



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 30, 2011

Mr. Kyle G. Thomas
Assistant City Attorney
City of Sugar Land
P.O. Box 110
Sugar Land, Texas 77487-0110

OR2011-14197

Dear Mr. Thomas:

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# 431638.

The City of Sugar Land (the "city") received a request for all audio recordings and all transcripts of Employee Board of Appeals Hearings for the four years previous to the request. You state you do not possess transcripts for any of the hearings or audio recordings for two of the hearings.¹ You claim the submitted information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.103 of the Government Code provides in relevant 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.

¹The Act does not require a governmental body to release information that did not exist when a request for information was received, create responsive information, or obtain information that is not held by or on behalf of the governmental body. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio, writ dismissed), Open Records Decision No. 452 at 3 (1986).

...

(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 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 was 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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You state the submitted information consists of recordings of disciplinary hearings brought before the city's Employee Board of Appeals pursuant to section six of the city's employee policy manual. You contend these hearings constitute "litigation" for purposes of section 552.103. This office has held that "litigation" within the meaning of section 552.103 includes contested cases conducted in a quasi-judicial forum. *See, e.g.*, *Open Records Decision Nos. 474* (1987), *368* (1983), *301* (1982). For instance, this office has held that cases conducted under the Texas Administrative Procedure Act, chapter 2001 of the Government Code, constitute "litigation" for purposes of section 552.103. *See, e.g.*, *Open Records Decision Nos. 588* (1991) (proceeding of former State Board of Insurance), *301* (1982) (proceeding of Public Utilities Commission). In determining whether an administrative proceeding is conducted in a quasi-judicial forum, this office has considered the following factors: 1) whether the dispute is, for all practical purposes, litigated in an administrative proceeding where a) discovery takes place, b) evidence is heard, c) factual questions are resolved, d) a record is made; and 2) whether the proceeding is an adjudicative forum of first jurisdiction, *i.e.*, whether judicial review of the proceeding in district court is an appellate review and not the forum for resolving a controversy on the basis of evidence. *See* ORD 588.

You assert these hearings conducted pursuant to section six of the city's policy manual and the procedures delineated within constitute administrative hearings that are sufficiently adjudicative to be considered litigation for purposes of section 552.103. In this instance, you have submitted a copy of the portion of the manual at issue. You state the procedural rules indicate "the hearing 'litigates' an employee's disciplinary dispute for all practical purposes." You also state the hearing process provides for discovery, evidence to be heard, and for a record to be made. Further, you state "any factual issues regarding the disciplinary action are resolved by the [b]oard, based upon evidence presented in the hearing." However, you have not provided any arguments explaining, and the supporting documents you provided do not reflect, the grievant has the opportunity to appeal the board's decision to any higher

adjudicative authority, such as a district court. Consequently, we find you have failed to demonstrate the city's administrative procedure for disciplinary hearings are conducted in a judicial or quasi-judicial forum, and thus, we find such hearings do not constitute litigation for purposes of section 552.103. Therefore, none of the submitted information may be withheld 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. This exception encompasses information that other statutes make confidential. You claim a portion of the submitted information is protected under the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 42 U.S.C. §§ 1320d-1320d-8. At the direction of Congress, the Secretary of Health and Human Services ("HHS") promulgated regulations setting privacy standards for medical records, which HHS issued as the Federal Standards for Privacy of Individually Identifiable Health Information. *See* Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 1320d-2 (Supp. IV 1998) (historical & statutory note); Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. pts. 160, 164 ("Privacy Rule"); *see also* Attorney General Opinion JC-0508 at 2 (2002). These standards govern the releasability of protected health information by a covered entity. *See* 45 C.F.R. pts. 160, 164. Under these standards, a covered entity may not use or disclose protected health information, except as provided by parts 160 and 164 of the Code of Federal Regulations. *Id.* § 164.502(a).

This office addressed the interplay of the Privacy Rule and the Act in Open Records Decision No. 681 (2004). In that decision, we noted section 164.512 of title 45 of the Code of Federal Regulations provides that a covered entity may use or disclose protected health information to the extent such use or disclosure is required by law and the use or disclosure complies with, and is limited to, the relevant requirements of such law. *See id.* § 164.512(a)(1). We further noted the Act "is a mandate in Texas law that compels Texas governmental bodies to disclose information to the public." *See* ORD 681 at 8; *see also* Gov't Code §§ 552.002, .003, .021. We, therefore, held that the disclosures under the Act come within section 164.512(a). Consequently, the Privacy Rule does not make information confidential for the purpose of section 552.101 of the Government Code. *See Abbott v. Tex. Dep't of Mental Health & Mental Retardation*, 212 S.W.3d 648 (Tex. App.—Austin 2006, no pet.); ORD 681 at 9; *see also* Open Records Decision No. 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). Because the Privacy Rule does not make information that is subject to disclosure under the Act confidential, the city may not withhold any portion of the submitted information on this basis.

Section 552.101 of the Government Code also 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. Common-law privacy protects the types of information held to be intimate or embarrassing in *Industrial Foundation*. *See id.* at 683

(information relating to sexual assault, pregnancy, mental or physical abuse in workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). Additionally, this office has found some kinds of medical information or information indicating disabilities or specific illnesses are generally highly intimate or embarrassing. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). However, as this office has often stated, information pertaining to the work conduct and reasons for termination of public employees is subject to a legitimate public interest and is, therefore, generally not protected from disclosure under common-law privacy. *See, e.g.*, Open Records Decisions Nos. 470 at 4 (1987) (public has legitimate interest in job qualifications and performance of public employees), 455 (1987) (public employee's job performance or abilities generally not protected by privacy), 444 at 3 (1986) (public has obvious interest in information concerning qualifications and performance of governmental employees), 423 at 2 (1987) (scope of public employee privacy is narrow). Upon review, we agree some of the information in the submitted recording is highly intimate or embarrassing information of no legitimate public interest. Therefore, the city must withhold the information we have indicated in the submitted audio recordings under section 552.101 in conjunction with common-law privacy. We note, however, the city states it lacks the technical capacity to redact the private information from the audio recording. Accordingly, the city must withhold the audio recordings we have indicated in their entirety under section 552.101 of the Government Code in conjunction with common-law privacy. *See* Open Records Decision No. 364 (1983). However, we find none of the remaining information may be withheld under section 552.101 on the basis of common-law privacy.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former employee of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code.² 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)(1)). We note section 552.117 is also applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). 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 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. We have indicated personal information of district employees, including personal cellular telephone numbers, in the submitted audio recordings. As noted previously, the city states it lacks the technical capacity to redact information from

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).

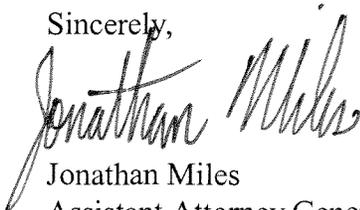
the audio recordings. Accordingly, to the extent the employees whose information is at issue timely requested confidentiality under section 552.024, the city must withhold the audio recordings containing the personal information we have indicated under section 552.117(a)(1) in their entirety. Conversely, to the extent the employees concerned did not timely request confidentiality under section 552.024, the telephone numbers are not home telephone numbers, or are cellular telephone numbers for which services are paid for by the city, the district may not withhold the information we have indicated under section 552.117(a)(1) of the Government Code.

In summary, the city must withhold the information we have indicated in the submitted audio recordings under section 552.101 in conjunction with common-law privacy and, to the extent the employees whose information is at issue timely requested confidentiality under section 552.024, the city must withhold the information we have indicated in the submitted audio recordings under section 552.117(a)(1) of the Government Code. As the city states it does not possess the technical capacity to redact the audio recordings, the city must withhold the audio recordings containing this information in their entirety. The remaining audio recordings 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,



Jonathan Miles
Assistant Attorney General
Open Records Division

JM/em

Ref: ID# 431638

Enc. Submitted documents

c: Requestor
(w/o enclosures)