



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 10, 2013

Mr. Brett Norbraten
Open Records Attorney
Texas Department of Aging and Disability Services
P.O. Box 149030
Austin, Texas 78714-9030

OR2013-21445

Dear Mr. Norbraten:

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# 508224 (DADS Nos. 2013SOLEG0175 and 2013SOLEG0176).

The Texas Department of Aging and Disability Services (the "department") received two requests from the same requestor for (1) the personnel file for a named department employee, (2) the job description for a specified department position, (3) complaints and investigation records for the named department employee, and (4) records of telephone calls for two named department employees for a specified time period. You state the department does not possess any information responsive to the requested records of telephone calls for either of the named department employees.¹ You claim the submitted information is excepted from disclosure under section 552.103 of the Government Code. We have

¹The Act does not require a governmental body to release information that did not exist when it received a request, create responsive information, or obtain information that is not held by the governmental body or on its behalf. See *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ diss'd); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

considered the exception you claim and reviewed the submitted representative sample of information.²

Initially, we note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a)(1) provides for the required public disclosure of “a completed report, audit, evaluation, or investigation made of, for, or by a governmental body[,]” unless it is excepted by section 552.108 of the Government Code or “made confidential under [the Act] or other law[.]” Gov’t Code § 552.022(a)(1). The submitted performance evaluations are subject to section 552.022(a)(1) and must be released unless they are either excepted under section 552.108 of the Government Code or are confidential under the Act or other law. You do not claim section 552.108. Although you assert this information is excepted from disclosure under section 552.103 of the Government Code, this section is discretionary 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); Open Records Decision No. 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the department may not withhold the information subject to section 552.022 under section 552.103. As you raise no further exceptions against disclosure of this information, which we have marked, it must be released. We will address your argument under section 552.103 for the remaining information that is not subject to section 552.022.

You claim that the information at issue is protected under section 552.103 of the Government Code. Section 552.103 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

²This letter ruling assumes that the submitted representative sample of information is truly representative of the requested information as a whole. This ruling does not reach, and therefore does not authorize, the withholding of any other requested information to the extent that the other information is substantially different than that submitted to this office. *See* Gov’t Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

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, 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.). The governmental body must meet both prongs of this test for information to be excepted from disclosure under section 552.103(a). *See Open Records Decision No. 551 at 4 (1990).*

You state, and provide supporting documentation demonstrating, a lawsuit styled *Silsbee Oaks Health Care, L.L.P. v. Woods*, Cause No. 54419, was filed in the 88th Judicial District of Hardin County against the named department employee in her official capacity before the department's receipt of the instant requests for information. Based upon your representations and our review, we find the department was a party to pending litigation prior to the dates it received the requests. Further, you state, and we agree, the information at issue, which consists of personnel information of the named department employee, relates to the pending litigation. Accordingly, we conclude the department may withhold the remaining information under section 552.103.

We note once the information has been obtained by all parties to the litigation, through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). We also note 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.

In summary, the department must release the information we have marked pursuant to section 552.022(a)(1) of the Government Code. The department may withhold the remaining information under section 552.103 of the Government Code.

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.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 "Lindsay E. Hale". The signature is written in a cursive style with a large initial "L".

Lindsay E. Hale
Assistant Attorney General
Open Records Division

LEH/tch

Ref: ID# 508224

Enc. Submitted documents

c: Requestor
(w/o enclosures)