



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 20, 2012

Ms. Molly Cost
Assistant General Counsel
Texas Department of Public Safety
P.O. Box 4087
Austin, Texas 78773-0001

OR2012-20613

Dear Ms. Cost:

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# 474438 (PIR #12-3390).

The Texas Department of Public Safety (the "department") received two requests from the same requestor for information pertaining to two specified job postings, including all submitted applications, and information pertaining to the requestor's client. We note you have redacted social security numbers from the submitted information.¹ You claim the submitted information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, we note some of the submitted information is subject to section 552.022 of the Government Code, which provides:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under [the Act] or other law:

¹Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office. See Gov't Code § 552.147(b).

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;

...

(15) information regarded as open to the public under an agency's policies [.]

Gov't Code § 552.022(a)(1),(15). The submitted employee performance evaluations and completed investigations, which we have marked, and the submitted audio recording, are subject to section 552.022(a)(1) of the Government Code and must be released unless the information is expressly confidential under the Act or other law or is excepted from disclosure by section 552.108. The job descriptions we have marked must be released pursuant to section 552.022(a)(15), if the department considers job descriptions to be open to the public under its policies, unless the information is expressly confidential under the Act or other law. Although you assert this information is excepted from disclosure under section 552.103 of the Government Code, this section is a discretionary exception under the Act and does not make information confidential under the Act. *See 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 (1999) (governmental body may waive section 552.103). Accordingly, the department may not withhold the information subject to section 552.022(a)(1) under section 552.103. Likewise, the job descriptions may not be withheld under section 552.103 if they are considered to be open to the public under the department's policies for purposes of section 552.022(a)(15). As you do not claim any other exceptions for the job descriptions, if they are considered to be open to the public under the department's policies then this information must be released pursuant to section 552.022(a)(15). However, we will consider your assertion of section 552.103 for the marked job descriptions if they are not considered to be open to the public under the department's policies, and for the information not subject to section 552.022 of the Government Code. Furthermore, we note some of the information subject to section 552.022(a)(1) may be subject to sections 552.101 and 552.117 of the Government Code, which make information confidential under the Act.² Accordingly, we will address the applicability of sections 552.101 and 552.117 to the information at issue.

Next, we address your argument under section 552.103 of the Government Code for the information not subject to section 552.022 and the job descriptions if the department does not consider them to be open to the public under the department's policies. Section 552.103

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).

of the Government Code 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 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 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 a pending Equal Employment Opportunity Commission ("EEOC") complaint indicates 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, the employee whose information is at issue filed an EEOC complaint against the department. You state the submitted information is directly related to the substance of the EEOC complaint. 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. Therefore, the department may withhold the information that is not subject to section 552.022 of the Government Code and the job descriptions if the department does not consider that

information to be open to the public under the department's policies pursuant to section 552.103 of the Government Code.

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to all parties to the anticipated litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded or is no longer anticipated. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) 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 demonstrated. *See id.* at 681-82. The type of information considered intimate or embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. This office has found some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 455 (1987) (information pertaining to prescription drugs, specific illnesses, operations and procedures, and physical disabilities protected from disclosure), 422 (1984), 343 (1982). This office has also found personal financial information not relating to the financial transaction between an individual and a governmental body is excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 600 (1992), 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history). This office has found financial information relating only to an individual ordinarily satisfies the first requirement of the test for common-law privacy. *See* ORD 600 (designation of beneficiary of employee's retirement benefits, direct deposit authorization, and forms allowing employee to allocate pretax compensation to group insurance, health care or dependent care), 523 (1989). However, this office has noted the public has a legitimate interest in information that relates to public employees and their conduct in the workplace. *See, e.g.*, Open Records Decision Nos. 562 at 10 (1990) (personnel file information does not involve most intimate aspects of human affairs but in fact touches on matters of legitimate public concern), 444 at 3 (1986) (public has obvious interest in information concerning qualifications and performance of government employees). Upon review, we find portions of the information at issue, which

we have marked, as well as portions of the submitted audio recording, which we have indicated, are highly intimate or embarrassing and not of legitimate public concern. Therefore, the department must withhold the information at issue, which we have marked and indicated, under section 552.101 of the Government Code in conjunction with common-law privacy.

We note portions of the remaining information may be subject to section 552.117(a)(1) of the Government Code. Section 552.117(a)(1) excepts from disclosure the home address and telephone number, social security number, emergency contact information, 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. *See* Gov't Code § 552.117(a)(1). 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. Therefore, if the individuals whose information we have marked timely requested confidentiality under section 552.024, the department must withhold the marked information under section 552.117(a)(1) of the Government Code. If the individuals whose information is at issue did not make a timely election under section 552.024, the department may not withhold the information at issue under section 552.117(a)(1) of the Government Code.

In summary, if the department considers the marked job descriptions to be open to the public under the departments's policies, the department must release this information pursuant to section 552.022(a)(15) of the Government Code. The department may withhold the information that is not subject to section 552.022 of the Government Code and the job descriptions if they are not considered to be open to the public under the department's policies pursuant to section 552.103 of the Government Code. The department must withhold the information we have marked, and the information we have indicated in the submitted audio recording, under section 552.101 of the Government Code in conjunction with common-law privacy. The department must withhold the information we have marked under section 552.117(a)(1) of the Government Code, if the individuals whose information is at issue made a timely election under section 552.024 of the Government Code. The department must release the remaining information to the requestor.³

³We note the information being released in this instance includes information that may be confidential with respect to the general public. *See* Gov't Code § 552.023(a) (governmental body may not deny access to person to whom information relates or person's agent on ground that information is considered confidential by privacy principles); ORD 481 at 4 (privacy theories not implicated when individuals request information concerning themselves). Therefore, if the department receives another request for this information from a different requestor, the department must again seek a ruling from this office.

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,



Cynthia G. Tynan
Assistant Attorney General
Open Records Division

CGT/akg

Ref: ID# 474438

Enc. Submitted documents

c: Requestor
(w/o enclosures)