



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 21, 2011

Ms. Connie Crawford
Assistant County Attorney
El Paso County Hospital District Legal Department
4815 Alameda Avenue 8th Floor Suite B
El Paso, Texas 79905

OR2011-13667

Dear Ms. Crawford:

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# 430750.

The El Paso County Hospital District (the "district") received a request for communications between the district and "anyone acting on behalf of" individuals who are or were employed by the requestor's client. You claim the requested information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the information you submitted. We also have considered the comments we received from the requestor.¹

We note some of the submitted information was created subsequent to the date of the district's receipt of this request for information. The Act does not require a governmental body to release information that did not exist when it received a request or create responsive information.² Thus, the submitted information that did not exist when the district received this request is not responsive to the request. This decision does not address the public availability of that information, which we have marked, and it need not be released in response to the request.

¹See Gov't Code § 552.304 (any person may submit written comments stating why information at issue in request for attorney general decision should or should not be released).

²See *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).

The requestor contends the remaining information must be released to him because it has previously been disclosed to members of the public. We note the Act does not permit selective disclosure of information to the public. *See* Gov't Code §§ 552.007(b), .021; Open Records Decision No. 463 at 1-2 (1987). Information that has been voluntarily released to a member of the public may not subsequently be withheld from the public, unless public disclosure of the information is expressly prohibited by law or the information is confidential under law. *See* Gov't Code § 552.007(a); Open Records Decision Nos. 518 at 3 (1989), 490 at 2 (1988); *but see* Open Records Decision Nos. 579 (1990) (exchange of information among litigants in "informal" discovery not "voluntary" release of information for purposes of statutory predecessor to Gov't Code § 552.007), 454 at 2 (1986) (governmental body that disclosed information because it reasonably concluded that it had constitutional obligation to do so could still invoke statutory predecessor to Gov't Code § 552.108). Having considered the requestor's arguments, we find no indication the district has voluntarily made any of the submitted information available to the general public for purposes of section 552.007 of the Government Code. Accordingly, we will determine whether the district may withhold the submitted information from public disclosure under section 552.103 of the Government Code.

We note the submitted information includes minutes of a meeting of the district's board of managers. Minutes of a governmental body's public meetings are specifically made public under provisions of the Open Meetings Act, chapter 551 of the Government Code. *See* Gov't Code §§ 551.022 (minutes and tape recordings of open meeting are public records and shall be available for public inspection and copying on request to governmental body's chief administrative officer or officer's designee), 551.041 (governmental body shall give written notice of date, hour, place, and subject of each meeting), 551.043 (notice of meeting of governmental body must be posted in place readily accessible to general public for at least 72 hours before scheduled time of meeting). As a general rule, the exceptions to disclosure found in the Act do not apply to information that other statutes make public. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Therefore, the meeting minutes we have marked must be released.

Next, we address the district's claim for the remaining responsive information under section 552.103 of the Government Code. This exception provides in 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 that claims an exception to disclosure under section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information at issue. To meet this burden, a governmental body must demonstrate that (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) the information at issue is related to the pending or anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See Open Records Decision No. 551 at 4 (1990).*

To establish litigation is reasonably anticipated, a governmental body must provide this office with “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” *Open Records Decision No. 452 at 4 (1986).* Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See id.* Concrete evidence to support a claim that 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.³ *See Open Records Decision No. 555 (1990); see also Open Records Decision No. 518 at 5 (1989)* (litigation must be “realistically contemplated”). On the other hand, this office has determined that 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. *See Open Records Decision No. 361 (1983).*

You state the requestor is an attorney for a company that is the subject of a complaint. You inform us the requestor has alleged the district acted without legal authority, denied his client due process, and illegally withheld funds from his client. You contend “[t]he strong language in the [submitted] letters and e-mails from the requestor . . . lead to a reasonable belief that litigation is anticipated.” You do not indicate, however, nor does it appear to this office that either the requestor or his client have taken any objective steps toward litigation with the district. Thus, having considered your arguments, we find you have not demonstrated the district reasonably anticipated litigation on the date of its receipt of the instant request for information. *See Gov’t Code § 552.103(c); ORD 361* (fact request was

³In addition, this office has concluded 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).*

made by attorney on behalf of rejected applicant not sufficient to invoke statutory predecessor to Gov't Code § 552.103), 331 (mere chance of litigation not sufficient to trigger statutory predecessor). We therefore conclude the district may not withhold the remaining responsive information under section 552.103 of the Government Code.

We note sections 552.101 and 552.137 of the Government Code are or may be applicable to some of the responsive information.⁴ 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 exception encompasses common-law privacy, which protects information that is highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and of no legitimate public interest. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both elements of the test must be established. *Id.* at 681-82. This office has determined personal financial information relating only to an individual ordinarily satisfies the first element of the common-law privacy test, but the public has a legitimate interest in the essential facts about a financial transaction between an individual and a governmental body. *See Open Records Decision Nos. 545 at 4 (1990) (attorney general has found kinds of financial information not excepted from public disclosure by common-law privacy to generally be those regarding receipt of governmental funds or debts owed to governmental entities), 523 at 4 (1989) (noting distinction under common-law privacy between confidential background financial information furnished to public body about individual and basic facts regarding particular financial transaction between individual and public body), 373 at 4 (1983) (determination of whether public's interest in obtaining personal financial information is sufficient to justify its disclosure must be made on case-by-case basis).* We have marked personal financial information we find to be highly intimate or embarrassing and not a matter of legitimate public interest. We conclude the district must withhold the marked information under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.137 of the Government Code states “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 public disclosure or the e-mail address falls within the scope of section 552.137(c). Gov't Code § 552.137(a)-(c). Thus, as section 552.137 protects personal privacy, the district may not withhold the e-mail addresses of the requestor and his client under this exception. *See id.* § 552.137(b). Likewise, the district may not withhold the e-mail addresses of individuals employed by entities with which the district has contractual relationships. *See id.* § 552.137(c). We note section 552.137 is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees. We have marked a

⁴This office will raise sections 552.101 and 552.137 on behalf of a governmental body, as these sections are mandatory exceptions to disclosure. *See Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).*

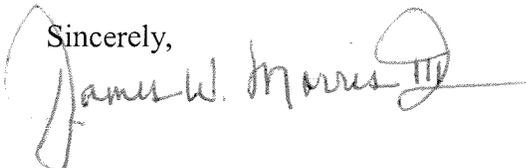
personal e-mail address the district must withhold under section 552.137 of the Government Code unless the owner has affirmatively consented to its public disclosure.⁵

In summary, the district must withhold (1) the marked personal financial information under section 552.101 of the Government Code in conjunction with common-law privacy and (2) the marked e-mail address under section 552.137 of the Government Code unless the owner has consented to its disclosure. The district must release the rest of the responsive information.

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,



James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/em

Ref: ID# 430750

Enc: Submitted documents

c: Requestor
(w/o enclosures)

⁵We note Open Records Decision No. 684 (2009) is a previous determination issued by this office authorizing all governmental bodies to withhold ten categories of information without the necessity of requesting an attorney general decision, including an e-mail address of a member of the public under section 552.137 of the Government Code.