



OFFICE *of the* ATTORNEY GENERAL  
GREG ABBOTT

December 2, 2002

Ms. Julie Reagan Watson  
Assistant General Counsel  
Texas Department of Human Services  
P.O. Box 149030  
Austin, Texas 78714-9030

OR2002-6848

Dear Ms. Watson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID#172954.

The Texas Department of Human Services (the "department") received a request for specific portions of a department employee's personnel file. You claim that the requested information is excepted from disclosure under section 552.103 of the Government Code. You also contend that various portions of the requested information are protected under section 552.117 of the Government Code and section 552.101 of the Government Code in conjunction with sections 12.003 and 21.012 of the Human Resources Code, section 252.126 of the Health and Safety Code, and section 90.216 of Title 40 of the Texas Administrative Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that the majority of the submitted materials includes information subject to section 552.022 of the Government Code. This section provides several categories of information that are not excepted from required disclosure unless they "are expressly confidential under other law." In pertinent part this section reads

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under 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[.]

The submitted materials include completed evaluations and investigations and are expressly public under section 552.022(a)(1) unless they are confidential under other law or excepted from disclosure under section 552.108.<sup>1</sup> Although you claim that the submitted information is excepted under section 552.103, this section is a discretionary exception to disclosure and is therefore not other law that makes information expressly confidential for purposes of section 552.022(a). Open Records Decision 473 (1987) (section 552.103 is a discretionary exception that may be waived). However, sections 552.101 and 552.117 are other laws that make information expressly confidential for purposes of section 552.022(a) and we will address those arguments in turn.

Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This section encompasses information protected by other statutes. You claim that section 12.003 of the Human Resources Code make confidential one page of the submitted information. Section 12.003 of the Human Resources Code provides:

(a) Except for purposes directly connected with the administration of the department’s assistance programs, it is an offense for a person to solicit, disclose, receive, or make use of, or to authorize, knowingly permit, participate in, or acquiesce in the use of the names of, *or any information concerning*, persons applying for or receiving assistance if the information is directly or indirectly derived from the records, papers, files, or communications of the department or acquired by employees of the department in the performance of their official duties. [Emphasis added.]

In Open Records Decision No. 584 (1991), this office concluded that “[t]he inclusion of the words ‘or any information’ juxtaposed with the prohibition on disclosure of the names of the department’s clients clearly expresses a legislative intent to encompass the broadest range of individual client information, and not merely the clients’ names and addresses.” Consequently, it is the specific information pertaining to individual clients, and not merely the clients’ identities, that is made confidential under section 12.003. *See* Hum. Res. Code § 21.012 (department shall provide safeguards restricting use or disclosure of information concerning applicants for or recipients of department’s assistance programs to purposes directly connected with administration of programs); Open Records Decision No. 166 (1977). It appears that release here is not for purposes directly connected with the administration of the department’s assistance programs. Consequently, we agree that you must withhold the submitted information we have marked from disclosure under section 552.101 of the Government Code in conjunction with section 12.003 of the Human Resource Code.

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<sup>1</sup>Because you do not raise section 552.108, we do not consider the applicability of this exception.

You also argue that section 252.126 of the Health and Safety Code makes portions of the submitted information confidential. Chapter 252 of the Health and Safety Code pertains to intermediate care facilities for the mentally retarded. Section 252.126 provides

[a] report, record, or working paper used or developed in an investigation made under this subchapter is confidential and may be disclosed only for purposes consistent with the rules adopted by the board or the designated agency.

Upon review of the submitted information, we note that much of the information you claim as confidential under section 252.126 was made in a personnel investigation rather than developed in an investigation made under the applicable subchapter of the Health and Safety Code. This information may not be withheld under section 252.126. We have marked the documents that must be withheld under section 252.126.

You also argue that the submitted evaluations contain information excepted from disclosure under section 552.117 of the Government Code. Section 552.117 excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former official or employee of a governmental body who requests 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 department may only withhold information under section 552.117 on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date on which the department received the present request for information. If the employee timely elected to keep her personal information confidential, the department must withhold the personal information. The department may not withhold this information under section 552.117 if the employee did not make a timely election to keep such information confidential. We have marked the information that is excepted from disclosure under section 552.117 if the employee made timely elections under section 552.024.

Note however that social security numbers may be withheld in some circumstances under section 552.101 of the Government Code. A social security number or "related record" may be excepted from disclosure 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 of the social security numbers in the file are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 of the Open Records Act on the basis of that federal provision. We caution, however, that section 552.353 of the Open Records Act imposes criminal penalties for the release of confidential information. Prior to releasing any social

security number information, you should ensure that no such information was obtained or is maintained by the department pursuant to any provision of law, enacted on or after October 1, 1990.

With regard to the remaining submitted documents to which section 552.022 of the Government Code is inapplicable, we address your argument for exception under section 552.103. 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.

The department 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, 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 department must meet both prongs of this test for information to be excepted under 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986). The department informs this office that, prior to its receipt of the request for information, the department referred various cases involving one of the requestor's clients to the Public Health and Elder Law Division of the Office of the Attorney General for the imposition of civil penalties. Thus, we conclude that the department has shown that it reasonably anticipated litigation on the date that the requestor asked for public information. You also state that the submitted information is related to the anticipated litigation because the department employee whose information is sought was the surveyor in the underlying investigations of the cases referred to the Office of the Attorney General for imposition of

civil penalties. After reviewing the submitted information, we further conclude that the information relates to the anticipated litigation. Thus, the department may withhold the remaining requested information we have marked under section 552.103.

We note that if the opposing party in the litigation has seen or had access to any of the information in these records, there is no section 552.103(a) interest in withholding that information from the requestor. Open Records Decision Nos. 349 (1982), 320 (1982). In addition, the applicability of section 552.103(a) ends once the litigation concludes. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982). However, if the records contain information that is confidential by law, you must not release such information even at the conclusion of the litigation. Gov't Code §§ 552.101, .352.<sup>2</sup>

In summary, we have marked the information that must be withheld pursuant to section 552.101 of the Government Code in conjunction with section 12.003 of the Human Resources Code and section 252.126 of the Health and Safety Code. We have also marked the information that must be withheld under sections 552.103 and 552.117 of the Government Code. The department must release the rest of the information.

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

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<sup>2</sup>As we resolve this matter under section 552.103, we need not address the other exceptions you have raised. We caution, however, that some of the information may be confidential by law or may implicate the proprietary interest of a third party. Therefore, if the department receives a request in the future, at a time when litigation is no longer reasonably anticipated or pending, the department should seek a ruling from this office on the other exceptions raised before releasing any of the requested information. See Gov't Code § 552.352 (distribution of confidential information may constitute criminal offense).

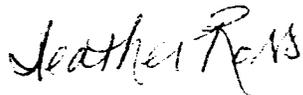
records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these 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,



Heather Pendleton Ross  
Assistant Attorney General  
Open Records Division

HPR/seg

Ref: ID# 172954

Enc: Submitted documents

c: Mr. Michael Dimmitt  
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(w/o enclosures)