



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

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OR2013-00462

Dear Ms. Fourt and Mr. Weber:

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# 474187 (Tarrant County Request Nos. 10-1032, 10-1055, and 10-1077).

Tarrant County (the "county") received five requests from four requestors for several categories of information pertaining to the filing of a specified charge of discrimination by a named former employee and any subsequent investigations.<sup>1</sup> You state you have released some information. You also state the county does not have some of the requested information.<sup>2</sup> You claim a portion of the requested information is not subject to the Act.

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<sup>1</sup>We note requestor number 10-1055 excludes social security numbers from his request. Thus, any of this information within the submitted documents is not responsive to requestor number 10-1055's request, and the county need not release it in response to this request.

<sup>2</sup>The Act does not require a governmental body to release information that did not exist when it received a request or to create responsive information. See *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).

Additionally, you claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.107, 552.111, and 552.117 of the Government Code, as well as privileged under rules 408 and 503 of the Texas Rules of Evidence and rules 192.3 and 192.5 of the Texas Rules of Civil Procedure.<sup>3</sup> You also state the county notified an individual whose privacy may be affected by the requests for information. See Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have considered your arguments and reviewed the submitted information. We have also considered comments submitted by an interested third party. See *id.*

Initially, you state a portion of the submitted information was created after the date the county received the instant requests. This decision does not address the public availability of the non-responsive information and that information need not be released in response to the present requests.<sup>4</sup>

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to

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<sup>3</sup>Although you raise section 552.101 of the Government Code in conjunction with rules 408 and 503 of the Texas Rules of Evidence and rules 192.3 and 192.5 of the Texas Rules of Civil Procedure, this office has concluded section 552.101 does not encompass discovery privileges. See Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). We also note that although you also raise section 552.022 of the Government Code, section 552.022 is not an exception to disclosure. Rather, section 552.022 enumerates categories of information that are not excepted from disclosure unless they are made confidential under the Act or other law. See Gov't Code § 552.022.

<sup>4</sup>As our ruling for this information is dispositive, we need not address your arguments against its disclosure.

a *confidential* communication, *id.*, meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5).

Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, orig. proceeding). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state the information you have marked under section 552.107 consists of communications involving county attorneys, staff, and consultants. You state these communications were made for the purpose of facilitating the rendition of professional legal services or legal guidance to the county. You assert these communications were confidential, and you state the county has not waived the confidentiality of the information at issue. *See also Harlandale Indep. Sch. Dist. v. Cornyn*, 25 S.W.3d 328 (Tex. App.—Austin 2000, pet. denied) (attorney’s entire investigative report was protected by attorney-client privilege where attorney was retained to conduct investigation in her capacity as attorney for purpose of providing legal services and advice). Based on your representations and our review, we find you have generally demonstrated the applicability of the attorney-client privilege to the marked information.

However, we note some of these e-mail strings include e-mails and attachments received from or sent to an opposing party in anticipated litigation, a non-privileged party. Accordingly, if the e-mails and attachments received from or sent to this non-privileged party are removed from the e-mail strings and stand alone, they are responsive to the instant requests for information. Therefore, if these non-privileged e-mails and attachments, which we have marked, are maintained by the county separate and apart from the otherwise privileged e-mail strings in which they appear, then the county may not withhold these non-privileged e-mails and attachments under section 552.107(1) of the Government Code. However, the county may withhold the remaining information it has marked, which consists of communications between county attorneys, county staff, and county consultants, under section 552.107(1) of the Government Code.<sup>5</sup>

Next, we address your argument under section 552.111 of the Government Code for the remaining information at issue, including the communications and attachments we have marked as non-privileged. Section 552.111 excepts from disclosure “[a]n interagency or

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<sup>5</sup>As our ruling is dispositive for this information, we need not address your remaining arguments against its disclosure.

intraagency memorandum or letter that would not be available by law to a party in litigation with the agency[.]” Gov’t Code § 552.111. Section 552.111 encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure, which is discussed above. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Open Records Decision No. 677 at 4-8 (2002). Rule 192.5 defines work product as

(1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party’s representatives, including the party’s attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or

(2) a communication made in anticipation of litigation or for trial between a party and the party’s representatives or among a party’s representatives, including the party’s attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX. R. CIV. P. 192.5. A governmental body seeking to withhold information under this exception bears the burden of demonstrating the information was created or developed for trial or in anticipation of litigation by or for a party or a party’s representative. TEX. R. CIV. P. 192.5; ORD 677 at 6-8. In order for this office to conclude the information was made or developed in anticipation of litigation, we must be satisfied

a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

*Nat’l Tank Co. v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993). A “substantial chance” of litigation does not mean a statistical probability, but rather “that litigation is more than merely an abstract possibility or unwarranted fear.” *Id.* at 204; ORD 677 at 7. Furthermore, as noted above, if a requestor seeks a governmental body’s entire litigation file, the governmental body may assert the file is excepted from disclosure in its entirety because such a request implicates the core work product aspect of the privilege. *See* ORD 677 at 5-6. Thus, in such a situation, if the governmental body demonstrates the file was created in anticipation of litigation, this office will presume the entire file is within the scope of the privilege. *See* ORD 647 at 5; *see also* *Curry*, 873 S.W.2d at 380.

You claim the remaining responsive information consists of attorney work product that is protected under section 552.111. You contend the county reasonably anticipated litigation at the time the information was created because an individual had filed a charge of discrimination with the Equal Opportunity Employment Commission (the “EEOC”). *See* Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982) (pending complaint before the

EEOC indicates a substantial likelihood of potential litigation). You contend the information at issue contains the mental impressions and advice of attorneys and consultants for and representatives of the county that were created or developed in anticipation of litigation. Upon review, we find the county has demonstrated the applicability of the attorney work product privilege to some of the remaining information at issue, which we have marked. Thus, the county may withhold the information we marked under section 552.111 of the Government Code.<sup>6</sup> However, as noted above, some of the information at issue consists of communications with the opposing party to the anticipated litigation, a non-privileged party. Upon review, we find you have failed to demonstrate the non-privileged communications consist of material prepared or mental impressions developed in anticipation of litigation or for trial by a party or a representative of a party. Accordingly, the county may not withhold any of the non-privileged communications under the work product privilege of section 552.111 of the Government Code. Further, you have failed to demonstrate that any of the remaining records constitute work product. Accordingly, the county may not withhold any of the remaining information under the work product privilege of section 552.111 of the Government Code.

Next, we address your claim for the rest of the submitted information under section 552.103 of the Government Code. Section 552.103 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 has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate: (1) that litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) that the information at issue is related to that 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.

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<sup>6</sup>As our ruling is dispositive for this information, we need not address your remaining arguments against its disclosure.

App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); *see also* Open Records Decision No. 551 at 4 (1990). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *Id.*

Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986). To demonstrate that litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *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. Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). This office has also found that a pending EEOC complaint indicates litigation is reasonably anticipated. Open Records Decision Nos. 386 at 2, 336 at 1, 281 at 1 (1981). 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). We also note that the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983).

You contend that the remaining information at issue, including the non-privileged communications, is excepted under section 552.103. You argue that although the EEOC complainant and the county have settled their claims, a threat of litigation remains because the EEOC maintains jurisdiction to prosecute an action against the county. However, beyond a general statement that the county anticipates litigation in this instance because the EEOC maintains jurisdiction, you have failed to demonstrate that the EEOC has taken any objective step toward filing litigation against the county as of the date the county received the requests. Accordingly, we find that you have failed to establish by concrete evidence the county reasonably anticipated litigation when it received these requests for information. *See* Gov't Code § 552.103(c). We also note the opposing party to the anticipated litigation has already seen or had access to some of the information. 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 (1990). Thus, once the opposing party to anticipated litigation has seen or had access to information relating to the litigation, there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). We therefore conclude the county may not withhold the remaining responsive information under section 552.103 of the Government Code.

Rule 192.3 of the Texas Rules of Civil Procedure provides for the consulting expert privilege. A party to litigation is not required to disclose the identity, mental impressions, and opinions of consulting experts whose mental impressions or opinions have not been reviewed by a testifying expert. *See* TEX. R. CIV. P. 192.3(e). A "consulting expert" is

defined as “an expert who has been consulted, retained, or specially employed by a party in anticipation of litigation or in preparation for trial, but who is not a testifying expert.” *Id.* 192.7. Although you generally claim this privilege, we find you have not demonstrated its applicability to the information at issue. Accordingly, the county may not withhold any of the remaining information at issue under rule 192.3 of the Texas Rules of Civil Procedure.

Section 552.101 of the Government Code exempts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This section encompasses information protected by other statutes, including section 6103(a) of title 26 of the United States Code, which renders tax return information confidential. *See* Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision No. 600 (1992) (W-4 forms). Section 6103(b) defines the term “return information” as:

a taxpayer’s identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments . . . or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary [of the Internal Revenue Service] with respect to a return or with respect to the determination of the existence, or possible existence, of liability . . . for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense[.]

26 U.S.C. § 6103(b)(2)(A). Federal courts have construed the term “return information” expansively to include any information gathered by the Internal Revenue Service regarding a taxpayer’s liability under title 26 of the United States Code. *See Chamberlain v. Kurtz*, 589 F.2d 827, 840-41 (5th Cir. 1979); *Mallas v. Kolak*, 721 F. Supp. 748, 754 (M.D.N.C. 1989), *aff’d in part*, 993 F.2d 1111 (4th Cir. 1993). Consequently, the county must withhold the W-4 form we have marked under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code.<sup>7</sup>

Section 552.101 of the Government Code also encompasses the Family Medical Leave Act (the “FMLA”), section 2654 of title 29 of the United States Code. Section 825.500 of chapter V of title 29 of the Code of Federal Regulations identifies the record-keeping requirements for employers that are subject to the FMLA. Subsection (g) of section 825.500 states:

[r]ecords and documents relating to medical certifications, recertifications or medical histories of employees or employees’ family members, created for purposes of FMLA, shall be maintained as confidential medical records in separate files/records from the usual personnel files, and if the ADA, as

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<sup>7</sup>As our ruling is dispositive for this information, we need not address your remaining arguments against its disclosure.

amended, is also applicable, such records shall be maintained in conformance with ADA confidentiality requirements . . . , except that:

- (1) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations;
- (2) First aid and safety personnel may be informed (when appropriate) if the employee's physical or medical condition might require emergency treatment; and
- (3) Government officials investigating compliance with FMLA (or other pertinent law) shall be provided relevant information upon request.

29 C.F.R. § 825.500(g). Upon review, we find the information we have marked is confidential under section 825.500 of title 29 of the Code of Federal Regulations. Further, we find none of the release provisions of the FMLA applies to the information. Accordingly, the county must withhold the information we marked under section 552.101 of the Government Code in conjunction with the FMLA.<sup>8</sup>

Section 552.101 also encompasses the doctrine of common-law right of privacy, which protects information that is (1) highly intimate or embarrassing, such that its release 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). 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.

In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied), the court addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment. The investigation files in *Ellen* contained individual witness statements, an affidavit by the individual accused of the misconduct responding to the allegations, and conclusions of the board of inquiry that conducted the investigation. *Ellen*, 840 S.W.2d at 525. The court ordered the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the public's interest was sufficiently served by the disclosure of such documents. *Id.* In concluding, the *Ellen* court held that "the public did not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released." *Id.*

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<sup>8</sup>As our ruling is dispositive for this information, we need not address your remaining arguments against its disclosure.

Thus, if there is an adequate summary of an investigation of alleged sexual harassment, the investigation summary must be released along with the statement of the accused under *Ellen*, but the identities of the victims and witnesses of the alleged sexual harassment must be redacted, and their detailed statements must be withheld from disclosure. See Open Records Decision Nos. 393 (1983), 339 (1982). If no adequate summary of the investigation exists, then all of the information relating to the investigation ordinarily must be released, with the exception of information that would identify the victims and witnesses. We note that supervisors are generally not witnesses for purposes of *Ellen*, except where their statements appear in a non-supervisory context. Further, since common-law privacy does not protect information about a public employee's alleged misconduct on the job or complaints made about a public employee's job performance, the identity of the individual accused of sexual harassment is not protected from public disclosure. See Open Records Decision Nos. 438 (1986), 405 (1983), 230 (1979), 219 (1978).

After reviewing the remaining documents, we have marked the information identifying an alleged victim and witnesses of sexual harassment that must be withheld in accordance with *Ellen*. Therefore, the county must withhold the information we have marked under section 552.101 of the Government Code in conjunction common-law privacy and *Ellen*. Upon review, however, we find the remaining information is not confidential under common-law privacy and *Ellen*, and the county may not withhold it under section 552.101 on that ground.

You also claim some of the remaining information is protected by common-law privacy. Upon review, we agree that portions of the remaining information are highly intimate or embarrassing and not of legitimate public interest. Therefore, the county must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, you have failed to demonstrate any of the remaining information is highly intimate or embarrassing and not of legitimate public interest. Accordingly, none of the remaining information may be withheld under section 552.101 in conjunction with common-law privacy.

Section 552.101 of the Government Code also encompasses the constitutional right to privacy. Constitutional privacy protects two kinds of interests. See *Whalen v. Roe*, 429 U.S. 589, 599- 600 (1977); Open Records Decision Nos. 600 at 3-5 (1992), 478 at 4 (1987), 455 at 3-7 (1087). The first is the interest in independence in making certain important decisions relating to the "zones of privacy" pertaining to marriage, procreation, contraception, family relationships, and child rearing and education the United States Supreme Court has recognized. See *Fadjo v. Coon*, 633 F.2d 1172 (5th Cir. 1981); ORD 455 at 3-7. The second constitutionally protected privacy interest is in freedom from public disclosure of certain personal matters. See *Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5th Cir. 1985); ORD 455 at 6-7. This aspect of constitutional privacy balances the individual's privacy interest against the public's interest in the information. See ORD 455 at 7. Constitutional privacy under section 552.101 is reserved for "the most intimate aspects of human affairs" and the scope of information protected is narrower than that under the

common-law doctrine of privacy. *Id.* at 5 (internal quotations omitted) (quoting *Ramie*, 765 F.2d at 492). Upon review, we find no portion of the remaining information falls within the constitutional zones of privacy or otherwise implicates an individual's privacy interests for purposes of constitutional privacy. Therefore, none of the remaining information may be withheld under section 552.101 of the Government Code in conjunction with constitutional privacy.

Section 552.101 also encompasses information protected by the common-law informer's privilege, which has long been recognized by Texas courts. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928). The privilege protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law enforcement authority, provided the subject of the information does not already know the informer's identity. Open Records Decision Nos. 515 at 3 (1988), 208 at 1-2 (1978). The informer's privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." Open Records Decision No. 279 at 2 (1981) (citing 8 John H. Wigmore, *Evidence in Trials at Common Law* § 2374, at 767 (J. McNaughton rev. ed. 1961)). The report must be of a violation of a criminal or civil statute. *See* Open Records Decision Nos. 582 at 2 (1990), 515 at 4-5.

You assert the remaining information contains the identifying information of individuals whose identities are protected by the common-law informer's privilege. We note a witness who provides information in the course of an investigation, but does not make the initial report of a violation, is not an informer for purposes of the common-law informer's privilege. Upon review, we find you have failed to demonstrate the applicability of the common-law informer's privilege to the information at issue. Therefore, none of the remaining information at issue may be withheld under section 552.101 of the Government Code in conjunction with the common-law informer's privilege.

You also argue some of the remaining submitted information is confidential under section 1601.22 of title 29 of the Code of Federal Regulations. Section 1601.22 provides:

[n]either a charge, nor information obtained during the investigation of a charge of employment discrimination under title VII, the ADA, or GINA, nor information obtained from records required to be kept or reports required to be filed pursuant to title VII, the ADA, or GINA, shall be made matters of public information by the [EEOC] prior to the institution of any proceeding under title VII, the ADA, or GINA involving such charge or information. This provision does not apply to such earlier disclosures to charging parties, or their attorneys, respondents or their attorneys, or witnesses where disclosure is deemed necessary for securing appropriate relief. This provision also does not apply to such earlier disclosures to representatives of interested

Federal, State, and local authorities as may be appropriate or necessary to the carrying out of the [EEOC]'s function under title VII, the ADA, or GINA, nor to the publication of data derived from such information in a form which does not reveal the identity of charging parties, respondents, or persons supplying the information.

29 C.F.R. § 1601.22 (emphasis added). Upon review, we find that section 1601.22 prohibits employees of the EEOC from releasing any information pertaining to a discrimination complaint unless a complainant files a lawsuit to remedy the discriminatory practice. *See also* 42 U.S.C. § 2000e-8(e). This prohibition does not extend to an employer's disclosure of information relating to a claim of employment discrimination. Open Records Decision No. 155 at 2 (1977). Therefore, the information at issue may not be withheld under section 552.101 of the Government Code in conjunction with section 1601.22 of title 29 of the Code of Federal Regulations.

You also raise section 552.101 of the Government Code in conjunction with section 21.304 of the Labor Code. Section 21.304 of the Labor Code, which relates to public release of information obtained by the Texas Workforce Commission ("TWC"), provides as follows:

An officer or employee of the [TWC] may not disclose to the public information obtained by the [TWC] under Section 21.204 except as necessary to the conduct of a proceeding under this chapter.

Labor Code § 21.304. We note that this section, by its own terms, only applies to officers and employees of the TWC. *See* Open Records Decision Nos. 478 at 2 (1987) (language of confidentiality statute controls scope of protection), 465 at 4-5 (1987) (statute explicitly required confidentiality). Therefore, section 21.304 does not apply to the county and none of the remaining information may be withheld under this provision.

Section 552.102(a) 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). We understand you to assert the privacy analysis under section 552.102(a) is the same as the common-law privacy test under section 552.101 of the Government Code. *See Indus. Found.*, 540 S.W.2d at 685. In *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the Third Court of Appeals ruled the privacy test under section 552.102(a) is the same as the *Industrial Foundation* privacy test. However, the Texas Supreme Court expressly disagreed with *Hubert's* interpretation of section 552.102(a) and held its privacy standard differs from the *Industrial Foundation* test under section 552.101. *See Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336, 342 (Tex. 2010). The supreme court then considered the applicability of section 552.102 and 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. *See id.* at 346. Having carefully reviewed the remaining information, we find the date of birth we have marked must be withheld under

section 552.102(a) of the Government Code. However, we find none of the remaining information is excepted under section 552.102(a) and may not be withheld on that basis.

Section 552.117(a)(1) 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. *See 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 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 be withheld under section 552.117(a)(1) only 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. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee who did not timely request under section 552.024 the information be kept confidential. Therefore, to the extent the individuals at issue timely requested confidentiality under section 552.024 of the Government Code, the county must withhold the information we have marked under section 552.117(a)(1) of the Government Code, including the personal cellular telephone number if the individual pays for the cellular telephone service with his personal funds. Conversely, to the extent the individuals at issue did not timely request confidentiality under section 552.024, the county may not withhold the marked information under section 552.117(a)(1).

Lastly, the county seeks to withhold medical records, mental health records, and communications made by participants to and during the course of an alternative dispute resolution. *See Occ. Code §§ 151.001-168.202* (governing release of confidential medical records); *Health & Safety Code § 611.002* (makes confidential mental health records); *Civ. Prac. & Rem. Code § 154.073* (makes certain information communicated or created during an alternative dispute resolution confidential). However, the county did not submit any such information. Section 552.301(e)(1)(A) requires a governmental agency to submit the requested information or a representative sample of such information and the arguments for the information it seeks to withhold. *Gov't Code § 552.301 (a)(1)(A)*. Thus, the county should only submit assertions for information that it actually submits to this office seeking to withhold. Accordingly, the county may not withhold any requested information under these provisions.

In summary, the county may generally withhold the marked information under section 552.107(1) of the Government Code but may not withhold the non-privileged communications and attachments we have marked if they are maintained by the county separate and apart from the otherwise privileged e-mail strings in which they appear. The

county may withhold the information marked under section 552.111 of the Government Code. The county must withhold the W-4 form we have marked under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code and the information we have marked under section 552.101 of the Government Code in conjunction with the FMLA. The county must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The county must withhold the information we have marked under section 552.102 of the Government Code. To the extent the individuals at issue timely requested confidentiality under section 552.024 of the Government Code, the county must withhold the information we have marked under section 552.117(a)(1) of the Government Code, including the personal cellular telephone number if the individual pays for the cellular telephone service with his personal funds. The county must release the remaining 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](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,



Paige Lay  
Assistant Attorney General  
Open Records Division

PL/tch

Ref: ID# 474187

Enc. Submitted documents

cc: Four Requestors  
(w/o enclosures)