



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 28, 2011

Mr. Glen Van Slyke
Legal Counsel to the Chief Medical Examiner
Harris County Institute of Forensic Sciences
1885 Old Spanish Trail, Suite 610
Houston, Texas 77054

OR2011-04235

Dear Mr. Van Syke:

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# 412530.

The Harris County Institute of Forensic Sciences (the "institute") received a request for (1) all records related to autopsies performed by a named former institute employee on children age 5 and under, including six named children, and (2) all records related to the named former employee's job performance. You believe release of this information may implicate the privacy interest of the former employee at issue. Accordingly, you provide documentation showing you notified her of the request and of her right to submit arguments to this office as to why the information should not be released. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We note you have redacted portions of the submitted information under section 552.117 of the Government Code, as permitted by section 552.024(c).¹ You claim portions of the remaining requested information are excepted from disclosure under sections

¹ Section 552.024(c) of the Government Code authorizes a governmental body to redact, without the necessity of requesting a decision from this office, the home address, home telephone number, social security number, and family member information of a current or former employee who properly elected to keep this information confidential. *See* Gov't Code § 552.024(c); *see id.* § 552.024(c-1) (requestor may appeal governmental body's decision to withhold information under section 552.024(c) to attorney general), .024(c-2) (governmental body withholding information pursuant to section 552.024(c) must provide certain notice to requestor).

552.101, 552.102, 552.103, 552.108, and 552.111 of the Government Code. We have considered the claimed exceptions and reviewed the submitted information, a portion of which is a representative sample.²

Initially, we note portions of the personnel information you have submitted, which we have marked, are not responsive to the request, which seeks only information related to job performance. This ruling does not address the public availability of non-responsive information, and the institute is not required to release non-responsive information in response to this request.

Next, we must address a governmental body's procedural obligations under section 552.301 of the Government Code when requesting a decision from this office under the Act. Pursuant to section 552.301(b), within ten business days after receiving the request the governmental body must request a ruling from this office and state the exceptions to disclosure that apply. *See* Gov't Code § 552.301(b). You inform us the institute received the instant request for information on December 20, 2010. You also inform us, and submit documentation showing, the institute sought clarification of the request on December 23, 2010 and received the requestor's response on January 7, 2011. *See id.* § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information). As we have no indication the institute acted in bad faith in seeking clarification in this instance, we consider the institute's ten-business-day period for requesting a decision under section 552.301(b) to have begun on January 7, 2011, the date the institute received the requestor's response to the request for clarification. *See City of Dallas v. Abbott*, 304 S.W.3d 380, 384 (Tex. 2010) (holding when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed). Thus, the institute's ten-business-day deadline was January 24, 2011. While you raised sections 552.101, 552.102, and 552.103 within the ten-business-day time period as required by subsection 552.301(b), you did not raise sections 552.108 and 552.111 until January 28, 2011, after that deadline had passed. Thus, we find the institute failed to comply with section 552.301(b) with respect to its claims under sections 552.108 and 552.111.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the legal presumption that the information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information. *See* Gov't Code § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797

² We assume 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 those records contain substantially different types of information than that submitted to this office.

S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 630 (1994). A compelling reason generally exists when information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3, 325 at 2 (1982). Although you raise sections 552.108 and 552.111 of the Government Code, these sections are discretionary in nature. They serve only to protect a governmental body's interests and may be waived. As such, they do not constitute compelling reasons to withhold information for purposes of section 552.302. *See* Gov't Code § 552.007; Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions in general), 473 at 2 (1987) (statutory predecessor to section 552.111 subject to waiver), 177 (1977) (statutory predecessor to section 552.108 subject to waiver). Thus, in failing to comply with section 552.301, the institute has waived its arguments under sections 552.108 and 552.111, and may not withhold any of the information at issue under those sections. However, we will consider your timely-raised claims under sections 552.101, 552.102, and 552.103 of the Government Code.

We next note portions of the remaining responsive information are subject to section 552.022 of the Government Code, which provides in relevant part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) 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). Thus, completed reports and evaluations are expressly public under section 552.022(a)(1). We have marked the completed investigator report and employee evaluation subject to this section. The institute must release this information unless it is excepted from disclosure under section 552.108 or expressly confidential under "other law[.]" *See id.* Although the institute raises section 552.103 for this information, this exception is discretionary in nature and thus may be waived. *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); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 473 (1987) (section 552.103 may be waived). Consequently, the institute may not withhold the completed investigator report or employee evaluation, which we have marked, under section 552.103. As you raise no additional exceptions for the investigator report, it must be released. However, you raise section 552.101 for the employee evaluation. Because this section does constitute "other law" for purposes of section 552.022, we will consider its applicability to the information at issue, along with your claims under section 552.102 and 552.103 for the remaining

responsive information.

As it is potentially the most encompassing exception, we first address your claim under section 552.103 of the Government Code for the responsive information not subject to section 552.022. Section 552.103 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). A governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) exception applies in a particular situation. The test for meeting this burden is a showing (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the requested information is related to that litigation. *See 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 parts of this test for information to be excepted under section 552.103(a). *See* ORD 551 at 4.

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 litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* Concrete evidence to support a claim litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Further, the fact a potential opposing party has hired an

attorney who makes a request for information does not establish litigation is reasonably anticipated. Open Records Decision No. 361 (1983).

The purpose of section 552.103 is to protect the litigation interests of governmental bodies that are parties to the litigation at issue. *See* Gov't Code § 552.103(a); Open Records Decision No. 638 at 2 (1996) (section 552.103 only protects the litigation interests of the governmental body claiming the exception). You state the submitted information is related to several pending appellate and post-conviction proceedings, including an appeal of the court order granting a writ of habeas corpus and recommending a conviction be set aside, styled *Ex parte Neal Hampton Robbins*, No. AP-76,464, that is pending before the Texas Court of Criminal Appeals. However, the institute is not a party to any of the litigation, and thus does not have a litigation interest in the matters for purposes of section 552.103. In such a situation, we require an affirmative representation from the governmental body with the litigation interest that the governmental body wants the information at issue withheld from disclosure under section 552.103. However, you have not provided this office with such a representation from the appropriate governmental body. Finally, while you assert the institute could be named as a defendant in suits that might be filed in the future against the former employee in her official capacity as an institute employee, you have not demonstrated that anyone has actually taken any concrete steps toward filing suit against the institute. *See* ORD 331. Consequently, you have not established the information at issue relates to litigation to which the institute is a party that was either pending or reasonably anticipated on the date the request was received. Accordingly, the institute may not withhold any of the information at issue 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.*, No. 08-0172, 2010 WL 4910163 (Tex. Dec. 3, 2010). 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. The remaining information is not excepted under section 552.102(a) and may not be withheld on that basis.

You raise section 552.101 of the Government Code for the employee evaluation subject to section 552.022(a)(1) and portions of the remaining responsive information not subject to section 552.022. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses the common-law right to privacy, which protects information if it (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). To demonstrate the applicability of common-law privacy, both prongs of this test must be met.

Id. at 681-82. 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). You have marked information in the former employee's personnel file to be withheld under section 552.101 in conjunction with common-law privacy. Upon review, we find the information you have marked is not highly intimate or embarrassing. Further, we find this information is of legitimate public concern because it pertains to the job performance of the former employee at issue. Consequently, the institute may not withhold any of the information you have marked under section 552.101 of the Government Code in conjunction with common-law privacy.

We next note the remaining responsive information contains additional information subject to section 552.117 of the Government Code. Section 552.117 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 this information be kept confidential prior to the governmental body's receipt of the request pursuant to section 552.024. *See* Gov't Code §§ 552.117(a)(1), .024(b). As noted, the former employee to whom the information at issue pertains timely requested confidentiality under section 552.024. Therefore, the institute must withhold the additional information we have marked under section 552.117. We further note you have marked a driver's license number to be withheld under this section. This information, which we have marked, is not protected by section 552.117 and may not be withheld on that basis.

Finally, we note portions of the remaining responsive information are subject to section 552.130 of the Government Code.³ This section excepts from disclosure "information [that] relates to (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or] (2) a motor vehicle title or registration issued by an agency of this state[.]" *Id.* § 552.130(a). Therefore, the institute must withhold the information we have marked under section 552.130.⁴

³ 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).

⁴ We note Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including a Texas driver's license number under section 552.130, without the necessity of requesting an opinion from this office.

In summary, the institute must withhold the information we have marked under sections 552.102, 552.117, and 552.130 of the Government Code. The remaining responsive information must be released to the requestor.

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,



Misty Haberer Barham
Assistant Attorney General
Open Records Division

MHB/eeg

Ref: ID # 412530

Enc. Submitted documents

c: Requestor
(w/o enclosures)