



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 17, 2013

Mr. Jorge L. Trevino, Jr.
Assistant County Attorney
County of Webb
1110 Washington Street, Suite 301
Laredo, Texas 78040

OR2013-12242

Dear Mr. Trevino:

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# 493397.

Webb County (the "county") received a request for all documents, e-mails, letters, or other forms of communication regarding a grievance filed by a named individual against the county sheriff during a specified year. You claim some of the submitted information is not subject to the Act. Additionally, you claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note some of the submitted information, which we have marked, is not responsive to the request for information because it was created after the request for

¹Although you raise sections 552.022 and 552.305 of the Government Code, we note these are not exceptions to public disclosure under the Act. *See* Gov't Code §§ 552.022, .305. 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 id.* § 552.022. Further, section 552.305 addresses the procedural requirements for notifying third parties their interests may be affected by a request for decision. *See id.* § 552.305. We note although you raise Texas Rule of Civil Procedure 192.5, section 552.111 is the proper exception to raise when asserting the work product privilege for information not subject to section 552.022 of the Government Code. Further, although you do not cite to section 552.107 of the Government Code in your brief, we understand you to raise this section based on your arguments.

information was received. This ruling does not address the public availability of information that is not responsive to the request, and the county need not release non-responsive information in response to the request.

Next, you assert the submitted letter filed by the named individual 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 because the submitted grievance letter was not filed in accordance with the procedural requirements for filing a complaint with civil service commission it does not constitute public information under the Act. Further, you assert this letter was not kept or maintained by the county attorney's office, and thus, does not constitute public information under the Act. However, we note the grievance at issue was filed by an employee of the county against the county sheriff regarding the sheriff's work performance. Further, we note the request was received by the county, and the document at issue was in the county's possession and provided to this office for our review. Upon review, we find the information at issue is maintained in connection with the transaction of official county business. Therefore, the information at issue 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 the information at issue.

Next, we must address the county's obligations under section 552.301 of the Government Code, which prescribes the procedural obligations that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(b) requires that a governmental body ask for a decision from this office and state which exceptions apply to the requested information by the tenth

business day after receiving the request. Gov't Code § 552.301(b). In this instance, the request reflects the county received the request for information on April 29, 2013. Accordingly, the county's ten-business-day deadline was May 13, 2013. While you raised sections 552.101, 552.103, and 552.111 of the Government Code within the ten-business-day time period as required by subsection 552.301(b), you did not raise section 552.107 of the Government Code until after the ten-business-day deadline had passed. Thus, the county failed to comply with the requirements mandated by subsection 552.301(b) as to its argument under section 552.107 of the Government Code. However, we will address your timely raised exceptions.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the requirements of section 552.301 results in the legal presumption that the requested information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); *see also* Open Records Decision No. 630 (1994). Generally, a governmental body may demonstrate a compelling reason to withhold information by showing the information is made confidential by another source of law or affects third party interests. *See* ORD 630. Although you raise section 552.107 of the Government Code for the submitted information, this section is discretionary in nature. It serves only to protect a governmental body's interests, and may be waived; as such, it does not constitute a compelling reason to withhold information. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 676 at 10-11 (attorney-client privilege under section 552.107 may be waived). Thus, the county has waived its claims under section 552.107 for the submitted information.

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). 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 that (1) litigation is pending or reasonably anticipated on the date the county 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).

In order to demonstrate that litigation is reasonably anticipated, the governmental body must provide this office “concrete evidence showing that the claim that litigation might ensue is more than a 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.* In Open Records Decision 638 (1996), this office stated that, when a governmental body receives a notice of claim letter, it can meet its burden of showing that litigation is reasonably anticipated by representing that the notice of claim letter is in compliance with the requirements of the Texas Tort Claims Act (the “TTCA”), Civil Practice and Remedies Code, chapter 101, or an applicable municipal ordinance. If that representation is not made, the receipt of the claim letter is a factor we will consider in determining, from the totality of the circumstances presented, whether the governmental body has established litigation is reasonably anticipated. *See* ORD 638 at 4.

You state, and the submitted information reflects, prior to the date the request was received, the county received a notice of representation and claim from an attorney for the named individual. You do not state the notice of claim letter complies with the requirements of the TTCA. However, in the attorney’s notice letter he requests his client “be placed on paid administrative leave while [he and his client] explore resolving [his client’s] justified grievance and related claims.” You inform us during numerous conversations, the named individual’s attorney stated he intends to sue the county on behalf of his client. Based on your representations, our review, and the totality of the circumstances, we find the county reasonably anticipated litigation on the date the request was received. Further, we find the submitted information relates to the anticipated litigation. Thus, the county may generally withhold the submitted information under section 552.103 of the Government Code.

We note, however, that the purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to that litigation to obtain it through discovery procedures. *See* ORD 551 at 4-5. Therefore, if the opposing party has seen or had access to information relating to the anticipated litigation through discovery or otherwise, there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). In this instance, the opposing party in the anticipated litigation has already seen or had access to some of the information at issue. The information that has been seen by the

opposing party may not be withheld from the requestor under section 552.103. Thus, the county may withhold the information we have marked under section 552.103. We note the applicability of section 552.103 ends once the related litigation concludes. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Section 552.111 of the Government Code excepts from disclosure “[a]n interagency or 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. *See 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. *See* 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.

You argue the remaining information is protected by the attorney work product privilege. However, as noted above, the information at issue consists of communications sent or received by the opposing party to the anticipated litigation. Therefore, the county has failed to demonstrate how the work-product privilege is applicable to the information at issue.

Accordingly, none of the remaining information may be withheld under section 552.111 of the Government Code on the basis of the attorney work product privilege.

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 exception encompasses information other statutes make confidential. You contend portions of the submitted information are excepted from disclosure under sections 2510 through 2521 of title 18 of the United States Code. However, you point us to no specific section that applies to the information at issue. Further, you have submitted no arguments explaining the applicability of any of the cited statutes to the submitted information. *See id.* §§ 552.301(e)(1)(A), .302. Accordingly, we find the county has failed to demonstrate sections 2510 through 2521 apply to the information. Thus, the county may not withhold any of the information at issue under section 552.101 of the Government Code pursuant to sections 2510 through 2521 of title 18 of the United States Code.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information if (1) the information contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *See Indus. Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both elements of the test must be established. *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 information that either identifies or tends to identify a victim of sexual harassment must be withheld under common-law privacy. *See* Open Records Decision No. 393 at 2 (1983); *see also Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied) (identity of witnesses to and victims of sexual harassment was highly intimate or embarrassing information and public did not have a legitimate interest in such information). Upon review, we find some of the remaining information is highly intimate or embarrassing and a matter of no 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, we find no portion of the remaining information is highly intimate or embarrassing information of no legitimate public interest. Consequently, the county may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.117(a)(1) of the Government Code 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 this information be kept confidential under section 552.024 of the Government

Code.² Gov't Code § 552.117(a)(1). 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 on behalf of a current or former employee only if the individual made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Accordingly, if the individual whose information we have marked timely requested confidentiality pursuant to section 552.024, the marked information must be withheld under section 552.117(a)(1). The county may not withhold the marked information under section 552.117(a)(1) if the individual did not make a timely election to keep this information confidential.

Section 552.137 excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body," unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). Gov't Code § 552.137(a)-(c). The county must withhold the e-mail addresses we have marked under section 552.137, unless the owners of the e-mail addresses affirmatively consent to their release.³ *See id.* § 552.137(b).

In summary, the county may withhold the information we have marked under section 552.103 of the Government Code. The county must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. To the extent the individual whose information we have marked 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. The county must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their release. The remaining responsive 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.

²The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

³We note this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including a personal e-mail address under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, appearing to read "Kathleen J. Santos". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Kathleen J. Santos
Assistant Attorney General
Open Records Division

KJS/som

Ref: ID# 493397

Enc. Submitted documents

c: Requestor
(w/o enclosures)