



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 16, 2004

Mr. Bryan P. Neal
Thompson & Knight, L.L.P.
1700 Pacific Avenue, Suite 3300
Dallas, Texas 75201

OR2004-5920

Dear Mr. Neal:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"). Your request was assigned ID# 205375.

The Dallas Children's Advocacy Center (the "center"), which you represent, received a request for certain statistical reports, names of and information relating to volunteers, board members and staff, socio-economic information, information about abuse alleged outside of court proceedings, communications with judges, meeting minutes, newsletters, and a copy of all multi-disciplinary team members by name and job title. You assert that some of the requested information does not exist.¹ You also assert that you have released some of the requested information, but claim that some of the remaining information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.107, 552.111, 552.117 and 552.138 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

¹The Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Econ. Opps. Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex.App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

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. In addition, as you did not submit to this office written comments stating the reasons why section 552.102 and 552.138 would allow the information to be withheld, we assume that you no longer assert these exceptions.

Initially, 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.

Two categories of expressly public information under section 552.022 are “a completed report... made of, for, or by a governmental body,” and “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)(1), (2). The submitted information includes completed quarterly statistical reports and the name, sex, ethnicity and titles of employees and officers of the 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, the center may not withhold this information under section 552.103.

We next consider whether the information that is subject to section 552.022 is excepted from disclosure under section 552.101 of the Government Code, which constitutes “other law” for the purposes of section 552.022. Section 552.101 excepts “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This section encompasses information protected by other statutes such as section 264.408 of the Family Code which provides:

(a) The files, reports, records, communications, and working papers used or developed in providing services under this chapter are confidential and not subject to public release under Chapter 552, Government Code, and may only be disclosed for purposes consistent with this chapter. Disclosure may be to:

(1) the department, department employees, law enforcement agencies, prosecuting attorneys, medical professionals, and other state agencies that provide services to children and families; and

(2) the attorney for the child who is the subject of the records and a court-appointed volunteer advocate appointed for the child under Section 107.031.

Fam. Code § 264.408(a). Thus, section 264.408 provides that certain information used or developed in providing services under chapter 264 of the Family Code, which concerns

child welfare services, is confidential. Section 264.408 also explicitly provides for circumstances in which such confidential information may be disclosed. *See* Fam. Code § 264.408(a)(1), (2). We understand that the center is established pursuant to chapter 264 of the Family Code. However, we are unable to conclude the information subject to section 552.022 constitutes information used or developed in providing services under chapter 264 of the Family Code. Accordingly, the center may not withhold any of this information under section 552.101 in conjunction with section 264.408 of the Family Code.

Section 552.101 also encompasses information made confidential by constitutional law or judicial decision. You assert that certain information that is subject to section 552.022, specifically the identities of the center's 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 of the U.S. Constitution's protection of freedom of association could protect an advocacy organization's list of contributors from compelled disclosure through a discovery request in pending litigation. The Court stated the following:

Freedom of Association for the purpose of advancing ideas and airing grievances is a fundamental liberty guaranteed by the First Amendment. 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. 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. It is immaterial whether the beliefs sought to be advanced by the association pertain to political, economic, religious or cultural matters, and state action which may have the affect of curtailing the freedom to associate is subject to the closest scrutiny.

Id. at 375. 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 "the burden must be light." *Id.* at 376. Quoting the U.S. Supreme Court in *Buckley v. Valeo*, 424 U.S. 1, 74 (1976), the 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, harassments, or appraisal from either government officials or private parties." *Id.* Such proof may include "specific evidence of past or present harassment of members due to their organizational ties, or of harassment directed at the organization itself." *Id.*

You argue that the center has, in this instance, made the requisite *prima facie* showing to this office. 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 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 center, and volunteers who donate their time and services to the center. *Id.* However, we note that the term “contributor” does not encompass members of the center’s governing board. *See generally* Gov’t Code § 522.022(a)(2). Consequently, the center may not withhold the identifying information of its board members on this basis.³

We turn now to the remaining information that is not subject to section 522.022. You claim that the remaining submitted information is excepted from disclosure in its entirety under section 552.103, which provides:

(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 center 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 center must meet both prongs of this test for information to be excepted under 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 center has not established that it is or will be a party to this litigation. However, you explain that the 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

³ We note that the other exceptions raised by the center were not raised for the information subject to section 552.022.

from Fort Bend explaining the interests that Fort Bend and the center share in the pending litigation and asking the 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 center received the request for information and in which the center shares a privity of interest with Fort Bend. Therefore, we conclude that the 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).⁴

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, the center must release the completed quarterly statistical reports and the name, sex, ethnicity and titles of its employees and officers pursuant to section 552.022. The center may withhold all remaining 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

⁴ Because we reach this conclusion under section 552.103, we do not reach your remaining arguments against disclosure.

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,



Karen Hattaway
Assistant Attorney General
Open Records Division

KEH/sdk

Ref: ID# 205375

Enc. Submitted documents

c: Mr. Gary Gates
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(w/o enclosures)