



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 2, 2016

Mr. Ronny H. Wall
Associate General Counsel
Office of General Counsel
Texas Tech University System
P.O. Box 42021
Lubbock, Texas 79409-2021

OR2016-17315

Dear Mr. Wall:

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# 620838.

The Texas Tech University System (the "system") received a request for (1) any documents regarding the decisions to demote or terminate two named individuals, or to ask the individuals to step down, and (2) a specified letter, and any documents relating to the letter. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.111, 552.117, 552.136, 552.137, and 552.147 of the Government Code.¹ You also state release of this information may implicate the interests of two system employees (the "interested third parties"). Accordingly, you state, and provide documentation showing, you notified the interested third parties of the request for information. *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 a representative of the interested third parties. We have

¹Although you also raise section 552.101 of the Government Code in conjunction with constitutional privacy, you have not submitted arguments explaining how constitutional privacy applies to the submitted information. Therefore, we assume you have withdrawn this claim. *See* Gov't Code §§ 552.301, .302.

considered the submitted arguments and reviewed the submitted representative sample of information.²

Initially, we note the requestor has excluded from his request social security numbers, bank account information, driver's license numbers, insurance information, and information relating to employees' family members. Therefore, this information is not responsive to the present request. This ruling does not address the public availability of any information that is not responsive to the request and the system is not required to release such information in response to this request.³

Next, the interested third parties contend some of the responsive information is not subject to the Act. The Act is applicable only to "public information." *See id.* §§ 552.002, .021. Section 552.002(a) defines "public information" as the following:

[I]nformation that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

(1) by a governmental body:

(2) for a governmental body and the governmental body:

(A) owns the information;

(B) has a right of access to the information; or

(C) spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information; or

(3) by an individual officer or employee of a governmental body in the officer's or employee's official capacity and the information pertains to official business of the governmental body.

²We assume that 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 that those records contain substantially different types of information than that submitted to this office.

³As we are able to reach this conclusion, we do not address your arguments to withhold this information.

Id. § 552.002(a). Thus, virtually all the information in a governmental body's physical possession constitutes public information and is subject to the Act. *Id.*; see Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). The interested third parties contend the specified letter and any documents repeating its allegations are not public information because the letter "does not concern any matter of which the [system] has any authority, administrative duties, or advisory duties." However, we note the system possesses the letter at issue, and this letter was "sent to a number of administrators throughout [the system]" and pertains to the work environment in a particular office of the system. Thus, we find the information at issue was collected and is maintained by the system in connection with the transaction of official business. As a result, the information at issue is public information under section 552.002 that must be released unless it falls within an exception to public disclosure. See Gov't Code §§ 552.002, .021.

Additionally, we note some of the responsive information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

(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:

(1) a completed report, audit, evaluation, or investigation made of for, or by a governmental body, except as provided by Section 552.108[.]

Id. § 552.022(a)(1). Some of the responsive information is part of a completed investigation subject to section 552.022(a)(1). The system must release this information, which we have marked, unless it is excepted from disclosure under section 552.108 of the Government Code or is made confidential under the Act or other law. You seek to withhold this information under sections 552.103 and 552.111 of the Government Code. However, sections 552.103 and 552.111 are discretionary exceptions and do 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. 677 (2002) (governmental body may waive attorney work product privilege under section 552.111), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 470 at 7 (1987) (deliberative process privilege under statutory predecessor to section 552.111 subject to waiver). Therefore, the system may not withhold the information at issue under section 552.103 or section 552.111 of the Government Code. However, you also raise sections 552.101, 552.117, and 552.136 of the Government Code for this information. Further, the interested third parties raise section 552.101 for some of this information. Because sections 552.101, 552.117, and 552.136 can make information confidential under the Act, we will consider the arguments under these sections for the responsive information subject to section 552.022. We will also consider the arguments for the remaining responsive information.

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 information protected by other statutes, such as section 51.971 of the Education Code, which provides, in relevant part:

(a) In this section:

(1) “Compliance program” means a process to assess and ensure compliance by the officers and employees of an institution of higher education with applicable laws, rules, regulations, and policies, including matters of:

(A) ethics and standards of conduct;

(B) financial reporting;

(C) internal accounting controls; or

(D) auditing.

(2) “Institution of higher education” has the meaning assigned by Section 61.003.

...

(c) The following are confidential:

(1) information that directly or indirectly reveals the identity of an individual who made a report to the compliance program office of an institution of higher education, sought guidance from the office, or participated in an investigation conducted under the compliance program; and

(2) information that directly or indirectly reveals the identity of an individual as a person who is alleged to have or may have planned, initiated, or participated in activities that are the subject of a report made to the compliance program office of an institution of higher education if, after completing an investigation, the office determines the report to be unsubstantiated or without merit.

(d) Subsection (c) does not apply to information related to an individual who consents to disclosure of the information.

Educ. Code § 51.971(a), (c)-(d). You inform us Texas Tech University is an institution of higher education for purposes of section 61.003 of the Education Code. *See id.* § 51.971(a)(2). You inform us the responsive information you have marked relates to an investigation that was undertaken by a member of the president's staff and a member of human resources on behalf of the Office of Equal Employment Opportunity. You state the investigation was conducted in response to allegations of discrimination and retaliation against system employees. Further, you indicate the investigation was initiated in order to assess and ensure compliance with all applicable laws, rules, regulations, and policies. Based on your representations, we find this information relates to an investigation conducted under the system's compliance program. *See id.* § 51.971(a)(1).

You state the information at issue relates to a concluded compliance matter, and the claims to which the information pertains were determined to be unsubstantiated. You inform us only a small subset of individuals were involved in the investigation at issue, and release of the information would directly or indirectly reveal the identities of those individuals who participated in the investigation. We note the requestor's client was a party to the incidents at issue and has specific knowledge of the incidents. You inform us none of the individuals have consented to release of their information. Upon review, we agree release of the information at issue would directly or indirectly identify individuals as complainants or as participants in the compliance program investigation. *See id.* § 51.971(c)(1). However, we note the requestor's client is one of the individuals whose information is subject to section 51.971(c). Pursuant to section 51.971(d), we find the information pertaining solely to the requestor's client is not confidential with respect to the requestor and thus, may not be withheld from him under section 552.101 in conjunction with section 51.971(c). *Cf.* Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning himself). Accordingly, with the exception of the information pertaining solely to the requestor's client, which we have marked, the system must withhold the responsive information you have marked under section 552.101 of the Government Code in conjunction with section 51.971(c)(1) of the Education Code.⁴

Section 552.103 of the Government Code provides in relevant part as follows:

(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.

...

⁴As our ruling is dispositive, we do not address the other arguments to withhold this information.

(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 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 from disclosure under section 552.103(a).

You state, and provide documentation showing, two lawsuits, styled *Laverie v. Wetherbe*, Case No. 7-23-00348-CV and *Wetherbe v. Goebel, et al.*, Cause No. 2015-515, 617, were pending against the system in the 7th District Court of Appeals at Amarillo, Texas, and in the 72nd District Court of Lubbock County, Texas, respectively, when the system received the request for information. Therefore, we agree litigation was pending when the system received the request. We also find you have established the responsive information not subject to section 552.022 is related to the pending litigation for purposes of section 552.103(a), as it pertains to many of the same individuals and issues involved in the pending litigation. Therefore, the system may withhold the responsive information not subject to section 552.022 under section 552.103(a) of the Government Code.⁵

However, 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 the applicability of section 552.103(a) ends when the litigation has concluded. Attorney General Opinion MW-575 at 2 (1982); Open Records Decision Nos. 350 at 3 (1982), 349 at 2.

The interested third parties raise common-law privacy for some of the remaining responsive information. Section 552.101 of the Government Code also 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

⁵As our ruling is dispositive, we do not address your other arguments to withhold this information.

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. Upon review, we find none of the remaining responsive information is highly intimate or embarrassing and of no legitimate public interest. Therefore, the system may not withhold any of the remaining responsive information under section 552.101 of the Government Code on this basis.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of current or former employees or officials of a governmental body who request this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code § 552.117(a)(1). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may be withheld under section 552.117(a)(1) only on behalf of a current or former employee or official who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Section 552.117 is also applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). However, we note the requestor has a right of access to his client's information under section 552.023 of the Government Code. *See* Gov't Code § 552.023(b) (governmental body may not deny access to person to whom information relates or person's agent on grounds that information is considered confidential by privacy principles); ORD 481 at 4. Therefore, to the extent the individual whose information is at issue timely requested confidentiality under section 552.024 of the Government Code and the cellular telephone service was not paid for by a governmental body, the system must withhold the information we have marked under section 552.117(a)(1) of the Government Code. Conversely, to the extent the individual whose information is at issue did not timely request confidentiality under section 552.024 or the cellular telephone service was paid for by a governmental body, the system may not withhold the information we have marked under section 552.117(a)(1) of the Government Code.

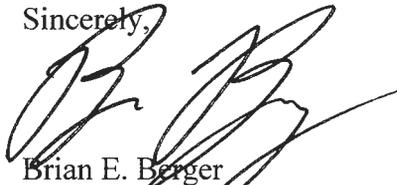
In summary, with the exception of the information pertaining solely to the requestor's client, which we have marked, the system must withhold the responsive information you have marked under section 552.101 of the Government Code in conjunction with section 51.971(c)(1) of the Education Code. The system may withhold the responsive information not subject to section 552.022 under section 552.103(a) of the Government Code. To the extent the individual whose information is at issue timely requested confidentiality under section 552.024 of the Government Code and the cellular telephone service was not paid for by a governmental body, the system must withhold the information

we have marked under section 552.117(a)(1) of the Government Code. The remaining responsive information must be released.⁶

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,



Brian E. Berger
Assistant Attorney General
Open Records Division

BB/akg

Ref: ID# 620838

Enc. Submitted documents

c: Requestor
(w/o enclosures)

1 Third Party
(w/o enclosures)

⁶Although some of the information being released is not confidential with respect to the requestor, we note it may be confidential with respect to the general public. Thus, if the system receives another request for this same information from a different requestor, then it must again seek a ruling from this office.