



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

October 5, 2010

Mr. William Christian  
Graves Dougherty Hearon & Moody  
P.O. Box 98  
Austin, Texas 78767

OR2010-15137

Dear Mr. Christian:

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# 395741.

The Del Mar College District (the "district"), which you represent, received a request for several categories of information pertaining to specified billing records, all grievances filed by a named individual that were reviewed in a specified investigation, and all correspondence defining the parameters of the specified investigation. You state you will release some information to the requestor. You claim the remaining requested information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>2</sup> We have also received and considered comments submitted by the requestor.

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<sup>1</sup>Although you also raise section 552.101 of the Government Code in conjunction with Texas Rule of Evidence 503, this office has concluded that section 552.101 does not encompass discovery privileges. *See* Open Records Decision No. 676 at 1-2 (2002). In addition, because the information for which you claim this provision is not subject to section 552.022 of the Government Code, the information is properly addressed here under section 552.107. ORD 676 at 6; *see also* Gov't Code § 552.022 (listing categories of information that are expressly public under the Act and must be released unless confidential under "other law").

<sup>2</sup>We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

*See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we address the requestor's assertion that the district failed to comply with section 552.301(d) of the Government Code, which provides as follows:

A governmental body that requests an attorney general decision under Subsection (a) must provide to the requestor within a reasonable time but not later than the 10th business day after the date of receiving the requestor's written request:

(1) a written statement that the governmental body wishes to withhold the requested information and has asked for a decision from the attorney general about whether the information is within an exception to public disclosure; and

(2) a copy of the governmental body's written communication to the attorney general asking for the decision or, if the governmental body's written communication to the attorney general discloses the requested information, a redacted copy of that written communication.

*Id.* § 552.301(d). The district received the request for information on July 19, 2010. Accordingly, the 10-business-day deadline to provide information to the requestor pursuant to section 552.301(d) was August 2, 2010. The requestor states the district did not timely inform the requestor pursuant to section 552.301(d)(1) of its intent to seek a ruling or provide the requestor a copy of the district's request for a ruling pursuant to section 552.301(d)(2). *See id.* § 552.301(d)(1), (2).

The district's request for a ruling from this office, which shows it was copied to the requestor, is dated July 30, 2010, and was received by this office by fax on the same date. The determination of the date that the district sent the requestor a copy of the request for a ruling is a question of fact. This office is unable to resolve disputes of fact in the open records ruling process. Accordingly, we must rely upon the facts alleged to us by the governmental body requesting our opinion, or upon those facts that are discernable from the documents submitted for our inspection. *See* Open Records Decision No. 522 at 4 (1990). The district represents that it provided the requestor a copy of the request for a ruling on July 30, 2010, the same day that it faxed the request for a ruling to this office. Thus, we conclude the district complied with the procedural requirements of section 552.301(d).

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.

...

(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 claiming this exception bears the burden of providing relevant facts and documents to demonstrate the applicability of the exception. 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. 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).

You state, and have provided documentation showing, that prior to the district's receipt of the request, a lawsuit styled *Bruce Olson v. Del Mar College District*, D-1-GN-10-001381, was filed and is currently pending in the 126th Judicial District Court in Travis County, Texas. Therefore, we agree that litigation was pending on the date the district received the present request for information. Further, you state that the submitted information is related to the lawsuit pending before the court. Based on your representations and our review, we agree the submitted information is related to the pending litigation. Accordingly, we find section 552.103 of the Government Code is generally applicable to the submitted information.

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). Thus, information that has either been obtained from or provided to the opposing party in the pending litigation is not excepted from disclosure under section 552.103, and it must be disclosed. In this instance, a portion of Exhibit B, which we have marked, has been obtained from the opposing party to the pending litigation. Therefore, the information we have marked may not be withheld under section 552.103. However, the remaining submitted information may be withheld under section 552.103 of

the Government Code.<sup>3</sup> We 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).

We note documents in Exhibit B that we have marked for release contain information that may be subject to sections 552.101 and 552.117 of the Government Code.<sup>4</sup> Section 552.101 of the Government Code 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 common-law right of privacy, which protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). The types 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. *See id.* at 683. This office has found that 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) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Common-law privacy also protects the identities of victims and witnesses in an investigation of alleged sexual harassment in the workplace. *See Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied) (identity of witnesses to and victims of sexual harassment was highly intimate or embarrassing information and public did not have a legitimate interest in such information). Accordingly, the district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.117(a)(1) of the Government Code excepts from public disclosure the home address and telephone number, social security number, and family member information of a current or former official or employee of a governmental body who requests that this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code § 552.117(a)(1). Whether a particular piece of 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). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former official or 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. We note section 552.117 is also applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for

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<sup>3</sup>As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

<sup>4</sup>The Office of the Attorney General will raise 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).

by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 is not applicable to cellular telephone numbers paid for by governmental body and intended for official use). Accordingly, to the extent the employees whose information is at issue timely elected confidentiality under section 552.024, the district must withhold the information we have marked under section 552.117(a)(1) of the Government Code; however, the district may only withhold the marked cellular telephone numbers if the numbers are not paid for by the district.

In summary, except for the information that has been obtained from the opposing party in the pending litigation, which we have marked in Exhibit B, the district may withhold the submitted information under section 552.103 of the Government Code. In releasing information that has been obtained from the opposing party, the district must withhold: (1) the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy, and (2) the information we have marked pursuant to section 552.117(a)(1) of the Government Code, to the extent the employees whose information is at issue timely elected confidentiality under section 552.024.

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,



Amy L.S. Shipp  
Assistant Attorney General  
Open Records Division

ALS/tp

Ref: ID# 395741

Enc. Submitted documents

c: Requestor  
(w/o enclosures)