



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 28, 2011

Ms. Pamela Harrell Liston
For Trophy Club Municipal Utility District No. 1
The Liston Law Firm, P.C.
P.O. Box 1882
Rowlett, Texas 75030

OR2011-10923

Dear Ms. Liston:

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# 425326.

The Trophy Club Municipal Utility District No. 1 (the "district"), which you represent, received a request for (1) all records pertaining to discrimination, harassment, and retaliation allegations made against either of two named individuals during a specified time period; (2) all records pertaining to the requestor's prior open records requests in April 2011; (3) all records pertaining to a workers compensation claim involving the requestor; (4) all records regarding the requestor's personal medical information; and (5) all records pertaining to changes to the district's personnel policy. You state you have released some information to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, and 552.103 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

Section 552.103 of the Government Code provides:

¹Although you indicate some of the records may be excepted under the attorney-client privilege, you submit no arguments establishing the applicability of that privilege to any of the submitted records. Accordingly, to the extent the district is asserting the attorney-client privilege, that assertion is waived. See Gov't Code §§ 552.301, .302; Open Records Decision Nos. 676 at 11 (2002) (attorney-client privilege is waived by failure to comply with Gov't Code § 552.301), 665 at 2 n.5 (2000) (addressing distinction between mandatory and discretionary exceptions to disclosure), 630 at 4 (1994) (governmental body may waive attorney-client privilege under Gov't Code § 552.107(1)).

(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 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 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 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 concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981). You state the requestor has notified the district that she is contemplating a suit against the district under Title VII of the Civil Rights Act of 1964. Further, you state, and provide documentation showing, the requestor has made numerous threats of litigation and made comments regarding retaining legal counsel. However, you do not state that the requestor has taken any concrete steps toward litigation. Accordingly, we find the district has failed to demonstrate that it reasonably anticipated litigation on the date it received the request for information. Therefore, the district may not withhold any of the submitted information under section 552.103 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

Code § 552.101. Section 552.101 encompasses the doctrine of common-law 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 established. *Id.* at 681–82. This office has found the following types of information are excepted from required public disclosure under common-law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps); and personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990). However, this office also has found a legitimate public interest in information relating to employees of governmental bodies and their employment qualifications and job performance. *See* Open Records Decision Nos. 542 at 5 (1990), 470 at 4 (1987) (public has legitimate interest in job qualifications and performance of public employees); *see also* Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow). We note the information at issue pertains mostly to the requestor. Section 552.023(a) of the Government Code states that a person or person's authorized representative has a special right of access to information that is excepted from public disclosure under laws intended to protect that person's privacy interests. *See* Gov't Code § 552.023. Thus, in this instance, the requestor has a right of access to her own information, and the district may not withhold that information from her under section 552.101 in conjunction with common-law privacy. *See id.*; Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning herself). Further, no portion of the remaining information is highly intimate or embarrassing and not of legitimate public interest. Thus, the district may not withhold any portion of the submitted information under section 552.101 of the Government Code in conjunction with common-law privacy.

You also raise section 552.102 of the Government Code and assert the privacy analysis under section 552.102(a) is the same as the common-law privacy test under section 552.101, which is discussed above. *See Indus. Found.*, 540 S.W.2d at 685. In *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 549–51 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled the privacy test under section 552.102(a) is the same as the *Industrial Foundation* privacy test. However, the Texas Supreme Court recently disagreed with *Hubert's* interpretation of section 552.102(a) and held its privacy standard differs from the *Industrial Foundation* test under section 552.101. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, No. 08-0172, 2010 WL 4910163, at *5 (Tex. Dec. 3, 2010). The supreme court then considered the applicability of section 552.102 and 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. *Id.* at *10. We again note the requestor has a right of access to her own personal information. *See* Gov't Code § 552.023; ORD 481 at 4. Upon review, we find no portion of the submitted information is excepted from disclosure under section 552.102(a). Accordingly, the district may not withhold any of the submitted information on that basis.

We note some of the submitted information may be subject to section 552.117(a)(1) of the Government Code.² Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 2 (to be codified as an amendment to Gov't Code § 552.117(a)). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *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. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who did not timely request under section 552.024 the information be kept confidential. Therefore, to the extent the information we have marked consists of the home telephone numbers of individuals who timely requested confidentiality for that information under section 552.024, the district must withhold the marked information under section 552.117(a)(1). Conversely, to the extent the information we have marked does not consist of the home telephone numbers of individuals who have timely requested confidentiality under section 552.024, the district may not withhold the marked information under section 552.117(a)(1).

Section 552.137 of the Government Code provides, "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act]," unless the owner of the e-mail address has affirmatively consented to its release or the e-mail address is specifically excluded by subsection (c). Gov't Code § 552.137(a)-(c). The district must withhold the e-mail addresses we have marked under section 552.137, unless their owners affirmatively consent to their release.³

In summary, to the extent the information we have marked consists of the home telephone numbers of individuals who timely requested confidentiality for that information under section 552.024 of the Government Code, the district must withhold the marked information under section 552.117(a)(1) of the Government Code. The district must also withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless

²The 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).

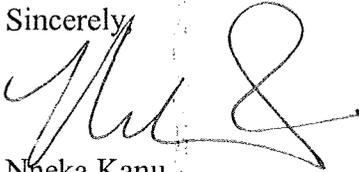
³We note this office has issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

their owners affirmatively consent to their release. The district must release the remaining information.⁴

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,



Nheka Kanu
Assistant Attorney General
Open Records Division

NK/em

Ref: ID# 425326

Enc. Submitted documents

cc: Requestor
(w/o enclosures)

⁴We note the requestor has a right of access to information the district would be required to withhold from the public to protect her privacy. See Gov't Code §§ 552.023, .137(b). If the district receives another request for this information from a different requestor, then the district should again seek a decision from this office.