



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 10, 2014

Ms. Tabitha Goodwin
City Attorney for the Town of Addison
Cowles & Thompson
901 Main Street, Suite 3900
Dallas, Texas 75202

OR2014-09940

Dear Ms. Goodwin:

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# 525508.

The Town of Addison (the "town"), which you represent, received a request for (1) all sectional personnel and disciplinary files relating to a named town police officer; (2) all town personnel and disciplinary files for the named officer; (3) all internal affairs investigations related to or initiated by the named officer; (4) all documents related to the criteria or matrix of a specified sergeant's promotion exam; (5) all test results for all candidates for the specified sergeant's promotion exam; (6) all notes from the town's police chief's interviews with the candidates for the specified sergeant's promotion exam; and (7) all charges, allegations, or investigations initiated by the town's police department (the "department") against the named officer, including a specified pending investigation. You state the town will release information responsive to items one and two of the request. You state the town has no information responsive to item six of the request.¹ You claim the remaining requested information is excepted from disclosure under sections 552.103 and 552.122 of the Government Code. We have considered the exceptions you claim and reviewed the

¹The 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 dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

submitted information, a portion of which constitutes a representative sample.² We have also received and considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Initially, we address the requestor's contention that the town did not comply with the requirements of section 552.301 of the Government Code. Section 552.301 prescribes procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. *See id.* § 552.301. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request. *See id.* § 552.301(b). We understand the requestor to claim the town failed to timely raise its argument under section 552.122 of the Government Code by failing to specifically cite to that section, and, thus, the town's arguments under this exception are waived. *See generally id.* § 552.302 (providing a governmental body's failure to comply with section 552.301 results in the presumption that the information is public). However, while the town specifically claimed section 552.103 of the Government Code in its correspondence seeking a decision from this office, we note the town also claimed "any other applicable exception to disclosure found in [the Act]." Accordingly, we find the town complied with the procedural requirements of section 552.301(b) with regard to your argument under section 552.122, and we will consider the applicability of this exception.

Next, we note a portion of the submitted information, which we have marked, is not responsive to the instant request for information because it was created after the request was received by the town. This ruling does not address the public availability of any information that is not responsive to the request, and the town need not release that information in response to this request.

Next, we note some of the responsive information, which we have marked, 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[.]" *Id.* § 552.022(a)(1). The information we have marked consists of completed investigations that are subject to section 552.022(a)(1) and must be released unless they are excepted from disclosure under section 552.108 of the Government Code or confidential under the Act or other law. 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.

²We assume the representative samples of records submitted to this office are 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.

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 town may not withhold the information subject to section 552.022 under section 552.103. However, we note portions of the information at issue are subject to sections 552.101 and 552.130 of the Government Code, which make information confidential under the Act.³ Accordingly, we will consider the applicability of these exceptions to the information subject to section 552.022. We will also consider your arguments under sections 552.103 and 552.122 of the Government Code for the responsive information that is not subject to section 552.022.

Section 552.103 of the Government Code provides in pertinent 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 that 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 governmental body 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, 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 prongs of this test for information to be excepted under section 552.103(a). *See* ORD 551 at 4.

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

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." ORD 452 at 4. Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *Id.* We note that the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. *See* Open Records Decision No. 361 (1983). 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. However, we note this office has found the fact that an opposing party hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly constituted an objective step toward litigation. *See* Open Records Decision No. 346 (1982).

You argue litigation is reasonably anticipated in this instance because the requestor, an attorney, submitted a notice of claim and demand letter on behalf of her client, the named officer, which also included the instant request for information. You do not affirmatively represent to this office that the notice of claim complies with the TTCA or an applicable ordinance; therefore, we will only consider the notice of claim as a factor in determining whether the town reasonably anticipated litigation over the incident in question. The requestor's demand letter alleges wrongful conduct by the town, specifically instances of discrimination and retaliation against her client. The requestor advises the purpose of the demand letter is to "give [the town] notice of [her client's] legal claims against [the department] and to give [the town] an opportunity to address his claims and issues without the need for further legal action." The letter further advises the requestor's client would be willing to consider a monetary settlement or severance package in exchange for release of any claims against the town. Thus, based on your representations, our review of the submitted information, and the totality of the circumstances, we find the town has established it reasonably anticipated litigation at the time it received the instant request. You state the information at issue is related to the anticipated litigation. Based on your representations and our review, we find you have established the information at issue is related to litigation the town reasonably anticipated on the date it received this request for information. Accordingly, we conclude the town may generally withhold the responsive information not subject to section 552.022 of the Government Code under section 552.103 of the Government Code.

We note, however, the opposing party has seen or had access to some of the information at issue. 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. Thus, once 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). Upon review, we find the information we have marked was seen by the opposing party to the anticipated litigation and may not be withheld under section 552.103. However, the remaining responsive information not subject to section 552.022 of the Government Code may be withheld under section 552.103 of the Government Code.⁴ We also note the applicability of section 552.103(a) ends once the litigation has been concluded. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

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 the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person and (2) 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 satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987). Upon review, we find the information we have marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the town must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.130 of the Government Code provides information relating to a motor vehicle operator's license, driver's license, motor vehicle title or registration, or personal identification document issued by an agency of this state or another state or country is excepted from public release. *See* Gov't Code § 552.130. Upon review, we find the town must withhold the motor vehicle record and identification information we have marked under section 552.130 of the Government Code.

We note the requestor contends she has a right of access to the requested information pursuant to section 552.023 of the Government Code. Section 552.023 grants a person or a person's authorized representative a special right of access, beyond the right of the general public, to information held by a governmental body that relates to the person and that is protected from public disclosure by laws intended to protect the person's privacy interests. *Id.* § 552.023(a); ORD 481 at 4 (privacy theories not implicated when individual requests information concerning himself). However, section 552.023 does not apply where interests

⁴As our ruling for this information is dispositive, we need not address your argument under section 552.122 of the Government Code.

other than the requestor's client's privacy are being protected. In this instance, portions of the information at issue are excepted under section 552.103 of the Government Code, which protects a governmental body's interests rather than privacy rights of an individual. Furthermore, the information that is protected by sections 552.101 and 552.130 of the Government Code pertains to individuals other than the requestor's client. Therefore, section 552.023 does not apply to the information subject to section 552.103 of the Government Code or the information we have marked under sections 552.101 and 552.130 of the Government Code.

Additionally, the requestor argues the department's General Order 207.03 provides a department employee may review their employment records at any reasonable time upon request. However, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. *See* Attorney General Opinion JM-672 (1987); Open Records Decision No. 541 at 3 (1990) (“[T]he obligations of a governmental body under [the predecessor to the Act] cannot be compromised simply by its decision to enter into a contract.”). Accordingly, we find this general order does not grant the requestor a right of access to the information at issue that supercedes the provisions of the Act.

Finally, the requestor states her client has a special right of access to the records at issue pursuant to section 559.004 of the Government Code. Section 559.004 provides “[e]ach state governmental body shall establish a reasonable procedure under which an individual is entitled to have the state governmental body correct information about the individual that is possessed by the state governmental body that is incorrect.” Gov’t Code § 559.004. This section further provides “[t]he procedure may not unduly burden an individual using the procedure.” *Id.* However, we note this section applies only to “state governmental bodies,” not local governmental bodies, like the town. *See id.* § 559.001 (chapter 559 of the Government Code applies to governmental bodies as defined by the Act that are part of state government). Accordingly, we find section 559.004 does not provide a right of access to the information at issue.

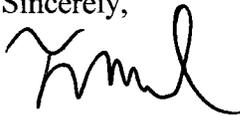
In summary, with the exception of the information subject to section 552.022 of the Government Code, which we have marked, and the information seen by the opposing party to the anticipated litigation, which we have also marked, the town may withhold the responsive information under section 552.103 of the Government Code. The town must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The town must withhold the motor vehicle record and identification information we have marked under section 552.130 of the Government Code. The town must release the remaining responsive information.⁵

⁵We note the information being released contains a social security number subject to section 552.147 of the Government Code. Section 552.147(b) of the Government Code authorizes a government body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act. Gov’t Code § 552.147(b).

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, appearing to read 'Tim Neal', written in a cursive style.

Tim Neal
Assistant Attorney General
Open Records Division

TN/bhf

Ref: ID# 525508

Enc. Submitted documents

c: Requestor
(w/o enclosures)