



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 5, 2013

Mr. Richard Contreras
Counsel for the El Paso County Emergency Services District Number 2
2150 Trawood, Suite B-200
El Paso, Texas 79935

OR2013-02038

Dear Mr. Contreras:

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# 478015.

The El Paso County Emergency Services District Number Two (the "district"), which you represent, received a request for documents presented to the district by Fabens Fire and Rescue regarding item #12 of the meeting on November 14, 2012. You claim that 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.

Initially, we note some of the submitted information consists of invoices subject to section 552.022(a)(3) of the Government Code. Section 552.022(a)(3) provides that "information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body" is subject to required public disclosure unless it is made confidential under this chapter or "other law." Gov't Code § 552.022(a)(3). Although you raise section 552.103 of the Government Code for the submitted information, this section is a discretionary exception to disclosure and does not make information confidential under the Act. *See Dallas Area Rapid Transit v. Dallas Morning News*, S.W.3d 69, 475-6 (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). Therefore, the district may not withhold the information subject to section 552.022(a)(3) under section 552.103. However, because section 552.101 of the

Government Code is “other law” for purposes of section 552.022, we will consider your arguments under this section for the submitted information.

You assert the district’s Accounting and Financial Policies and Procedures Manual directs that all material and facts found in certain investigations remain confidential. 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. A governmental body may not promulgate a rule that designates information as being confidential, so as to bring the information within the scope of section 552.101 of the Government Code, unless the governmental body has been given specific statutory authority to do so. *See* Open Records Decision Nos. 594 at 2-3 (1991) (city ordinance cannot operate to make information confidential when not excepted by Act), 263 (1981) (city ordinance may not conflict with Act); *see also Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976) (agency rule may not make information confidential in circumvention of Act). You have not directed our attention to any law, nor are we aware of any, that authorizes the district to make information confidential for purposes of the Act. Thus, the district has failed to demonstrate how the district’s Accounting and Financial Policies and Procedures Manual constitutes “law” for purposes of section 552.101 of the Government Code, and none of the submitted information may be withheld on that basis.

Section 552.101 of the Government Code encompasses section 551.071 of the Government Code, which permits a governmental body to consult with its attorney in a closed meeting. Gov’t Code § 551.071. We understand the district to assert that the submitted information is confidential under section 551.071 of the Government Code. However, this provision does not make information confidential for purposes of section 552.101 of the Government Code. *See* Open Records Decision No. 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). Thus, the district may not withhold any of the submitted information under section 552.101 in conjunction with section 551.071 of the Government Code.

Section 552.101 also encompasses section 551.104 of the Government Code. This section provides that “[t]he certified agenda or tape of a closed meeting is available for public inspection and copying only under a court order issued under Subsection (b)(3).” Gov’t Code § 551.104(c). Thus, such information cannot be released in response to an open records request. *See* Attorney General Opinion JM-995 at 5-6 (1988) (public disclosure of certified agenda of closed meeting may be accomplished only under procedures provided in Open Meetings Act). However, other than certified agendas and tape recordings, records relating to closed meetings are not expressly made confidential by chapter 551 of the Government Code. *See, e.g.,* Open Records Decision No. 485 at 6 (1987) (investigative report not excepted from disclosure under statutory predecessor to section 552.101 simply by virtue of its having been considered in executive session); *see also* Open Records Decision Nos. 658 at 4 (1998) (statutory confidentiality provision must be express, and

confidentiality requirement will not be implied from statutory structure), 649 at 3 (1996) (language of confidentiality provision controls scope of its protection), 478 at 2. You state the submitted information was presented and discussed in an executive session of the district's Board of Commissioners (the "board") meeting. You have not demonstrated, however, nor does it appear, the submitted information consists of a certified agenda or tape. Therefore, the submitted information may not be withheld under section 552.101 of the Government Code in conjunction with section 551.104 of the Government Code.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy. Common-law privacy 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. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *See id.* at 681-82. The types 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. *See id.* at 683. This office has stated in numerous opinions that the public has a legitimate interest in knowing the reasons for the resignation or dismissal of public employees. Open Records Decision No. 444 at 6 (1986); *see* Open Records Decision Nos. 470 at 4 (1987) (public has legitimate interest in job qualifications and performance of public employees), 423 at 2 (1984) (scope of public employee privacy is narrow). Additionally, the work behavior of a public employee and the conditions for the employee's continued employment are generally matters of legitimate public interest not protected by the common-law right of privacy. *See* Open Records Decision Nos. 438 (1986), 405 at 2-3 (1983) (public has interest in manner in which public employee performs his job), 329 at 2 (1982) (information relating to complaints against public employees and discipline resulting therefrom is not protected under former section 552.101), 208 at 2 (1978) (information relating to complaint against public employee and disposition of the complaint is not protected under either the constitutional or common-law right of privacy). Upon review, we find you have failed to demonstrate any portion of the submitted information is highly intimate or embarrassing and not of legitimate public interest. Accordingly, the district may not withhold any of the submitted information under section 552.101 of the Government Code in conjunction with common-law privacy.

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 the governmental body received 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, 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 prongs of this test for information to be excepted from disclosure under section 552.103(a). *See* ORD 551 at 4.

To establish litigation is reasonably anticipated for the purposes of section 552.103, a governmental body must provide this office with “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” *See* Open Records Decision No. 452 at 4 (1986). In the context of anticipated litigation in which the governmental body is the prospective plaintiff, the concrete evidence must at least reflect litigation is “realistically contemplated.” *See* Open Records Decision No. 518 at 5 (1989); *see also* Attorney General Opinion MW-575 (1982) (finding investigatory file may be withheld if governmental body attorney determines it should be withheld pursuant to section 552.103 and litigation is “reasonably likely to result”). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* ORD 452 at 4.

You state that the submitted documents were presented to the board in executive session where the board directed the district’s counsel to conduct an investigation and report back to the board for further action involving possible litigation. We note, however, you have not informed us, nor does the submitted information reflect, that the district has taken any concrete steps towards the initiation of litigation. *See* Gov’t Code § 552.301(e)(1)(A) (governmental body must provide comments explaining why claimed exceptions to disclosure apply); Open Records Decision No. 331 (1982). Further, you have failed to provide any arguments demonstrating that litigation is realistically contemplated by the district. Thus, we find you have not established the district reasonably anticipated litigation when it received the request for information. Accordingly, the district has failed to demonstrate the applicability of section 552.103 of the Government Code to the submitted information, and it may not be withheld on that basis.

We note portions of the submitted information are subject to section 552.117 of the Government Code.¹ Section 552.117(a)(1) 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). We note section 552.117 also encompasses a personal pager, fax, or cellular telephone number, if the individual personally pays for the service. See Open Records Decision No. 670 at 6 (2001); *see also* Open Records Decision No. 506 at 5-6 (1998) (statutory predecessor to section 552.117 not applicable to cellular telephone numbers provided and paid for by governmental body and intended for official use). 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). Therefore, a governmental body must withhold information under section 552.117(a)(1) on behalf of current or former officials or employees only if these individuals made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. To the extent the employee timely elected to keep such information confidential under section 552.024, the district must withhold the information we have marked under section 552.117(a)(1) of the Government Code. However, the district may only withhold the marked fax number under section 552.117(a)(1) if the employee paid for the service with his own funds. If the employee did not make a timely election under section 552.024, or the service was not paid for with personal funds, the district may not withhold the information we have marked under section 552.117(a)(1) of the Government Code.

In summary, the district must withhold the information we have marked under section 552.117(a)(1) of the Government Code if the employee whose information is at issue timely elected to keep his information confidential pursuant to section 552.024 of the Government Code and the fax service was paid for with personal funds. 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.

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

¹The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body. See Open Records Decision Nos. 481 (1987), 480 (1987), 470.

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,

A handwritten signature in black ink, appearing to read 'Thana Hussaini', with a stylized flourish at the end.

Thana Hussaini
Assistant Attorney General
Open Records Division

TH/som

Ref: ID# 478015

Enc. Submitted documents

c: Requestor
(w/o enclosures)