



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 11, 2012

Ms. Mia Settle
General Counsel
Harris County Community Supervision and Corrections Department
49 San Jacinto
Houston, Texas 77002

OR2012-14380

Dear Ms. Settle:

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# 465590.

The Harris County Community Supervision and Corrections Department (the "department") received a request for the summary and recommendations related to a specified investigation. You claim a portion of the submitted information is not public information subject to the Act. You also claim the submitted information is excepted from disclosure under sections 552.103 and 552.111 of the Government Code. We have considered your arguments and reviewed the submitted information.

First, we address your assertion that a portion of the requested information constitutes judicial records not subject to the Act. The Act generally requires the disclosure of information maintained by a "governmental body." Gov't Code § 552.002(a)(1). A governmental body under the Act "does not include the judiciary." *Id.* § 552.003(1)(B). However, in Open Records Decision No. 646 (1996), this office determined that a community supervision and corrections department is a governmental body for purposes of the Act, and that its administrative records such as personnel files and other records reflecting the day-to-day management of the department are subject to the Act. ORD 646 at 5; *see also Benavides v. Lee*, 665 S.W.2d 151 (Tex. App.—San Antonio 1983, no writ) (in determining whether governmental entity falls within judiciary exception, this office looks to whether governmental entity maintains relevant records as agent of judiciary with regard to judicial, as opposed to administrative, functions). In contrast, specific records held

by a community supervision and corrections department that concern individuals who are on probation and subject to the direct supervision of a court are not subject to the Act, because such records are held on behalf of the judiciary. ORD 646 at 5. Upon review, we agree Exhibit 28 of the report in Exhibit 2 constitutes specific records held by the department that concern an individual who is on probation and subject to the direct supervision of a court, and which are held on behalf of the judiciary. Thus, this information consists of records of the judiciary not subject to the Act and need not be released in response to the instant request.

We next note some of the remaining information consists of completed employee evaluations subject to section 552.022 of the Government Code. Section 552.022(a)(1) provides for the required public disclosure of “a completed report, audit, evaluation, or investigation made of, for, or by a governmental body,” unless it is excepted by section 552.108 of the Government Code or “made confidential under [the Act] or other law[.]” Gov’t Code § 552.022(a)(1). Although you raise sections 552.103 and 552.111 of the Government Code for the evaluations, these are discretionary exceptions to disclosure that may be waived and do not make information confidential under the Act. *See id.* § 552.007; *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); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 470 at 7 (1987) (statutory predecessor to section 552.111 subject to waiver), 473 (1987) (section 552.103 may be waived). As such, sections 552.103 and 552.111 do not make information confidential for the purposes of section 552.022(a)(1), and the employee evaluations may not be withheld on those bases. However, we note portions of one of the evaluations are subject to sections 552.101 and 552.117 of the Government Code,¹ which do make information confidential under the Act. Accordingly, we will address the applicability of sections 552.101 and 552.117 to the evaluations, along with your arguments under sections 552.103 and 552.111 for the remaining information.

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 section 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

¹The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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). Upon review, we find the information we have marked is highly intimate or embarrassing and of no legitimate public interest. Therefore, the department must withhold the marked information under section 552.101 in conjunction with common-law privacy.

Section 552.117 of the Government Code 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. Gov't Code § 552.117(a)(1). Section 552.117 encompasses 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) (statutory predecessor to Gov't Code § 552.117 not applicable to numbers for cellular mobile telephones installed in county officials' and employees' private vehicles and intended for official business). Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). The department may withhold information under section 552.117(a)(1) only on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Thus, if the individuals whose personal information we marked timely requested confidentiality under section 552.024, the department must withhold the marked information under section 552.117(a)(1). However, the department may withhold the marked cellular telephone numbers only if the cellular service is not paid for by a governmental body. Conversely, if the individuals did not make timely elections under section 552.024, or if the cellular services are paid for by a governmental body, the department may not withhold the marked information under section 552.117(a)(1). As you raise no additional exceptions to disclosure for the remaining information in the completed employee evaluations subject to section 552.0222, it must be released to the requestor.

We now address your argument under section 552.103 of the Government Code for the information not subject to section 552.022. Section 552.103 provides, 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 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 applies 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 requested information is related to that litigation. *See 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 parts of this test for information to be excepted under section 552.103(a). *See* ORD 551 at 4.

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

You have submitted information to this office showing that, prior to the department’s receipt of the instant request, two former department employees filed EEOC complaints against the department. You state the information at issue is directly related to the substance of the EEOC complaints. Based on your representations and our review, we find you have demonstrated the information at issue is related to litigation that was reasonably anticipated at the time the department received the request for information. Accordingly, the department may withhold the information not subject to section 552.022 under section 552.103 of the Government Code.²

We note 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. Therefore, once the information at issue has been obtained by all parties to the anticipated litigation through discovery or otherwise, a section 552.103(a) interest no longer exists as to that information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). We also note the applicability of section 552.103(a)

²Because our ruling as to this information is dispositive, we do not address your remaining argument against its disclosure.

ends once the litigation has concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, Exhibit 28 of the report in Exhibit 2 consists of records of the judiciary not subject to the Act and need not be released in response to the instant request. The department must generally release the employee evaluations we marked under section 552.022(a)(1) of the Government Code. In releasing that information, the department must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy and under section 552.117 of the Government Code, if the employee whose information we marked timely requested confidentiality under section 552.024 of the Government Code. However, the department may withhold the marked cellular telephone numbers only if the cellular services are not paid for by a governmental body. The department may withhold the information not subject to section 552.022 under section 552.103 of the Government Code.

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,



Misty Haberer Barham
Assistant Attorney General
Open Records Division

MHB/som

Ref: ID# 465590

Enc. Submitted documents

c: Requestor
(w/o enclosures)