



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 16, 2007

Ms. Sylvia F. Hardman
General Counsel
Texas Department of Assistive and Rehabilitative Services
4800 North Lamar Blvd., Suite 300
Austin, Texas 78756

OR2007-08947

Dear Ms. Hardman:

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# 284026.

The Texas Department of Assistive and Rehabilitative Services (the "department") received a request for information pertaining to a specified department office on a specified date, including: (1) the hard drive of any computers or servers; (2) any and all emails to or from any employee, contractor, representative or agent of the department during a specified time period; (3) any cell phones owned by the department that were used or in the possession of any department employee; and (4) any and all records relating to cell phone calls to or from any department employee during a specified time period.¹ You inform us that the requestor has excluded any department consumer information from this request. Accordingly, this information is not responsive to the present request. You also state that you do not have information responsive to item three of the request for a cell phone and for item four

¹The department informs us it sought and received clarification from the requestor regarding a portion of his request. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).

regarding department cell phone records.² You claim that the submitted information is excepted from disclosure under sections 552.103 and 552.117 of the Government Code.³ We have considered the exceptions you claim and reviewed the submitted information.⁴

Initially, we must address your claim that the requestor seeks tangible evidence that is not subject to the Act. The Act applies to “public information,” which is defined 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. This office has ruled that tangible physical items are not “information” as that term is contemplated under the Act. *See, e.g.,* Open Records Decision No. 581 (1990). Although the requestor originally sought tangible physical items in regard to items one and three of his request, the department received a clarification on May 7, 2007 stating that the request for items one and three was for information contained on these media to the extent the information could be retrieved by conventional means. Information is generally subject to the Act when it is held by a governmental body and it relates to the official business of a governmental body or is used by a public official or employee in the performance of official duties. *See* Open Records Decision No. 635 (1995). Accordingly, we conclude that the requested information retrieved from the hard drive is public information as defined by section 552.002, and is subject to disclosure under the Act. Thus, we will address your arguments for this information.

Section 552.103 of the Government Code provides in 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.

²We note that the Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ.App.—San Antonio 1978, writ dismissed); *Open Records Decision* Nos.605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

³Although you also initially raised sections 552.101 and 552.107(2) of the Government Code for portions of the requested information, in subsequent correspondence with our office you withdrew your arguments regarding these exceptions.

⁴We note that you did not raise section 552.117 as an exception to disclosure within ten business days of the date the department received the present request. *See* Gov’t Code §§ 552.301(b), 302. However, because section 552.117 is a mandatory exception that can provide a compelling reason to withhold information from disclosure, we will address your claim under section 552.117. *See id.*; *see also* *Open Records Decision* Nos. 150 at 2 (1977), 319 (1982).

...

(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. 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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You inform this office that the submitted information relates to two lawsuits currently pending in the district courts of Harris County. We note, however, that the department is not a party to these litigations. See Gov't Code § 552.103(a); Open Records Decision No. 575 at 2 (1990) (stating that predecessor to section 552.103 only applies when governmental body is party to litigation). Furthermore, you have not provided this office with an affirmative representation from a governmental body with a litigation interest that seeks to withhold the information at issue pursuant to section 552.103. Accordingly, the department may not withhold any of the submitted information under section 552.103 of the Government Code.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. See Gov't Code § 552.117(a)(1). Information subject to section 552.117(a)(1) may only be withheld from disclosure if the current or former employee made the request for confidentiality under section 552.024 after the request for information at issue was received by the governmental body. Whether a particular piece of information is public must be determined at the time the request for it is made. See Open Records Decision No. 530 at 5 (1989). In this case, the submitted information indicates that the employee whose information is at issue timely elected confidentiality under section 552.024. Accordingly, the department must withhold the information you have marked under section 552.117(a)(1) of the Government Code. The remaining submitted information must be released.

Finally, you request that this office issue a previous determination that would permit the department in the future to withhold from disclosure the personal information of department

employees under section 552.117(a)(1) without the need of requesting a ruling from us about whether such information can be withheld from disclosure. We decline to issue such a previous determination at this time.

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,

A handwritten signature in black ink that reads "Paige Savoie". The signature is written in a cursive, flowing style.

Paige Savoie
Assistant Attorney General
Open Records Division

PS/ma

Ref: ID# 284026

Enc. Submitted documents

c: Mr. Russell J. Ramsey
Ramsey & Murray, P.C.
800 Gessner, Suite 1100
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(w/o enclosures)