold any of the remaining information under section 552.103 of the Government Code.

We note that some of the remaining information is subject to sections 552.117 and 552.137 of the Government Code.<sup>2</sup> Section 552.117(a)(1) excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former employee of a governmental body who requests that this information be kept confidential under section 552.024. 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 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 employee who did not timely request under section 552.024 that the information be kept confidential. Therefore, the town must withhold the information we have marked under section 552.117(a)(1) to the extent the employees at issue timely requested confidentiality for that information under section 552.024.

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). We have marked e-mail addresses pursuant to section 552.137. We find that the marked e-mail addresses are not a type specifically excluded by section 552.137(c). Likewise, section 552.137 is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees. We have marked the personal e-mail addresses that must be withheld under section 552.137, unless the owner of an e-mail address has consented to its disclosure.

In summary, the town must continue to rely on Open Records Letter No. 2009-12868 as a previous determination and dispose of the subject e-mail in accordance with that ruling. The town must withhold the information we have marked under section 552.117(a)(1) of the Government Code to the extent the employees at issue timely requested confidentiality for that information under section 552.024. The town must withhold the marked e-mail addresses under section 552.137 of the Government Code unless the owner of an e-mail address has consented to its disclosure. The remaining information must be released.

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

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,



Tamara Wilcox  
Assistant Attorney General  
Open Records Division

TW/dls

Ref: ID# 359619

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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