



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 3, 2014

Ms. Thao La
Senior Attorney
Legal Affairs
Parkland Health & Hospital System
5201 Harry Hines Boulevard
Dallas, Texas 75235

OR2014-17638

Dear Ms. La:

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# 538229 (DCHD# 14-70).

The Dallas County Hospital District d/b/a Parkland Health & Hospital System (the "district") received a request for several categories of information regarding the requestor's termination and a specified charge. You state the district does not have information responsive to portions of the request.¹ You state you have released some information to the requestor. We understand the district will redact information subject to section 552.117(a)(1) of the Government Code as permitted by section 552.024(c)(2) of the Government Code.²

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).

²Section 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 or official to whom the information pertains timely chooses not to allow public access to the information. *See Gov't Code* § 552.024(c)(2). If a governmental body redacts such information, it must notify the requestor in accordance with subsections 552.024(c-1) and (c-2). *See id.* § 552.024(c-1), (c-2).

You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.111, 552.136, and 552.150 of the Government Code. You also indicate release of the submitted information may implicate the interests of the Texas Board of Nursing (the "board") and of several district employees (the "employees"). Accordingly, you notified the board and the employees of the request for information and of their right to submit arguments stating why their information should not be released. *See* Gov't Code § 552.304 (permitting interested third party to submit to attorney general reasons why requested information should or should not be released). We have received comments from the board and from two employees. We have considered the submitted arguments and reviewed the submitted representative sample of information.³

You assert the submitted job description and audio recordings were the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2012-12598 (2012). In that ruling, we determined, in part, the district must withhold (1) certain information, which included the audio recordings at issue, under section 552.101 of the Government Code in conjunction with section 181.006 of the Health and Safety Code and (2) the information we marked, which included the job description at issue, under section 552.101 of the Government Code in conjunction with the Americans with Disabilities Act. We have no indication there has been any change in the law, facts, or circumstances on which the previous ruling was based with regard to the audio recordings. Accordingly, we conclude the district may continue to rely on Open Records Letter No. 2012-12598 as a previous determination and withhold the submitted audio recordings in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). However, we note the submitted job description is not held in the same capacity as the job description we addressed in Open Records Letter No. 2012-12598, and thus, we find the facts and circumstances on which the previous ruling was based have changed with regard to the submitted job description. Therefore, we find the district may not rely on Open Records Letter No. 2012-12598 with regard to the submitted job description. We will address the submitted arguments against the disclosure of the remaining requested information that is not subject to the prior ruling.

We note some of the submitted information may be subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

³We assume 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 those records contain substantially different types of information than that submitted to this office.

(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:

...

(15) information regarded as open to the public under an agency's policies[.]

Gov't Code § 552.022(a)(15). The submitted information includes a job description, which is generally open to the public as part of a job posting. If the district regards the submitted job description as open to the public, then this information is subject to section 552.022(a)(15), and the district may only withhold the job description if it is made confidential under the Act or other law. You seek to withhold the information at issue 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 Gov't Code § 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 information subject to section 552.022 of the Government Code may not be withheld under section 552.103 of the Government Code. As you claim no other exception to the disclosure of the information at issue, if the district regards the submitted job description as open to the public, it must be released. If the district does not regard the job description at issue as open to the public, we will consider your argument under section 552.103 for that information, as well as the remaining information.

We now turn to your argument under section 552.103 of the Government Code for the information not subject to section 552.022. 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 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).*

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See Open Records Decision No. 452 at 4 (1986).* To establish litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. *Open Records Decision No. 555 (1990); see Open Records Decision No. 518 at 5 (1989)* (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *Open Records Decision No. 331 (1982).* Further, 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. *Open Records Decision No. 361 (1983).*

You state, and provide documentation showing, on the date of the district's receipt of this request, it received a letter from the requestor seeking damages from the district for her alleged wrongful termination. You state the present request "also acts as notice that the [r]equestor wishes to litigate and seek discovery of voluminous records relating to certain [district] employees . . . as well as multiple restitutions from [the district]." You also inform us, in the course of proceedings before the State Office of Administrative Hearings related to her employment with the district, the requestor, in a *pro se* capacity, has filed and served to district employees a Motion for Subpoenas Duces Tecum. You further state the submitted information is directly related to the anticipated litigation. After reviewing your arguments and the submitted documents, and based on the totality of the circumstances, we conclude, for purposes of section 552.103, you have established the district reasonably anticipated litigation when it received the request for information. Our review of the submitted documents also shows they are related to the anticipated litigation for purposes of

section 552.103(a). Therefore, the district may withhold the information at issue under section 552.103 of the Government Code.⁴

However, once information has been obtained by all parties to the anticipated litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to all parties to the anticipated 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 been concluded. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

In summary, the district may continue to rely on Open Records Letter No. 2012-12598 as a previous determination and withhold the submitted audio recordings in accordance with that ruling. The district may withhold the remaining information under section 552.103 of the Government Code; however, if the district regards the submitted job description at issue as open to the public, the district must release it pursuant to section 552.022(a)(15) 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,



Cristian Rosas-Grillet
Assistant Attorney General
Open Records Division

CRG/dls

⁴As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

Ref: ID# 538229

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Ms. Jena R. Abel
Assistant General Counsel
Texas Board of Nursing
333 Guadalupe Street, Suite 3-460
Austin, Texas 78701
(w/o enclosures)