



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 14, 2006

Ms. Ashley Stewart  
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Dallas, Texas 75202-3294

OR2006-06289

Dear Ms. Stewart:

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# 251761.

Dallas County Schools ("DCS"), which you represent, received a request for all materials and investigative case files relating to six named former DCS employees. You argue that the requested information is not public information because it is not a completed investigation under section 552.022(a)(1) of the Government Code. In the alternative, you claim that the requested information is excepted from disclosure under sections 552.103, 552.107, 552.114, 552.135, and 552.136 of the Government Code. We have considered your arguments and reviewed the submitted information.

Initially, we note that some of the submitted information was created after the request for that information was received. Because this information was created after DCS's receipt of the request, it is not encompassed by the request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986) (governmental body not required to disclose information that did not exist at the time request was received). Accordingly, we do not address the availability of this non-responsive information, and DCS need not release it in response to the request.

Next, we address your argument that the submitted information is not "public information" because it is not subject to section 552.022(a)(1) of the Government Code. We note, however, that "public information" is defined by the Act in section 552.002 of the

Government Code. That section defines "public information" as information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business by a governmental body or 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). Section 552.022(a)(1), on the other hand, simply provides that a governmental body may only withhold a completed report or investigation if it is confidential under other law or section 552.108 of the Government Code. *Id.* § 552.022(a)(1). The submitted information has been collected, assembled, or maintained under a law or ordinance or in connection with the transaction of DCS's official business. Therefore, the submitted information is public information that is subject to required public disclosure unless an exception to disclosure under the Act applies. We will therefore consider your claimed exceptions against disclosure for the submitted information.

We note that the submitted information includes documents presented at open meetings of DCS. Section 551.022 of the Open Meetings Act, chapter 551 of the Government Code, expressly provides that the "minutes and tape recordings of an open meeting are public records and shall be available for public inspection and copying on request to the governmental body's chief administrative officer or the officer's designee." *Id.* § 551.022. Information that is specifically made public by statute may not be withheld from the public under any of the exceptions to public disclosure under chapter 552 of the Government Code. *See, e.g.,* Open Records Decision Nos. 544 (1990), 378 (1983), 161 (1977), 146 (1976). DCS must therefore release the information we have marked under section 551.022.

Next, we note that the submitted information contains records of polygraph examinations. Section 552.101 of the Government Code<sup>1</sup> excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," and encompasses information made confidential by other statutes. Gov't Code § 552.101. Section 1703.306 of the Occupations Code provides as follows:

(a) A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person other than:

- (1) the examinee or any other person specifically designated in writing by the examinee;
- (2) the person that requested the examination;

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<sup>1</sup>The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

(3) a member, or the member's agent, of a governmental agency that licenses a polygraph examiner or supervises or controls a polygraph examiner's activities;

(4) another polygraph examiner in private consultation; or

(5) any other person required by due process of law.

(b) The [Polygraph Examiners B]oard or any other governmental agency that acquires information from a polygraph examination under this section shall maintain the confidentiality of the information.

(c) A polygraph examiner to whom information acquired from a polygraph examination is disclosed under Subsection (a)(4) may not disclose the information except as provided by this section.

Occ. Code § 1703.306. We have marked the polygraph information that is subject to section 1703.306. We note, however, that the requestor identifies herself as an attorney for some of the polygraph examinees. Where information falls within both a specific and a general provision of law, the specific provision prevails over the general. *See Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 901 (Tex.2000) ("more specific statute controls over the more general"); *Cuellar v. State*, 521 S.W.2d 277 (Tex.Crim.App.1975) (under well-established rule of statutory construction, specific statutory provisions prevail over general ones); Open Records Decision Nos. 598 (1991), 583 (1990), 451 (1986). The statutory access provision in section 1703.306(a)(1) of the Occupations Code is more specific than the general protection afforded to broader categories of information under sections 552.103 and 552.135 of the Government Code. Therefore, if the requestor has a right of access to her clients' polygraph information under section 1703.306(a)(1), that information may not be withheld from her on the basis of either section 552.103 or 552.135, but instead must be released to the requestor. We note, however, that the requestor does not have a right of access to the polygraph information of the other examinees. In the event that the requestor does not have a right of access to her clients' polygraph information, DCS must withhold the polygraph information of the requestor's clients, in addition to that of the other examinees, under section 552.101 in conjunction with section 1703.306.

Next, we note that some of the submitted documents are medical records, access to which is governed by the Medical Practices Act ("MPA"), chapter 159 of the Occupations Code. Section 159.002 of the Occupations Code provides in 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.

Occ. Code § 159.002(b), (c). This office has concluded that the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). Further, information that is subject to the MPA also includes information that was obtained from medical records. *See* Occ. Code. § 159.002(a), (b), (c); *see also* Open Records Decision No. 598 (1991).

Medical records must be released upon the governmental body's receipt of the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. *See* Occ. Code §§ 159.004, .005. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. *See* Open Records Decision No. 565 at 7 (1990). Here, the requestor represents the subjects of some of the medical records at issue. We have marked the submitted information that is confidential under the MPA and that may be released only in accordance with the MPA.

Next, we note that the submitted information contains documents subject to section 552.022 of the Government Code. Section 552.022 provides in pertinent part as follows:

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; [and]

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(1), (3). In this instance, the submitted information includes a completed investigation and completed evaluations made of, for, or by DCS. DCS must release the completed investigation and the completed evaluations under section 552.022(a)(1) unless they are excepted from disclosure under section 552.108 or

expressly confidential under other law. The submitted information also includes information in an account, voucher, or contract relating to the expenditure of public or other funds by DCS. These documents must be released under section 552.022(a)(3) unless they are expressly confidential under other law. You claim that the information subject to section 552.022 is excepted from disclosure under section 552.103 of the Government Code. We note, however, that section 552.103 is a discretionary exception to disclosure that protects the governmental body's interests and may be waived. *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 of the Government Code); Open Records Decision No. 542 at 4 (1990) (litigation exception may be waived). As such, section 552.103 is not other law that makes information confidential for the purposes of section 552.022. Therefore, DCS may not withhold any of the information subject to section 552.022 under section 552.103. Because sections 552.135 and 552.136 are “other law” for purposes of section 552.022, we will discuss your arguments under these exceptions for the information subject to section 552.022.

However, we will first address your arguments for the information that is not subject to section 552.022. 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 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 was 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).

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). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.<sup>2</sup> Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983).

You state, and the submitted documents reflect, that the requestor is an attorney representing the six terminated employees at issue in their grievances filed against DCS. You also provide documentation showing that prior to DCS's receipt of the instant request for information, the requestor wrote letters to DCS stating that she would "advise [her] clients to pursue any and all remedies available to them under the law," and that her clients are prepared to "initiate litigation" against DCS. Based on your representations and our review of the information at issue, we find that DCS reasonably anticipated litigation when it received this request for information. We also find that the remaining information at issue relates to the anticipated litigation. We therefore conclude that section 552.103 is applicable to the remaining submitted information that is not subject to section 552.022.

We note however, that 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 parties in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. As it appears that some of the information DCS claims is excepted from release under section 552.103 has either been seen by or provided to the opposing parties in the anticipated litigation, we find that this information may not be withheld under section 552.103. DCS may withhold the remaining submitted information that has not been provided to the opposing parties in the anticipated litigation pursuant to section 552.103. Finally, 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).

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<sup>2</sup>In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

We next address your arguments against disclosure for the remaining information at issue. DCS raises section 552.107 of the Government Code for the information not subject to section 552.103. Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5). Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein). The information DCS claims is excepted from release under section 552.107 has either been seen by or provided to the opposing parties in the anticipated litigation. Therefore, we find that you have failed to establish that any portion of the submitted information not otherwise excepted under section 552.103 constitutes privileged attorney-client communications, and none of it may be withheld on this basis.

DCS also raises section 552.135 of the Government Code for the information not subject to section 552.103, and for the information subject to section 552.022. Section 552.135 provides as follows:

(a) "Informer" means a student or former student or an employee or former employee of a school district who has furnished a report of another person's or persons' possible violation of criminal, civil, or regulatory law to the school district or the proper regulatory enforcement authority.

(b) An informer's name or information that would substantially reveal the identity of an informer is excepted from [required public disclosure].

(c) Subsection (b) does not apply:

(1) if the informer is a student or former student, and the student or former student, or the legal guardian, or spouse of the student or former student consents to disclosure of the student's or former student's name; or

(2) if the informer is an employee or former employee who consents to disclosure of the employee's or former employee's name; or

(3) if the informer planned, initiated, or participated in the possible violation.

(d) Information excepted under Subsection (b) may be made available to a law enforcement agency or prosecutor for official purposes of the agency or prosecutor upon proper request made in compliance with applicable law and procedure.

(e) This section does not infringe on or impair the confidentiality of information considered to be confidential by law, whether it be constitutional, statutory, or by judicial decision, including information excepted from the requirements of Section 552.021.

Gov't Code § 552.135. You state that portions of the submitted information contain the identifying information of informers who reported possible violations of criminal law codified in Title 7, chapter 32, and Title 8, chapter 37 of the Texas Penal Code. However, you have failed to identify informers in the remaining information at issue. Therefore, you may not withhold any of the remaining submitted information under section 552.135.

Finally, DCS raises section 552.136 of the Government Code for the information subject to section 552.022. Section 552.136 of the Government Code states that "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." *Id.* § 552.136. DCS must therefore withhold the bank account information we have marked.

In summary, DCS must release the information we have marked under section 551.022. If the requestor has written authorization to obtain her client's polygraph information, DCS must release such information to her. However, if the requestor does not have such a right of access, then all of the marked polygraph information must be withheld under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code. The submitted medical records, which we have marked, may only be released in accordance with the MPA. With the exception of the bank account information we have marked under section 552.136 of the Government Code, the information we have marked that is subject to section 552.022 must be released. DCS may withhold the remaining submitted information that has not been provided to the opposing parties under section 552.103 of the Government Code. As our ruling is dispositive, we need not address your remaining arguments.

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, 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); *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 Office of the Attorney General 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. 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,



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Open Records Division

LVC/eb

Ref: ID# 251761

Enc. Submitted documents

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