



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

April 29, 2013

Mr. Tillman S. Roots
Assistant District Attorney
Comal County Criminal District Attorney's Office
150 North Seguin, Suite 307
New Braunfels, Texas 78130

OR2013-07031

Dear Mr. Roots:

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# 487334 (Comal County File No. 13-OR-029).

Comal County (the "county") received a request for (1) the personnel records of the requestor, (2) the entire contents of three specified computer drives, and (3) the requestor's "exchange server e-mails, contacts, and calendar." You state the county has released some information to the requestor. You claim some of the remaining requested information is not subject to the Act. You also claim the remaining requested information is excepted from disclosure under sections 552.103 and 552.139 of the Government Code.¹ We have considered your arguments and reviewed the submitted representative sample of information.²

¹Although you raise section 552.228(b) of the Government Code, this section is not an exception to disclosure under the Act. See Gov't Code § 552.301(a) (noting that exceptions to disclosure under Act are found at subchapter C of chapter 552 of Government Code). Further, although you argue some of the remaining requested information is excepted from disclosure pursuant to federal copyright law, we note copyright law does not make information confidential. See Open Records Decision No. 660 at 5 (1999). A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; see Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

²We assume the "representative sample" of information submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than those submitted to this office.

You assert Exhibit 2 is not subject to the Act. The Act applies to “public information,” which is defined in section 552.002 of the Government Code as:

information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

- (1) by a governmental body; or
- (2) for a governmental body and the governmental body owns the information or has a right of access to it.

Gov’t Code § 552.002. Thus, virtually all of the information in a governmental body’s physical possession constitutes public information and, thus, is subject to the Act. *Id.* § 552.002(a)(1); *see* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). The Act also encompasses information a governmental body does not physically possess, if the information is collected, assembled, or maintained for the governmental body, and the governmental body owns the information or has a right of access to it. Gov’t Code § 552.002(a)(2); *see* Open Records Decision No. 462 at 4 (1987).

You assert Exhibit 2 consists of a personal photo and document of the requestor, a former county employee, that does not relate to the transaction of official county business. *See* Gov’t Code § 552.021; *see also* Open Records Decision No. 635 (1995) (statutory predecessor not applicable to personal information unrelated to official business and created or maintained by state employee involving *de minimis* use of state resources). However, you inform us the information at issue is located on the requestor’s requested computer drives in direct violation of the county’s security policy and standards. Further, you state the information contained on the requested computer drives are highly relevant to the basis of the requestor’s termination. Based on these representations and our review, we find the information at issue is maintained in connection with the transaction of official county business. Therefore, Exhibit 2 constitutes “public information” as defined by section 552.002(a) and must be released unless it falls within an exception to public disclosure under the Act. Accordingly, we will address your argument against disclosure of Exhibit 2.

Section 552.103 of the Government Code provides in relevant part as follows:

- (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). The governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing (1) litigation is pending or reasonably anticipated on the date that the department received the request for information, and (2) the information at issue is related to that litigation. *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 under section 552.103(a).

To establish litigation is reasonably anticipated, a governmental body must provide this office with “concrete evidence showing the claim that litigation may ensue is more than mere conjecture.” Open Records Decision No. 452 at 4 (1986). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See id.* Concrete evidence to support a claim 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.³ *See* Open Records Decision No. 555 (1990); *see also* Open Records Decision No. 518 at 5 (1989) (litigation must be “realistically contemplated”). On the other hand, this office has determined 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). Further, the fact a potential opposing party has hired an attorney who makes a request for information does not establish litigation is reasonably anticipated. *See* Open Records Decision No. 361 (1983).

You state the requestor was recently terminated from his employment with the county. Further, you state the requestor has filed for unemployment benefits and filed a grievance with the county complaining of harassment and discrimination. However, you have neither provided any evidence demonstrating the requestor has taken any objective steps toward filing suit as of the date of the county’s receipt of the request for information nor have you shown the county’s grievance process constitutes “litigation” for purposes of section 552.103. *See generally* Open Records Decision No. 301 (1982) (discussing meaning of “litigation” under predecessor to section 552.103). Accordingly, we find the county has

³In addition, this office has concluded litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

failed to demonstrate litigation was reasonably anticipated when the county received the request, and the county may not withhold the submitted information under section 552.103 of the Government Code.

Section 552.139 of the Government Code provides:

(a) Information is excepted from [required public disclosure] if it is information that relates to computer network security, to restricted information under Section 2059.055 [of the Government Code], or to the design, operation, or defense of a computer network.

(b) The following information is confidential:

(1) a computer network vulnerability report; [and]

(2) any other assessment of the extent to which data processing operations, a computer, a computer program, network, system, or system interface, or software of a governmental body or of a contractor of a governmental body is vulnerable to unauthorized access or harm, including an assessment of the extent to which the governmental body's or contractor's electronically stored information containing sensitive or critical information is vulnerable to alteration, damage, erasure, or inappropriate use[.]

Gov't Code § 552.139. Section 2059.055 of the Government Code provides in pertinent part:

(b) Network security information is confidential under this section if the information is:

(1) related to passwords, personal identification numbers, access codes, encryption, or other components of the security system of a state agency;

(2) collected, assembled, or maintained by or for a governmental entity to prevent, detect, or investigate criminal activity; or

(3) related to an assessment, made by or for a governmental entity or maintained by a governmental entity, of the vulnerability of a network to criminal activity.

Id. § 2059.055(b). You state Exhibit 3 relates to the design, operation, and defense of the county's computer network. You state Exhibit 3 contains passwords, personal identification

numbers, access codes, encryption, and other components of the county's network security system. Further, you assert the release of the information at issue will compromise and enable circumvention of both physical and logical security measures in place to protect the county. Based on your representations and our review, we find you have demonstrated Exhibit 3 relates to computer network security, and the design, operation, or defense of the county's computer network. Accordingly, the county must withhold Exhibit 3 under section 552.139 of the Government Code.

In summary, the county must withhold Exhibit 3 under section 552.139 of the Government Code. As you raise no further exceptions to disclosure, the county must release the remaining 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, 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,



Sean Nottingham
Assistant Attorney General
Open Records Division

SN/tch

Ref: ID# 487334

Enc. Submitted documents

c: Requestor
(w/o enclosures)