



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

April 30, 2013

Ms. Celeste Blackburn  
General Counsel  
Office of Violent Sex Offender Management  
Mail Code 4300  
P.O. Box 149347  
Austin, Texas 78714-9347

OR2013-07119

Dear Ms. Blackburn:

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# 485971.

The Office of Violent Sex Offender Management (the "office") received a request for approximately 169 categories of information pertaining to the office's rules, policies, procedures, forms, budget and finance information, treatment plans, residential and treatment facilities, vendors, and information about the sexually violent offenders, including a specified offender, in addition to information specific to a named program specialist and a named treatment provider. The office states it does not have some of the requested information.<sup>1</sup> The office states it has released, or made available for inspection, some of the requested information, including information pertaining to the requested rules, policies, procedures, budget and finance information, treatment plans, residential and treatment facilities, vendors, and information about sexually violent offenders, including the specified offender. You claim that the remaining requested information regarding the named program specialist and treatment provider is excepted from disclosure under sections 552.101 and 552.103 of the

---

<sup>1</sup>The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dism'd); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>2</sup>

Initially, we note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

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

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

Gov't Code § 552.022(a)(1). The submitted information contains Exhibits D, J, and N, which consist of completed reports that are subject to subsection 552.022(a)(1). The office must release these completed reports pursuant to subsection 552.022(a)(1) unless they are excepted from disclosure under section 552.108 of the Government Code or are made confidential under the Act or other law. *See id.* You seek to withhold the information subject to subsection 552.022 under section 552.103 of the Government Code. However, section 552.103 is a discretionary exception 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); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the completed reports may not be withheld under section 552.103 of the Government Code. You also claim this information is excepted under section 552.101 of the Government Code, which can make information confidential for purposes of section 552.022(a)(1). Therefore, we will consider the applicability of this exception to the reports in Exhibits D, J, and N. We will also consider your arguments against disclosure of the information not subject to section 552.022.

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 information made confidential by other statutes. Section 552.101 encompasses section 1703.306 of the Occupations Code, which provides in relevant part:

---

<sup>2</sup>We assume that the “representative sample” of records 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 that those records contain substantially different types of information than that submitted to this office.

(a) A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person other than:

- (1) the examinee or any other person specifically designated in writing by the examinee;
- (2) the person that requested the examination;
- (3) a member, or the member's agent, of a governmental agency that licenses a polygraph examiner or supervises or controls a polygraph examiner's activities;
- (4) another polygraph examiner in private consultation; or
- (5) any other person required by due process of law.

(b) The [Texas Department of Licensing and Regulation] or any other governmental agency that acquires information from a polygraph examination under this section shall maintain the confidentiality of the information.

Occ. Code § 1703.306(a)-(b). We have marked polygraph information in Exhibits D and J. It does not appear the requestor falls into any of the categories of individuals authorized to receive the polygraph information under section 1703.306(a). Thus, the marked information in Exhibits D and J is confidential under section 1703.306 and must be withheld under section 552.101 of the Government Code.

Section 552.101 of the Government Code also encompasses section 611.002 of the Health and Safety Code, which provides in pertinent part:

- (a) Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.
- (b) Confidential communications or records may not be disclosed except as provided by Section 611.004 or 611.0045.

Health & Safety Code § 611.002(a)-(b); *see id.* § 611.001 (defining "patient" and "professional"). Upon review, we find Exhibit N consists of confidential mental health records that are subject to chapter 611 of the Health and Safety Code. Accordingly, the office must withhold Exhibit N under section 552.101 of the Government Code in conjunction with chapter 611 of the Health and Safety Code.

Section 552.101 also encompasses the doctrine of common-law 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 established. *Id.* at 681–82. The type of information considered highly 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. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). You seek to withhold Exhibits D, J, and N pursuant to common-law privacy. Upon review, we find the information we have marked in Exhibit J constitutes information that is highly intimate or embarrassing and of no legitimate concern to the public. Accordingly, the office must withhold the information we have marked in Exhibit J under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find none of the information in Exhibit D, and none of the remaining information in Exhibit J, may be withheld under section 552.101 of the Government Code in conjunction with common-law privacy. As you raise no other exceptions to disclosure for the information subject to section 552.022, the office must release Exhibit D and the remaining information in Exhibit J.

Now, we will address your arguments against disclosure for the information not subject to section 552.022. 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 at issue. To meet this burden, the governmental body must demonstrate that (1) litigation was pending or reasonably anticipated on the date of its receipt of 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 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See* Open Records Decision No. 551 at 4 (1990).

You seek to withhold the remaining exhibits under section 552.103.<sup>3</sup> You state, and have provided pleadings confirming, that prior to the receipt of this request for information, lawsuits styled *Richards, et al. v. Office of Violent Sex Offender Management, et al.*, Cause No. A12CV1093 and *Beasley, et al. v. Office of Violent Sex Offender Management, et al.*, Cause No. A12CV1165 were filed in the United States District Court for the Western District of Texas, Austin Division. You also explain the responsive information relates to these lawsuits. Based on our review of the pleadings you provided and the submitted information, we find that the submitted information is related to this pending litigation. Therefore, we conclude the office may withhold the remaining exhibits at issue under section 552.103 of the Government Code.<sup>4</sup>

We note, however, once the information at issue has been obtained by all parties to the pending litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to the information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, any information obtained from or provided to all other parties in the pending 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 concluded. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

In summary, the office must release Exhibits D and J pursuant to section 552.022 of the Government Code, except for the information we have marked to be withheld under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code and in conjunction with common-law privacy. The office must withhold Exhibit N under section 552.101 of the Government Code in conjunction with chapter 611 of the Health and Safety Code. The remaining information may be withheld under section 552.103 of the Government Code.

---

<sup>3</sup>The remaining exhibits at issue include: E, F, G, H, I, M, O, and P.

<sup>4</sup>As our ruling is dispositive, we need not address your remaining argument against disclosure of this 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,

A handwritten signature in black ink that reads "Britni Fabian". The signature is written in a cursive, flowing style.

Britni Fabian  
Assistant Attorney General  
Open Records Division

BF/dls

Ref: ID# 485971

Enc. Submitted documents

c: Requestor  
(w/o enclosures)