



September 19, 2002

Ms. Katherine A. Antwi  
General Counsel  
Texas Commission on Human Rights  
P.O. Box 13006  
Austin, Texas 78711-3006

OR2002-5297

Dear Ms. Antwi:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 168896.

The Texas Commission on Human Rights (the “commission”) received a request for 1) “all equal employment complaints including internal complaints lodged against staff members of the [commission] since January 1, 2001 including agency responses, the details of resolutions including settlements, and supporting materials”; 2) “any internal complaints regarding sexual harassment including complaints against current or former members of the commission board since September 2000 and subsequent letters, e-mails or related materials”; and 3) “the public portions of the personnel files of all employees who have left the [commission] since January 1, 2001.” We note that your request for a decision does not address the portions of the request seeking items 2 and 3 above, nor have you raised any exceptions to disclosure of such information. We assume that the commission has released this information to the extent that any such additional information not encompassed by item 1 exists. If you have not, you must do so at this time. *See Gov’t Code §§ 552.021, .301, .302; Open Records Decision No. 664 (2000) (concluding that section 552.221(a) requires that information not excepted from disclosure must be released as soon as possible under circumstances).* You claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.103, and 552.111 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted representative sample of information.<sup>1</sup>

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<sup>1</sup>We assume that the “sample” of records submitted to this office is truly representative of those 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.

As an initial matter, we note that the submitted documents include information that was generated after the commission received the request for information. Chapter 552 of the Government Code does not require a governmental body to make available information that did not exist at the time the request was received. *See Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.--San Antonio 1978, writ dismissed); Open Records Decision No. 452 (1986); Open Records Decision No. 362 (1983) (document not within purview of chapter 552 if not in existence at time of request). Nor does the Public Information Act (the "Act") require a governmental body to inform a requestor if the requested information comes into existence after the request is made. Open Records Decision No. 452 at 8. The commission received the present request on July 3, 2002; thus, information that was not in existence on that day is not responsive to the request. Because a portion of the submitted information did not exist at the time the commission received the request, we conclude that the commission need not release this information to the requestor and we do not address it in this ruling.

We first note that the submitted information contains medical records, access to which is governed by the Medical Practice Act, (the "MPA"), chapter 159 of the Occupations Code. Open Records Decision No. 565 at 7 (1990). Section 552.101 of the Government Code protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception encompasses information that another statute makes confidential. Section 159.002 of the MPA provides in pertinent part:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

The MPA also includes provisions that govern the disclosure of information that it encompasses. *See* Occ. Code §§ 159.003, .004, .005, .006. This office has determined that in governing access to a specific subset of information, the MPA prevails over the more general provisions of chapter 552 of the Government Code. *See* Open Records Decision No. 598 (1991). Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See* Occ. Code § 159.002(a), (b), (c); Open Records Decision Nos. 598 (1991), 546 (1990) (because hospital treatment is routinely conducted under supervision of physicians, documents relating to diagnosis and treatment during hospital stay would constitute protected MPA records). The MPA requires that any subsequent release of medical records be consistent with the purposes for which a governmental body obtained the records. Open Records Decision No. 598 (1991). Absent

the applicability of an MPA access provision, you must withhold from disclosure the medical records that we have marked pursuant to section 552.101 of the Government Code in conjunction with the MPA.

We now address your claim under section 552.103 for the remaining information. Section 552.103 provides 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.

....

(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 raises section 552.103 has the burden of providing relevant facts and documents sufficient to establish the applicability of the exception to the information that it seeks to withhold. To show that the litigation exception is applicable, the commission must demonstrate that (1) litigation was pending or reasonably anticipated on the date the commission received the request and (2) the information at issue is related to that litigation. *See* Gov't Code § 552.103(a), (c); *see also* *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).

You indicate that the requested information relates to charges that have been filed with the EEOC alleging discrimination by the commission, and you have submitted the relevant notice forms. *See* Open Records Decision No. 336 (1982) (litigation was reasonably anticipated where the opposing party filed a complaint with the EEOC). Based on your representations and our review of the information at issue, we conclude that the information at issue relates to litigation that was anticipated on the date the request was received. Therefore, the commission may withhold this information under section 552.103, with the following exceptions.

We note that the submitted information includes completed reports and evaluations, which we have marked, that generally must be released pursuant to section 552.022(a)(1) of the Government Code. Section 552.022 makes "a completed report, audit, evaluation, or

investigation made of, for, or by a governmental body” public information unless expressly made confidential under other law or “except as provided by [s]ection 552.108[.]” Gov’t Code § 552.022(a)(1). Sections 552.103 and 552.111 are discretionary exceptions under the Act and are, therefore, not “other law” that makes the completed reports and evaluations confidential.<sup>2</sup> Therefore, you may not withhold the completed reports and evaluations from disclosure under section 552.103 or section 552.111 of the Government Code.

Furthermore, the potential opposing parties have had access to much of the submitted information. 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. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in anticipated litigation is not excepted from disclosure under section 552.103(a) and may not be withheld on that basis.<sup>3</sup>

In relation to all of the information not excepted under section 552.103, we first address your claim under section 552.101 in conjunction with federal law. The Equal Employment Opportunity Commission (the “EEOC”) is constrained by 42 U.S.C. 2000e (e), which reads

It shall be unlawful for any officer or employee of the Commission to make public in any manner whatever any information obtained by the Commission pursuant to its authority under this section prior to the institution of any proceeding under this subchapter involving such information. Any officer or employee of the Commission who shall make public in any manner whatever any information in violation of this subsection shall be guilty, of a misdemeanor and upon conviction thereof, shall be fined not more than \$1,000, or imprisoned not more than one year.

This statute, and related federal regulations, applies to information held by the EEOC, that was obtained during an EEOC investigation of employment discrimination. Open Records Decision No. 245 (1980). We note that the information at issue is held by the commission as the employer against whom complaints were made. This office has held that the federal statute only restricts disclosure by those enforcing the Equal Employment Opportunity Act, and that no federal statute or regulation prevents an employer’s disclosure of information

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<sup>2</sup> Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.*, Open Records Decision Nos. 665 at 2 n.5 (2000) (governmental body may waive litigation exception, section 552.103), 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 473 (1987) (governmental body may waive section 552.111). Discretionary exceptions therefore do not constitute “other law” that makes information confidential.

<sup>3</sup> We note that the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

relating to a claim of employment discrimination. Open Records Decision No. 155 (1977) (citing Open Records Decision Nos. 132 (1976), 59 (1974)). Because the information at issue is held by the commission as the employer, it is not excepted under section 552.101 in conjunction with the federal statute, which only restricts disclosure by the EEOC, its officers, and employees. ORD 155. Therefore, as to information not excepted under section 552.103, the commission may not withhold the information under section 552.101 in conjunction with this federal provision.

With regard to documents obtained from or provided to potential opposing parties, we address your argument that some information may be withheld under section 552.111. Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin, 2001, no pet.). An agency's policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. ORD 615 at 5-6. Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 160; ORD 615 at 4-5. We also note that a governmental body waives its interest in section 552.111 when information it holds has been disclosed to a member of the public. See Open Records Decision Nos. 400 (1983), 435 (1986).

Upon review of your arguments and this particular information, we find that you have not demonstrated that any of it constitutes internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the commission. Therefore, you may not withhold any of the information seen or obtained by the potential opposing parties under section 552.111.

However, the documents obtained from or provided to the potential opposing parties contain some confidential information that must be withheld. Section 552.101 also encompasses the common-law right to privacy and excepts from disclosure private facts about an individual. See *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), cert. denied, 430 U.S. 931 (1977). Information must be withheld from the public under common-law privacy when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. See *id.* at 685; see also Open Records Decision No. 611 at 1 (1992). The types 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. This office has also found that the following types of information are excepted from required public disclosure under common-law privacy: some kinds of medical information or information indicating disabilities or specific illnesses; *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps), and personal financial information pertaining to voluntary financial decisions and financial transactions that do not involve public funds, *see* Open Records Decision Nos. 600 (1992), 545 (1990). We have marked the information contained within the documents at issue that must be withheld under section 552.101 and the common-law right to privacy.

We further note that one of the evaluations made public pursuant to section 552.022(a)(1) contains a social security number. Section 552.117(1) 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). The documents you submitted reflect that the current or former employee whose social security number is at issue elected under section 552.024, prior to the request, to keep this information confidential. Therefore, you must withhold it under section 552.117(1) of the Government Code.

Furthermore, we have marked personal information contained in the documents obtained from or provided to potential opposing parties that must be withheld under section 552.117(1) to the extent the employees elected, prior to the commission's receipt of the request, to keep this information confidential pursuant to section 552.024. Such information may not be withheld under this provision for current or former employees who did not make a timely election under section 552.024.

For social security numbers not so excepted under section 552.117(1), social security numbers contained in these documents may nevertheless be confidential under federal law. Social security numbers may be withheld in some circumstances under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that any social security numbers contained in the information at issue are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 of the Act on the basis of that federal provision. We caution, however, that section 552.352 of the Act imposes criminal penalties for the release of confidential

information. Prior to releasing any social security numbers, you should ensure that they were not obtained or are not maintained by the commission pursuant to any provision of law enacted on or after October 1, 1990.

We also note that the submitted information includes Employment Eligibility Verification, Forms I-9. Form I-9 is governed by title 8, section 1324a of the United States Code, which provides that the form "may not be used for purposes other than for enforcement of this chapter" and for enforcement of other federal statutes governing crime and criminal investigations. *See* 8 U.S.C. § 1324a(b)(5); *see also* 8 C.F.R. § 274a.2(b)(4). Release of these documents in this instance would be "for purposes other than for enforcement" of the referenced federal statutes. Accordingly, we conclude that the Forms I-9 are confidential under section 552.101 and may only be released in compliance with the federal laws and regulations governing the employment verification system.

Additionally, W-4 forms are confidential under section 6103 of title 26 of the United States Code. Section 6103(a) makes federal tax return information confidential. The term "return information" includes "the nature, source, or amount of income" of a taxpayer. *See* 26 U.S.C. § 6103(b)(2). Federal courts have construed the term "return information" expansively to include any information gathered by the Internal Revenue Service regarding a taxpayer's liability under title 26 of the United States Code. *See Mallas v. Kolak*, 721 F.Supp. 748, 754 (M.D.N.C. 1989), *dismissed in part, aff'd in part, vacated in part, and remanded*, 993 F.2d 1111 (4<sup>th</sup> Cir. 1993). The commission must withhold the submitted W-4 forms under section 552.101 in conjunction with federal law.

Furthermore, section 552.130 excepts from public disclosure information relating to a driver's license or motor vehicle title or registration issued by an agency of this state. Gov't Code § 552.130. Therefore, the commission must withhold the driver's license information that we have marked within the documents at issue under section 552.130.

These documents also contain e-mail addresses that are excepted from disclosure under section 552.137 of the Government Code. Section 552.137 provides that "[a]n e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act]." *See* Gov't Code § 552.137(a). As there is no indication that any of the individuals to whom the personal e-mail addresses belong have consented to their release, the commission must withhold the e-mail addresses that we have marked under section 552.137 of the Government Code. *See* Gov't Code § 552.137(b) (confidential information described by this section that relates to member of the public may be disclosed if member of public affirmatively consents to its release).

In summary, we have marked medical records that may only be released in accordance with the MPA. The remaining information at issue may be withheld under section 552.103, with the following exceptions. You must release the marked reports and evaluations pursuant to

section 552.022(a)(1), and the information obtained from or provided to the potential opposing parties in anticipated litigation. However, within these documents not excepted under section 552.103, you must withhold the marked social security number contained in an evaluation under section 552.117, and the personal information we have marked under section 552.117 for current or former employees who made timely elections under section 552.024. Regardless of the applicability of section 552.117, you must withhold social security numbers under section 552.101 to the extent they are confidential under the federal Social Security Act. You must withhold the information we have marked under section 552.101 and common-law privacy. The marked I-9 forms and attachments may only be released in compliance with the federal laws and regulations governing the employment verification system. You must withhold the marked W-4 forms under section 552.101, the driver's license information we have marked under section 552.130, and the e-mail addresses we have marked under section 552.137.

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,



Kristin Bates  
Assistant Attorney General  
Open Records Division

KAB/sdk

Ref: ID# 168896

Enc. Submitted documents

c: Mr. W. Gardner Selby  
Austin Bureau  
San Antonio Express-News  
1005 Congress, Suite 430  
Austin, Texas 78701  
(w/o enclosures)