



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 24, 2011

Ms. Elizabeth Lutton
Legal Advisor
Dallas County Sheriff's Department
133 Riverfront, LB-31
Dallas, Texas 75207-4313

OR2011-02770

Dear Ms. Lutton:

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# 410010.

The Dallas County Sheriff's Department (the "sheriff") received a request for (1) a specified Equal Employment Opportunity Commission (the "EEOC") complaint, (2) any reports from a named individual on the matter, and (3) the personnel records of a named individual. You claim 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.

Initially, we note the submitted information contains a completed investigation and completed 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 investigation and completed evaluations are expressly public unless they are either excepted under section 552.108 of the Government Code or 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 Nos. 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 sheriff may not withhold the

information subject to section 552.022(a)(1), which we marked, under section 552.103. However, sections 552.101 and 552.117 of the Government Code are other laws for the purposes of section 552.022.¹ Therefore, we will address the applicability of these exceptions to the information we marked under section 552.022(a)(1) as well as your claim under section 552.103 for the information that is not encompassed by section 552.022(a)(1).

We now address your argument under section 552.103 of the Government Code for the information not subject to section 552.022(a)(1) of the Government Code. Section 552.103 provides, in 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 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. 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 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 stated that a pending complaint with the EEOC indicates

¹The 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).

litigation is reasonably anticipated. Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982).

You state, and provide documentation showing, prior to the sheriff's receipt of the instant request, an employee filed a charge of discrimination with the EEOC against the sheriff. Based on your representations and our review, we conclude the sheriff reasonably anticipated litigation on the date it received the instant request. Further, we find the information that is not subject to section 552.022 is related to the anticipated litigation. Accordingly, the sheriff may generally withhold the information at issue under section 552.103 of the Government Code.

We note 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). We note the individual who filed the EEOC complaint has seen the complaint. Because the complaint has been seen by the opposing party to the anticipated litigation, the sheriff may not withhold it under section 552.103. However, we note portions of the complaint are subject to sections 552.101, 552.102(a), and 552.117 of the Government Code.² Thus, we will address the applicability of these exceptions to the complaint. Further, we note the applicability of section 552.103(a) ends once the litigation has concluded or is no longer anticipated. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982). The sheriff may withhold the remaining information not subject to section 552.022 of the Government Code under section 552.103 of the Government Code.

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." Gov't Code § 552.102(a). The Texas Supreme Court recently held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex. & The Dallas Morning News, Ltd.*, No. 08-0172, 2010 WL 4910163 (Tex. Dec. 3, 2010) (Dec. 20, 2010, motions for reconsideration and rehearing pending). Having carefully reviewed the information at issue, we have marked the information that must be withheld under section 552.102(a) of the Government Code.

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

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

Code § 552.101. This section encompasses the doctrine of common-law privacy, which 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. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). 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. Upon review, we find the information we marked is highly intimate or embarrassing and of no legitimate public interest. Thus, the sheriff must withhold the information we marked under section 552.101 in conjunction with common-law privacy.

Section 552.117(a)(1) of the Government Code excepts from disclosure the current and former home addresses and telephone numbers, social security number, and family member information of current and former employees of governmental bodies who timely request this information be kept confidential under section 552.024 of the Government Code. Section 552.117 encompasses personal cellular telephone numbers, provided the cellular telephone services are paid for by the employees with their own funds. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular mobile phone numbers paid for by governmental body and intended for official use). 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 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 the information be kept confidential. We marked the personal information of an employee under section 552.117(a)(1). If this employee timely elected to keep this information confidential, the sheriff must withhold it under section 552.117(a)(1); however, the sheriff must only withhold the marked cellular telephone number if the cellular telephone service is paid for with the employee's own funds. The sheriff may not withhold the marked information under section 552.117(a)(1) if the employee did not make a timely election to keep the information confidential and may not withhold the cellular telephone number if the service for that number is not paid for with the employee's own funds.

Section 552.117(a)(2) of the Government Code excepts from disclosure the current and former home addresses and telephone numbers, social security number, and family member information regarding a peace officer regardless of whether the officer requested confidentiality under section 552.024 or section 552.1175 of the Government Code.³ Gov't

³"Peace officer" is defined by Article 2.12 of the Texas Code of Criminal Procedure.

Code § 552.117(a)(2). As noted, section 552.117 encompasses personal cellular telephone numbers if the cellular telephone service is paid for by the employee with his or her own funds. *See* ORD 506 at 5-6. We marked the cellular telephone number of a peace officer. We find the sheriff must withhold the marked cellular telephone number under section 552.117(a)(2) if the peace officer pays for the cellular telephone service with personal funds.

In summary, except for the information subject to section 552.022 of the Government Code and the EEOC complaint, which we marked, the sheriff may withhold the submitted information under section 552.103 of the Government Code. The sheriff must withhold the information we marked under section 552.102(a) of the Government Code. The sheriff must also withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy. If the employee whose information we marked timely elected to keep this information confidential, the sheriff must withhold it under section 552.117(a)(1) of the Government Code; however, the sheriff must only withhold the marked cellular telephone number to the extent the cellular telephone service is paid for with the employee's own funds. The sheriff must withhold the marked peace officer's cellular telephone number under section 552.117(a)(2) of the Government Code if the peace officer pays for the cellular telephone service with personal funds. The remaining information must be released.

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,



Ana Carolina Vieira
Assistant Attorney General
Open Records Division

ACV/eeg

Ref: ID# 410010

Enc. Submitted documents

c: Requestor
(w/o enclosures)