



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

May 25, 2010

Mr. Robert N. Nebb  
Law Office of Michael H. Carper, P.C.  
1102 Main Street  
Lubbock, Texas 79401

OR2010-07574

Dear Mr. Nebb:

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# 380433.

The South Plains Association of Government (the "association"), which you represent, received a request for the names and personnel files of all employees terminated since January 1, 2010 and any communications among employees regarding the procedure to terminate any employee since January 1, 2010. You claim that the requested information is excepted from disclosure under sections 552.102 and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that you have only submitted the requested personnel files and a single letter for our review. Thus, to the extent any additional responsive information existed when the present request was received, we assume it has been released. If such information has not been released, then it must be released at this time. *See* Gov't Code §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

Next, we note that some of the submitted information, which we have marked, consists of completed performance evaluations made by or for the association, 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. 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 association may not withhold the marked completed performance evaluations under section 552.103 of the Government Code. You also raise section 552.102 of the Government Code as an exception for the marked evaluations. Because section 552.102 is “other law” for purposes of section 552.022, we will address your argument under this exception for the marked evaluations, as well as the remaining information.

We first address your arguments under section 552.103 of the Government Code for the information not subject to section 552.022(a)(1). Section 552.103 of the Government Code provides in relevant 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 that the department 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.* 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 indicate that, prior to the association's receipt of the instant request, one of the terminated employees filed two discrimination claims against the association with the EEOC, claim nos. 453-2009-00915 and 453-2010-00287. You state the submitted personnel files, one of which pertains to the terminated employee at issue, are related to his claims of discrimination because they "will be integral portions of any such litigation regarding the propriety of the . . . terminations." Based on your representations and our review, we find the association reasonably anticipated litigation on the date this request was received, and the information at issue is related to the anticipated litigation. Therefore, with the exception of the marked performance evaluations that are subject to section 552.022, the association may generally withhold the remaining information under section 552.103 of the Government Code.

We note, however, that the opposing party in the anticipated litigation has seen or had access to most of the information in Exhibit D, which consists of the opposing party's personnel file. The purpose of section 552.103 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. Thus, 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 public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Accordingly, the association may only withhold the information we have marked under section 552.103. Because the opposing party in the anticipated litigation has seen or had access to the remaining in Exhibit D, it is not protected by section 552.103 and may not be withheld on that basis. We note that the applicability of section 552.103 ends once the related litigation concludes. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

We will now address your argument under section 552.102 of the Government Code for the marked performance evaluations and the remaining information in Exhibit D. 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 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 of the Government Code.

The types of information considered intimate or 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. *See 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. 405 at 2-3 (1983) (public has interest in manner in which public employee performs job), 329 at 2 (1982) (information relating to complaints against public employees and discipline resulting therefrom is not protected under former section 552.101), 208 at 2 (1978) (information relating to complaint against public employee and disposition of the complaint is not protected under common-law right of privacy); *see also* Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow). Upon review, we find that none of the information at issue is highly intimate or embarrassing or is of legitimate public interest. Consequently, the association may not withhold any of the marked performance evaluations or any of the remaining information in Exhibit D under section 552.102(a) of the Government Code.

We note that the remaining information in Exhibit D contains information subject to section 552.130 of the Government Code.<sup>1</sup> Section 552.130 excepts from disclosure "information [that] relates to . . . a motor vehicle operator's or driver's license or permit issued by an agency of this state [or] a motor vehicle title or registration issued by an agency of this state." Gov't Code § 552.130(a)(1), (2). Accordingly, the association must withhold the Texas driver's license number we have marked pursuant to section 552.130 of the Government Code.

We also note a portion of the remaining information in Exhibit D is subject to section 552.136 of the Government Code. Section 552.136 states that "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." *Id.* § 552.136. Accordingly, we find the association must withhold the credit card number we have marked under section 552.136 of the Government Code.

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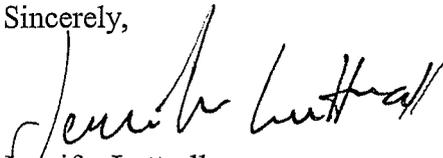
<sup>1</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

In summary, the association may withhold the information we have marked under section 552.103 of the Government Code. The association must withhold the information we have marked in Exhibit D under sections 552.130 and 552.136 of the Government Code.<sup>2</sup> The marked performance evaluations, which are subject to section 552.022(a)(1) of the Government Code, and the remaining information in Exhibit D must be released.<sup>3</sup>

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,



Jennifer Luttrall  
Assistant Attorney General  
Open Records Division

JL/dls

Ref: ID# 380433

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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<sup>2</sup>We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including Texas driver's license numbers under section 552.130 of the Government Code and credit card numbers under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.

<sup>3</sup>We note that the remaining information contains a social security number. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.