



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 13, 2010

Ms. Connie Crawford
Assistant County Attorney
El Paso County Hospital District
4815 Alameda, 8th Floor, Suite B
El Paso, Texas 79905

OR2010-05230

Dear Ms. Crawford:

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# 375559.

The El Paso County Hospital District d/b/a the University Medical Center of El Paso (the "district") received a request for six categories of information related to the position of security operations manager and a former district employee. You state the district has no documents responsive to part of category five of the request.¹ You claim that the submitted information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

We begin by noting that one of the submitted documents is not responsive to the instant request for information, as it was created after the date that the district received the request. This ruling does not address the public availability of any information that is not responsive to the request, and the district need not release that information in response to this request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San

¹The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986) (governmental body not required to disclose information that did not exist at time request was received).

We next note that the responsive information includes employee evaluations, which are subject to section 552.022(a)(1) of the Government Code. Section 552.022(a)(1) provides for the required public disclosure of “a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108.” Gov’t Code § 552.022(a)(1). Pursuant to section 552.022(a)(1), a completed evaluation is expressly public unless it is either excepted under 552.108 of the Government Code or is expressly confidential under other law.² We further note that some of the submitted information pertains to the expenditure of funds by the district and falls within the purview of subsection 552.022(a)(3), which provides “information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body” is subject to required release unless expressly confidential under other law. *Id.* § 552.022(a)(3).

Although you raise section 552.103 of the Government Code, section 552.103 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.) (governmental body may waive section 552.103); Open Records Decision No. 665 at 2 n.5 (discretionary exceptions generally), 663 (1999) (governmental body may waive section 552.103). As such, section 552.103 is not “other law” that makes information confidential for the purposes of section 552.022. Therefore, the district may not withhold the information subject to section 552.022, which we have marked, under section 552.103 of the Government Code.

As you raise no other exception to disclosure of the information subject to section 552.022, the marked information must be released to the requestor. However, we will address your argument under section 552.103 for the remaining responsive information, which is not subject to section 552.022.

Section 552.103 of the Government Code 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 state or a political subdivision, as a consequence of the person’s office or employment, is or may be a party.

...

²The district does not raise section 552.108 as an exception to disclosure of this information.

(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 district 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 district 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.* This office has found that a pending complaint filed with the Equal Employment Opportunity Commission (the "EEOC") indicates that litigation is reasonably anticipated. *See, e.g.*, Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982).

You inform this office the requestor notified the district "on or about December 10, 2009," prior to its receipt of the present request for information, that his client had filed a grievance alleging that the district discriminated against him on the basis of age, as well as violations of the Family and Medical Leave Act, when selecting a candidate for the Security Operations Manager position. You also state the requestor's letter and the grievance each included a claim for damages.³ Based on these representations, we agree that the district reasonably anticipated litigation on the date it received this request. Furthermore, we agree that the remaining information relates to the anticipated litigation. Therefore, the district may generally withhold the remaining information under section 552.103 of the Government Code.

We note, however, that once 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). Thus, the district may not withhold under section 552.103 any portion of the information at issue that the requestor has previously seen or had access to. We also note that the applicability of section 552.103(a) ends when the

³We note that on February 2, 2010, subsequent to the district's receipt of the request for information, the requestor's client filed a complaint with the EEOC, which was received by the district on February 10, 2010.

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, we have marked the information subject to section 552.022 of the Government Code that must be released to the requestor. Except for information that the requestor has previously seen or had access to, the district 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, 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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/dls

Ref: ID# 375559

Enc. Submitted documents

c: Requestor
(w/o enclosures)