



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 20, 2011

Mr. J. Greg Hudson
Hudson & O'Leary, L.L.P.
1010 MoPac Circle, Suite 201
Austin, Texas 78746

OR2011-10373

Dear Mr. Hudson:

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# 424472.

The Montgomery County Hospital District (the "district"), which you represent, received three requests from the same requestor for twenty-seven categories of information pertaining to specified personnel files and e-mails.¹ You indicate some of the requested information does not exist.² You claim the remaining requested information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code, as well as privileged under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5. We have considered your arguments and reviewed the submitted representative samples of information.³

¹We note the district sought and received clarification from the requestor regarding the request. *See* Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used); *see also City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that 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).

²The Act does not require a governmental body to release information that did not exist when it received a request or to create information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

³We assume the "representative samples" of information submitted to this office are 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 those submitted to this office.

Initially, we note a portion of the submitted information, which we have marked, is not responsive to the instant request because it does not pertain to any of the twenty-seven categories of requested information. The district need not release non-responsive information in response to this request, and this ruling will not address that information.

You inform us the completed report in Exhibit F in the submitted file Monika~1.pdf, which you have marked, was the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2010-17936 (2010). In that ruling, we determined, among other things, that the district may withhold this completed report pursuant to rule 503 of the Texas Rules of Evidence. As we have no indication the law, facts, and circumstances on which the prior ruling was based have changed, the district may continue to rely on that ruling as a previous determination and withhold this completed report in accordance with Open Records Letter No. 2010-17936. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

Next, we note portions of the submitted 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; [and]

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(1), (3). In this instance, some of the information at issue consists of completed evaluations made by the district subject to section 552.022(a)(1) and cellular telephone account records of district employees reflecting the expenditure of public funds by the district subject to section 552.022(a)(3). The district may withhold information subject to subsection 552.022(a)(1) only to the extent it is confidential under "other law" or excepted by section 552.108. The district may withhold information subject to section 552.022(a)(3) only to the extent it is confidential under "other law." Although you raise section 552.103 of the Government Code, this is a discretionary exception to disclosure

that protects only a governmental body's interests and may be waived. *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), 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). 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 completed evaluations or the cellular telephone account records under section 552.103 of the Government Code. As you raise no further exceptions to disclosure for the completed evaluations, the district must release this information, which we have marked for release, pursuant to subsection 552.022(a)(1) of the Government Code. We note, however, the cellular telephone account records contain information subject to section 552.136 of the Government Code.⁴ Because this exception is other law for purposes of section 552.022, we will consider its applicability.

Section 552.136 of the Government Code provides in part that “[n]otwithstanding any other provision of [the Act], 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.” Gov’t Code § 552.136(b); *see id.* § 552.136(a) (defining “access device”). Upon review, we find the district must withhold the cellular telephone account number we have marked under section 552.136 of the Government Code. As no further exceptions to disclosure have been raised for the cellular telephone account records, the remaining information in these records, which we have marked for release, must be released pursuant to section 552.022(a)(3) of the Government Code.

We will now consider your claim under section 552.103 of the Government Code for the remaining information at issue not subject to section 552.022 of the Government Code. Section 552.103 states 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

⁴The 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).

on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Id. § 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 district 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). *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.* This office has stated a pending Equal Employment Opportunity Commission (“EEOC”) complaint indicates litigation is reasonably anticipated. Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982).

You state the requestor filed a claim of discrimination with the EEOC prior to the date of the district’s receipt of the clarification of the present request for information. Thus, we agree the district reasonably anticipated litigation on the date it received the present request for information. You also argue the information at issue not subject to section 552.022 of the Government Code is related to the anticipated litigation. Upon review, we agree the information at issue not subject to section 552.022 is related to the anticipated litigation for purposes of section 552.103.

We note, however, that the purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to that litigation to obtain it through discovery procedures. *See* ORD 551 at 4-5. Therefore, if the opposing party has seen or had access to information relating to anticipated litigation through discovery or otherwise, there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). In this instance, the opposing party in the anticipated litigation has already seen or had access to some of the information at issue not subject to section 552.022 of the Government Code. We note the individual’s access to some of this information was only in the usual scope of her employment with the district. Such information is not considered to have been obtained by the opposing party to the litigation and, thus, may be withheld under section 552.103. However, the information we have marked for release has been seen by the opposing party outside of her scope of employment with the district and may not be withheld from the requestor under section 552.103. The district may withhold the remaining information at issue under section 552.103. We note the applicability of section 552.103 ends once the

related litigation concludes or is no longer reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, the district may continue to rely on OR2010-17936 and withhold the completed report in Exhibit F in the submitted file Monika~1.pdf pursuant to rule 503 of the Texas Rules of Evidence. The district must release the completed evaluations we have marked pursuant to subsection 552.022(a)(1) of the Government Code. The department must withhold the account number we have marked in the cellular telephone account records under section 552.136 of the Government Code and release the remaining information in these records pursuant to subsection 552.022(a)(3) of the Government Code. The district may withhold the remaining information at issue under section 552.103 of the Government Code except for the information we have marked for release which has been seen by the opposing party outside the scope of her employment. As we are able to make these determinations, we need not address your other arguments against disclosure.

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,



Sean Nottingham
Assistant Attorney General
Open Records Division

SN/bs

Ref: ID# 424472

Enc. Submitted documents

c: Requestor
(w/o enclosures)