



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 16, 2004

Ms. Susan Oliva
Executive Director
Advocacy Center for the Children of El Paso
1100 East Cliff Drive, Building D
El Paso, Texas 79902

OR2004-5858A

Dear Ms. Oliva:

This office issued Open Records Letter No. 2004-5858 (2004) on July 15, 2004. We have examined this ruling and determined that we made an error. Where this office determines that an error was made in the decision process under sections 552.301 and 552.306, and that error resulted in an incorrect decision, we will correct the previously issued ruling. Consequently, this decision serves as the correct ruling and is a substitute for the decision issued on July 15, 2004. *See generally* Gov't Code 552.011 (providing that Office of Attorney General may issue decision to maintain uniformity in application, operation, and interpretation of the Public Information Act (the "Act")).

You ask whether certain information is subject to required public disclosure under the Act, chapter 552 of the Government Code. Your request was assigned ID# 205067.

The Advocacy Center for the Children of El Paso (the "Advocacy Center") received a request for information pertaining to the "Texas CASA Statistical Report" since January 1, 2002, as well as seven categories of information related to the following: volunteers, board members, staff, and advisory board members of Advocacy Center; children served by Advocacy Center; certain communications; minutes of all meetings; and newsletters. You state that the Advocacy Center does not have information responsive to some of the categories of requested information.¹ You also claim that some of the requested information is not subject to the Act or, in the alternative, that this information and the remaining requested

¹We note that the Act does not require the Advocacy Center to disclose information that did not exist at the time the request was received. *Econ. Opportunities Dev. Corp. v. Bustanante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978 writ dismissed); Open Records Decision No. 452 at 3 (1986). Further, although the Act does not require a governmental body to answer factual questions, Open Records Decision No. 555 (1990), a governmental body must make a good faith effort to relate a request to information which it holds. Open Records Decision No. 561 (1990).

information, or portions thereof, is excepted from disclosure under sections 552.101, 552.102, 552.103, and 552.130 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted information.

You assert that the information in Enclosures 6A and 6B is not subject to the Act. Enclosure 6A consists of volunteer information forms and copies of volunteers' Texas driver's licenses and social security cards. Enclosure 6B consists of a list of the names of the Advocacy Center's board of directors. You assert that this information pertains to unpaid volunteers and board members who have only a tangential relationship to the receipt of expenditure of public funds and therefore does not fall within the scope of "public information" subject to the Act.

We disagree. Section 552.002(a) of the Act defines "public information" as information "collected, assembled, or maintained under a law or ordinance or in connection with transaction of official business: (1) by a governmental body; or (2) for a governmental body and the governmental body owns the information or has a right of access to it." Gov't Code § 552.002(a). Thus, information requested of a governmental body is subject to the Act if the information is collected, assembled, or maintained for a governmental body and the governmental body owns the information or has a right of access to the information. The Advocacy Center is a governmental body. As we find that the information in Enclosures 6A and 6B is maintained in connection with the transaction of official business of the Advocacy Center, we conclude that the information in Enclosures 6A and 6B is public information under the Act and subject to release, unless it is otherwise excepted from disclosure pursuant to one or more of the exceptions outlined in subchapter C of the Act.

We next address your arguments against disclosure of the submitted information. First, regarding the information contained in Enclosures 5, 6B and 6C, we note that section 552.022 of the Government Code makes certain information expressly public, and therefore not subject to discretionary exceptions to disclosure. Section 552.022 states in relevant part:

(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 are not excepted from required disclosure under this chapter unless they are expressly confidential under other law.

²You also seek to withhold some of the submitted information under sections 552.002 and 552.024 of the Government Code. We note, however, that these sections are not exceptions to public disclosure under chapter 552 of the Government Code. Rather, section 552.002 defines a "Public Record," and section 552.024 permits a current or former official or employee of a governmental body to choose whether to allow public access to certain information relating to the current or former official or employee that is held by the employing governmental body. See Gov't Code §§ 552,002, .024.

Gov't Code § 552.022(a). One such category of expressly public information consists of a completed report, audit, evaluation, or investigation made of, for, or by a governmental body unless it is confidential under other law. Gov't Code § 552.022(a)(1). Another such category consists of the name, sex, ethnicity, salary, title, and dates of employment of each employee and officer of a governmental body. Gov't Code § 552.022(a)(2). Enclosure 5 consists of statistical reports made of, for, or by the Advocacy Center. Enclosure 6B lists the names of board members of the Advocacy Center. Enclosure 6C includes the name, salary, title, and dates of employment for employees of the Advocacy Center. As prescribed by section 552.022, this information must be released to the requestor unless it is confidential under other law. Section 552.103, which serves to protect a governmental body's position in litigation, is a discretionary exception and does not provide a compelling reason to overcome the presumption of openness. *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 section 552.103), 522 at 4 (1989) (discretionary exceptions in general). Therefore, you may not withhold Enclosures 5, 6B and the information subject to section 552.022(a)(2) in 6C under section 552.103. However, because you also assert section 552.101 of the Government Code for information contained in Enclosures 6B and 6C, which constitutes other law for purposes of section 552.022, we will address your claim under this exception for the information in Enclosures 6B and 6C.

Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information made confidential by constitutional law or judicial decision. You assert that information that identifies board members, may be withheld under section 552.101 in conjunction with the holding of the Texas Supreme Court in *In re Bay Area Citizens Against Lawsuit Abuse*, 982 S.W.2d 371 (Tex. 1998). In that decision, the Texas Supreme Court determined that the First Amendment right to freedom of association could protect an advocacy organization's list of contributors from compelled disclosure through a discovery request in pending litigation. In reaching this conclusion, the court stated:

Freedom of association for the purpose of advancing ideas and airing grievances is a fundamental liberty guaranteed by the First Amendment. *NAACP v. Alabama*, 357 U.S. 449, 460, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958). Compelled disclosure of the identities of an organization's members or contributors may have a chilling effect on the organization's contributors as well as on the organization's own activity. *See Buckley v. Valeo*, 424 U.S. 1, 66-68, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976). For this reason, the First Amendment requires that a compelling state interest be shown before a court may order disclosure of membership in an organization engaged in the advocacy of particular beliefs. *Tilton*, 869 S.W.2d at 956 (citing *NAACP*, 357 U.S. at 462-63, 78 S.Ct. 1163). "[I]t is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious

or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.” *Id.*

Bay Area Citizens, 982 S.W.2d at 375-76 (footnote omitted). The court held that the party resisting disclosure bears the initial burden of making a *prima facie* showing that disclosure will burden First Amendment rights but noted that “the burden must be light.” *Id.* at 376. Quoting the United State Supreme Court’s decision in *Buckley v. Valeo*, 424 U.S. 1, 74 (1976), the Texas court determined that the party resisting disclosure must show “a reasonable probability that the compelled disclosure of a party’s contributors’ names will subject them to threats, harassment, or reprisals from either Government officials or private parties.” *Id.* Such proof may include “specific evidence of past or present harassment of members due to their associational ties, or of harassment directed against the organization itself.” *Id.*

You argue that the Advocacy Center has, in this instance, made the requisite *prima facie* showing to this office that disclosure of the identities of the Advocacy Center’s board members will burden First Amendment rights of freedom of association. Considering the representations made to this office, the supporting information submitted, and the totality of the circumstances, we agree that you have made a *prima facie* showing that disclosure of the identities of contributors to the Advocacy Center in this instance will burden First Amendment rights of freedom of association. We believe the term “contributor” encompasses both the identities of those individuals and corporations who make financial donations to the Advocacy Center, and volunteers who donate their time and services to the Advocacy Center. *Id.* However, we note that the term “contributor” does not encompass members of the Advocacy Center’s governing board. *See generally* Gov’t Code § 522.022(a)(2). Consequently, the Advocacy Center may not withhold the identifying information of its board members on this basis.

Next, we address your claim that sections 552.101 and 552.102 of the Government Code are applicable to those portions of information that you have highlighted in Enclosure 6C that are subject to section 552.022(a)(2). 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. Accordingly, we will consider your section 552.101 and section 552.102 claims together.

Common law privacy protects information if (1) the information contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found.*, 540

S.W.2d at 685. Prior decisions of this office have found that financial information relating only to an individual ordinarily satisfies the first requirement of the test for common law privacy but that there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. *See* Open Records Decision Nos. 600 (1992), 545 (1990), 373 (1983). However, this office has found that the age, salary, title, date of employment, and reasons for a public employee's demotion, dismissal, or resignation are not excepted under common law privacy. *See* Open Records Decision Nos. 455 (1987), 444 (1986), 373 (1983), 329 (1982), 278 (1981). Upon review of the information you have highlighted in Enclosure 6C that is subject to section 552.022(a)(2), we find that none of this information is protected by privacy and, therefore, it must be released to the requestor.

Next, we will address your claim under section 552.103 of the Government Code for the remaining submitted information that is not subject to section 552.022. 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 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 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, 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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You assert that the requestor in this instance is a party to pending litigation involving the Texas Department of Protective and Regulatory Services, Fort Bend County Child Advocates, Inc. ("Fort Bend"), and others. *See Gary Gates et. al. v. TDPRS et. al.*,

No. H-02-0495; *Derodrick Gates and Marcus Gates, Minors v. Fort Bend Child Advocates, Inc. et. al.*, No. 01-CV-119502. The Advocacy Center has not established that it is or will be a party to this litigation. However, you indicate that the Advocacy Center and Fort Bend share common interests that are impacted by the pending litigation. You have provided us a copy of a letter and pleadings from Fort Bend explaining the interests that Fort Bend and the Advocacy Center share in the pending litigation and asking the Advocacy Center to assert section 552.103 for the information at issue in order to protect Fort Bend's position in the litigation. Upon review of the submitted information and consideration of your arguments, we find that the remaining submitted information relates to litigation that was pending on the date the Advocacy Center received the request for information, and in which the Advocacy Center shares a privity of interest with Fort Bend. Therefore, we conclude that the Advocacy Center may withhold the remaining submitted information under section 552.103. *Cf.*, Open Records Decision No. 586 (1991) (need of another governmental body may be compelling reason for non-disclosure of requested information).

Generally, however, 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. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, 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).

In summary, with the exception of Enclosures 5, 6B and the information subject to section 552.022((a)(2) contained in Enclosure 6C, which must be released to the requestor, the Advocacy Center may withhold all remaining submitted information under section 552.103.

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 Dep't of Pub. 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,



Cary Grace

Assistant Attorney General
Open Records Division

ECG/seg

Ref: ID# 205067

c: Mr. Gary W. Gates, Jr.
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