



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 27, 2005

Mr. Kyle M. Jones
Arnold & Placek, P.C.
203 East Main Street, Suite 103
Round Rock, Texas 78664

OR2005-05658

Dear Mr. Jones:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 227131.

The Caldwell County Appraisal District (the "district"), which you represent, received a request for the employment file of the requestor's client as well as calculations supporting his client's final payment from the district. You claim that the requested information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information. We have also considered comments submitted by the requestor. See Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

We first address the requestor's argument that he has a right of access to the requested information under section 552.102 of the Government Code. In support of this assertion, the requestor relies on a sentence in section 552.102(a), which reads in part "that all information in the personnel file of an employee of a government body is to be made available to that employee or the employee's designated representative as public information is made available under [the Act]." Gov't Code § 552.102(a). The purpose of section 552.102 is to except from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." *Id.* 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 for information claimed to be protected under the doctrine of common-law privacy. *See Industrial Foundation*, 540 S.W.2d at 683-85. The language in section 552.102(a) on which the requestor relies is intended to allow a person or person's authorized representative a right of access to information relating to the person that is protected from public disclosure for the purpose of protecting that person's privacy interests. *See Gov't Code § 552.102(a)*; *see also, e.g., Gov't Code § 552.023*.

Because the requestor has a special right of access to information implicating his client's privacy interests, the district would not be able to withhold such information on the basis of either common-law privacy or section 552.102. In this instance, however, the district is claiming that the requested information is excepted from disclosure under section 552.103 of the Government Code. The purpose of section 552.103 is not to protect the privacy interests of any individual, but rather to protect a governmental body's interests in situations involving litigation. *See Gov't Code § 552.103*. Access provisions that apply to information subject to laws intended to protect a person's privacy interests (including the language in section 552.102(a) on which the requestor relies) are not relevant in determining whether information is excepted from required public disclosure under section 552.103. As such, we will address the district's arguments regarding this exception.

Section 552.103 of the Government Code provides in relevant part 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 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). 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, 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). The district must meet both prongs of this test for information to be excepted under 552.103(a).

In this case, you inform us that the requestor's client has filed a lawsuit against the district for actions arising from her employment with the district. In support of this assertion, you provide a copy of the amended complaint, which lists the district as a defendant and was filed with the United States District Court for the Western District of Texas, Austin Division. Although the requestor informs us that he initially requested this information from the Lockhart Independent School District on March 25, 2005, we note that he did not request this information from the district until April 11, 2005. You state, and provide documentation showing, that the requestor's client amended her complaint to add the district as a defendant to the litigation on April 7, 2005. Based on this information, we find that you have demonstrated that litigation involving the district was pending on the date that the district received this request for information. Further, based on your arguments and our review, we also find that the submitted information relates to the pending litigation. As such, we conclude that the district may withhold some of the submitted information pursuant to section 552.103(a) of the Government Code.

We note, however, that the requestor's client has already had access to some of the submitted documents. 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 pending 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).¹

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).

¹Because some of the information is confidential with respect to the general public, if the district receives a future request for this information from a person other than the requestor acting as a representative for the named individual or the named individual herself, the district should again seek our decision.

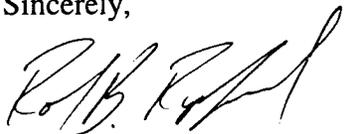
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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); *Tex. 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,



Robert B. Rapfogel
Assistant Attorney General
Open Records Division

RBR/krl

Ref: ID# 227131

Enc. Submitted documents

c: Mr. Donald T. Cheatham
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(w/o enclosures)