



August 7, 2002

Ms. Beverly West Irizarry
Gale, Wilson, & Sanchez, L.L.C.
115 East Travis, Suite 618
San Antonio, Texas 78205

OR2002-4357

Dear Ms. Irizarry:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 166899.

The Alamo Community College District (the "district"), which you represent, received a request for the personnel files of five named individuals. You claim that the requested information is excepted from disclosure under sections 552.101, 552.102, and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We note that the submitted records include information that is subject to section 552.022 of the Government Code, which enumerates categories of information that are not excepted from disclosure unless they are expressly confidential under other law. The documents that you submitted for our review include employee evaluations and information in a voucher relating to the expenditure of funds by a governmental body, both of which are included among the categories of information expressly made public by section 552.022. *See Gov't Code § 552.022(a)(1), (a)(2), (a)(3)*. You contend that this information is excepted under section 552.103 of the Government Code. However, section 552.103 is a discretionary exception to disclosure that protects the governmental body's interests and is therefore not other law that makes information expressly confidential for purposes of section 552.022(a). *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 522 at 4 (1989) (discretionary exceptions in general). As you also argue that sections 552.101 and 552.102 apply to this information, we will address those claims.

Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976) for information claimed to be protected under the doctrine of common law privacy as incorporated by section 552.101. We will therefore consider your claims regarding section 552.101 and section 552.102 together.

In *Industrial Foundation*, the Texas Supreme Court stated that information is excepted from disclosure if it (1) contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person and (2) is not of legitimate concern to the public. *Id.* at 685. The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683.

Having reviewed the documents that are subject to section 552.022, we conclude that none of the information in question is protected by common law privacy. See Open Records Decision Nos. 659 at 5 (1999) (listing types of information that attorney general has held to be protected by right to privacy), 622 at 1-2 (1994) (stating that social security numbers are not private under section 552.101 or section 552.102), 470 (1987) (finding that public employee's job performance does not generally constitute his private affairs), 455 (1987) (ruling that public employee's job performances or abilities generally not protected by privacy), 423 at 2 (1984) (explaining that because of greater legitimate public interest in disclosure of information regarding public employees, employee privacy under section 552.102 is confined to information that reveals "intimate details of a highly personal nature"). Thus, none of the information in the documents that are subject to section 552.022 must be withheld from disclosure under section 552.101 or 552.102.

We note, however, that section 552.117 may be applicable to some of the information contained in the documents that are subject to section 552.022. Section 552.117 excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. See Open Records Decision No. 530 at 5 (1989). Therefore, the district may only withhold information under section 552.117 on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. For those employees who timely elected to keep their personal information confidential, the district must withhold the employees' home addresses and telephone numbers, social security numbers, and any

information that reveals whether these employees have family members. The district may not withhold this information under section 552.117 for those employees who did not make a timely election to keep the information confidential. We have marked the information the district must withhold if section 552.117 applies.

We turn now to the documents that are not subject to section 552.022. You contend that these documents are excepted from disclosure 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 on the date that the requestor applies to the officer for public information for access to or duplication of the information.

The district 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 district received the request for information and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *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 district must meet both prongs of this test for information to be excepted under section 552.103(a).

In this case, you indicate that litigation was pending between the district and the requestor's client on the date the district received this request. In support, you have provided us with a copy of a petition filed in Bexar County district court almost three months before the district received the present request. We therefore find that you have met the first prong of the section 552.103 test. Furthermore, after reviewing your arguments and the remaining information, we agree that this information is related to the pending litigation for purposes of section 552.103(a).

We note that, absent special circumstances, once 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 and it must be disclosed. Open Records Decision

Nos. 349 (1982), 320 (1982). Thus, to the extent that the requestor's client has seen or had access to the submitted records, the district may not now withhold them from disclosure under section 552.103(a). If, however, the requestor's client has not had access to these records, we conclude that the district may withhold these records during the pendency of the litigation under section 552.103(a). See Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982) (stating that applicability of Gov't Code § 552.103(a) ends once litigation has been concluded).

In summary, the district may withhold the submitted information under section 552.103, with the exception of the documents that we have indicated must be released pursuant to section 552.022. Prior to releasing the marked documents, the district must redact the information we have indicated is subject to section 552.117 for employees who made a timely election to keep such information confidential.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

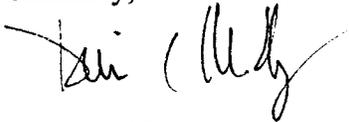
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental

body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Denis C. McElroy
Assistant Attorney General
Open Records Division

DCM/seg

Ref: ID# 166899

Enc. Submitted documents

c: Mr. Thad Harkins
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(w/o enclosures)