



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 17, 2013

Mr. Jonathan Miles
Open Government Attorney
Texas Department of Family and Protective Services
Mail Code E611
P.O. Box 149030
Austin, Texas 78714-9030

OR2013-16103

Dear Mr. Miles:

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# 499589 (DFPS ORR Request No. 06252013MKC).

The Texas Department of Family and Protective Services (the "department") received a request for the personnel file of the requestor. You inform us the department will redact information subject to section 552.117(a)(1) of the Government Code.¹ You further inform us you will redact certain information pursuant to the previous determination issued in Open Records Letter No. 2003-5590 (2003).² You claim portions of the remaining submitted

¹Section 552.117(a)(1) of the Government Code exempts 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. Gov't Code § 552.117(a)(1). Section 552.024(c)(2) of the Government Code authorizes a governmental body to redact information protected by section 552.117(a)(1) of the Government Code without the necessity of requesting a decision under the Act if the current or former employee of official to whom the information pertains timely chooses not to allow public access to the information. *See id.* § 552.024(c)(2).

²Open Records Letter No. 2003-5590 is a previous determination authorizing the department to withhold, under section 552.101 of the Government Code in conjunction with section 261.201(a) of the Family Code, the records concerning an investigation of an allegation of abuse or neglect of a child and the records used or developed in providing services as a result of such an investigation, unless the department's rules permit the department to release requested records to a particular requestor.

information are excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

We note portions of the submitted information are subject to section 552.022 of the Government Code. This section provides, in pertinent part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the 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 a completed investigation and evaluation that are subject to section 552.022(a)(1). The department must release the completed investigation and evaluation pursuant to section 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 raise section 552.103 of the Government Code for this information.. However, section 552.103 is a discretionary exception to disclosure and does not make information confidential under the Act. *See id.* § 552.007; Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, none of the information subject to section 552.022(a)(1), which we have indicated, may be withheld under section 552.103 of the Government Code. As no further exceptions to disclosure have been raised for this information, it must be released. However, we will consider your argument under section 552.103 for the remaining information you have marked that is not subject to section 552.022.

Section 552.103 of the Government Code provides, in relevant 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 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* Open Records Decision No. 551 at 4-5 (1990). A governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) exception applies in a particular situation. The test for meeting this burden is a showing (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the requested information is related to that litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, orig. proceeding); *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 parts of this test for information to be excepted under section 552.103(a). *See* ORD 551 at 4.

This office has long held that “litigation,” for purposes of section 552.103, includes “contested cases” conducted in a quasi-judicial forum. *See* Open Records Decision Nos. 474 (1987), 368 (1983), 336 (1982), 301 (1982). In determining whether an administrative proceeding is conducted in a quasi-judicial forum, some of the factors this office considers are whether the administrative proceeding provides for discovery, evidence to be heard, factual questions to be resolved, the making of a record, and whether the proceeding is an adjudicative forum of first jurisdiction with appellate review of the resulting decision without a re-adjudication of fact questions. *See* Open Records Decision No. 588 (1991).

You contend litigation against the department is currently pending or is reasonably anticipated because prior to department’s receipt of the instant request for information, the requestor filed a grievance against the department. We understand you to assert department grievance hearings are “litigation” in that the department follows administrative procedures in handling such disputes. You state that “a grievant may obtain evidence from the department, which may include witness statements, investigative reports, and tapes of witness interviews.” You also state during these hearings the grievant is allowed to be represented by counsel, present evidence to the department, and present witnesses. You further state these hearings are held before an administrative law judge, whose decision is final. Based on your representations and our review, we find the department’s administrative procedure for disputes, as described above, is conducted in a quasi-judicial forum. Thus, the department’s administrative procedure for disputes constitutes litigation for purposes of section 552.103. You state the requestor’s grievance hearing occurred on May 30 and 31, 2013. However, you further state the decision was before the administrative law judge as of the date of the instant request for information. Thus, we determine the department was involved in pending litigation at the time it received the request for information. You state the submitted information relates to the pending litigation against the

department. Upon review of your arguments and the information at issue, we find the submitted information is related to litigation involving the department that was pending on the date the request was received. Accordingly, we find the department may withhold the information you have marked under section 552.103.

However, we note 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. Therefore, once the information has been obtained by all parties to the pending litigation, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). We also note that the applicability of section 552.103(a) ends when the litigation is concluded. Attorney General Opinion MW-575 (1982) at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2.

We note the remaining information contains a cellular telephone account number. Section 552.136 of the Government Code provides that “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.”³ Gov’t Code § 552.136(b). An access device number is one that may be used to (1) obtain money, goods, services, or another thing of value, or (2) initiate a transfer of funds other than a transfer originated solely by paper instrument, and includes an account number. *Id.* § 552.136(a). Thus, the department must withhold the account number, a representative sample of which we have indicated, under section 552.136 of the Government Code.

In summary, the department must release the information we have indicated subject to section 552.022(a)(1) of the Government Code. The department may withhold the information you have marked under section 552.103 of the Government Code. The department must withhold the information, a representative sample of which we have indicated, under section 552.136 of the Government Code. The department must release the remaining information.⁴

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.

³The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481, 480 (1987), 470 (1987).

⁴In this instance, the requestor has a right of access to some of the information being released. Thus, if the department receives another request for this information from a different requestor, the department must seek another ruling from this office.

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 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# 499589

Enc. Submitted documents

c: Requestor
(w/o enclosures)