



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

December 29, 2011

Ms. Jameene Y. Banks  
Mr. Ryan S. Henry  
For Dallas County Hospital District  
Denton, Navarro, Rocha & Bernal, P.C.  
2517 North Main Avenue  
San Antonio, Texas 78212-4685

OR2011-19122

Dear Ms. Banks and Mr. Henry:

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# 440864.

The Dallas County Hospital District d/b/a Parkland Health and Hospital System (the "district"), which you represent, received a request for fifteen categories of information pertaining to a named former employee. You state the district does not have information responsive to some of the requested categories.<sup>1</sup> You also state the district will withhold certain information pursuant to Open Records Decision No. 684 (2009).<sup>2</sup> You claim the

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<sup>1</sup>We note the Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Attorney General Opinion H-90 (1973); Open Records Decision Nos. 452 at 2-3 (1986), 342 at 3 (1982), 87 (1975); *see also* Open Records Decision Nos. 572 at 1 (1990), 555 at 1-2 (1990), 416 at 5 (1984).

<sup>2</sup>Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including: direct deposit authorization forms under section 552.101 of the Government Code in conjunction with common-law privacy; a Form I-9 and attachments under section 552.101 of the Government Code in conjunction with section 1324a of title 8 of the United States Code; personal e-mail addresses under section 552.137 of the Government Code, and Texas driver's license numbers under section 552.130 of the Government Code, without the necessity of requesting an attorney general decision. However, on September 1, 2011, the Texas legislature amended section 552.130 to allow a governmental body to redact the information described in subsection 552.130(a)(1) without the necessity of seeking a decision from the attorney general. *See* Gov't Code § 552.130(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.130(e). *See id.* § 552.130(d), (e). Thus, the statutory amendments to section 552.130 of the Government Code supercede Open Records Decision No. 684 on September 1, 2011. Therefore, a governmental body may only redact information subject to subsection 552.130(a)(1) in accordance with section 552.130, not Open Records Decision No. 684.

submitted information is excepted from disclosure under sections 552.102, 552.103, and 552.117 of the Government Code. You also believe release of the information may implicate the interests of the named former employee. Accordingly, you state you have notified the named former employee of the request and her right to submit arguments to this office. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have considered the exceptions you claim and reviewed the submitted information.

We note the submitted information includes information that is subject to section 552.022(a)(1) of the Government Code. Section 552.022(a)(1) provides for required disclosure of “a completed report, audit, evaluation, or investigation made of, for, or by a governmental body[,]” unless the information is made confidential under this chapter or “other law” or is excepted from disclosure under section 552.108 of the Government Code. *Id.* § 552.022(a)(1). The submitted information includes completed employee evaluations that are subject to section 552.022(a)(1). The district must release the completed evaluations, which we have marked, pursuant to subsection 552.022(a)(1) unless they are excepted from disclosure under section 552.108 of the Government Code or are made confidential under the Act or other law. *See id.* You do not claim section 552.108 of the Government Code. Although you assert the marked evaluations are excepted from disclosure under section 552.103 of the Government Code, that exception is discretionary and does not make information confidential under the Act. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 439, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the district may not withhold the marked evaluations under section 552.103. As you raise no further exceptions to disclosure of this information, the district must release it. We will, however, address your argument under section 552.103 for the information that is not subject to section 552.022.

Section 552.103 of the Government Code 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 that it seeks to withhold. To meet this burden, the 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).*

Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See Open Records Decision No. 452 at 4 (1986).* To establish that 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.” *Id.* This office has found that a pending Equal Employment Opportunity Commission (“EEOC”) complaint and a pending complaint filed with the Texas Workforce Commission’s Civil Rights Division (“CRD”) indicate that litigation is reasonably anticipated. *See Open Records Decision Nos. 386 at 2 (1983), 336 at 1(1982).*

You state, and provide documentation showing, the named former employee filed an EEOC claim against the district prior to the district’s receipt of the request for information. You explain that although the EEOC has concluded its investigation and issued a right-to-sue letter, the 90-day period in which the complainant has a right to sue had not expired when the district received this request for information. Based on your representations, we find the district reasonably anticipated litigation on the date of its receipt of this request for information. We also find that the remaining information is related to the anticipated litigation. We therefore conclude the remaining information is generally subject to section 552.103 of the Government Code.

However, we note the opposing party in the anticipated litigation has seen or had access to some of the information at issue, which we have marked. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. *See ORD 551 at 4-5.* Thus, if the opposing party has seen or had access to information relating to litigation, through discovery or otherwise, then there is no interest in withholding such information from public disclosure under section 552.103. *See Open Records Decision Nos. 349 (1982), 320 (1982).* Therefore, the information we have marked is not protected by section 552.103 and may not be withheld on that basis. We also note the applicability of section 552.103 ends once the related litigation concludes. *See Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).* Accordingly, except for the

information we have marked, the district may withhold the remaining information under section 552.103 of the Government Code.<sup>3</sup>

We will now address your arguments against disclosure of the information the opposing party has seen or accessed. 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. & The Dallas Morning News, Ltd.*, 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.

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 official or employee of a governmental body who requests that this information be kept confidential under section 552.024 of the Government Code. *See* Gov’t Code §§ 552.117(a)(1), .024. 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. You inform us, and provide documentation showing, the former employee at issue timely elected confidentiality under section 552.024. Therefore, the district must withhold the information you have marked and the information we have marked under section 552.117(a)(1) of the Government Code.

In summary, the district must release the marked completed employee evaluations pursuant to section 552.022(a)(1) of the Government Code. Except for the information we have marked, the district may withhold the remaining information under section 552.103 of the Government Code. The district must withhold the information we have marked under sections 552.102(a). The district must withhold the information you have marked and the information we have marked under 552.117(a)(1) of the Government Code. The remaining information 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.

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<sup>3</sup>As our ruling is dispositive for this information, we do not address your remaining argument.

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](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,



Jennifer Luttrall  
Assistant Attorney General  
Open Records Division

JL/dls

Ref: ID# 440864

Enc. Submitted documents

c: Requestor  
(w/o enclosures)