



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

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Mr. B. Calvin Hendrick
Attorney for the City of Odessa
Shafer, Davis, O'Leary & Stoker
P.O. Drawer 1552
Odessa, Texas 79760-1552

OR2007-16354

Dear Mr. Hendrick:

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# 298128.

The City of Odessa (the "city") received a request for a copy of all information regarding a certain employee's suspension as well as the employee's personnel file. You state that the city is releasing to the requestor a summary of the investigation and discipline. You claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.102, 552.103 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We begin by noting that the submitted information includes two documents that apparently did not exist at the time the city received the request. This ruling does not address the public availability of these documents. The Act only applies to information that is in existence at the time of the request. *See* 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). Thus, the Act does not require the city to release these documents, which we have marked, in response to this request. *See Econ. Opportunities Dev. Corp v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed).

Next, we note that the submitted information includes information that is subject to section 552.022 of the Government Code. Section 552.022 enumerates categories of information

that are not excepted from required disclosure unless they “are expressly confidential under other law.” Gov’t Code § 552.022. This section provides in pertinent 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 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[.]

Gov’t Code § 552.022(a)(1). The submitted information contains a completed investigation made for the city, performance evaluations and Odessa Job Counseling and Evaluation Reports. The district may only withhold this information if it is confidential under other law or excepted from disclosure under section 552.108. You argue that the information or portions of the information are excepted from disclosure under section 552.101, 552.103 and 552.107. However, sections 552.103 and 552.107 are discretionary exceptions that are intended to protect only the interests of the governmental body 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); Open Records Decision Nos. 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body’s position in litigation and does not itself make information confidential); 676 at 10 (2002) (attorney-client privilege under section 552.107(1) may be waived); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, sections 552.103 and 552.107 do not constitute “other law” that makes information confidential. Accordingly, we conclude that the city may not withhold any of the submitted information that is subject to section 552.022 under sections 552.103 and 552.107. However, the Texas Supreme Court has held that the Texas Rules of Evidence are “other law” that makes information expressly confidential for the purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). For Exhibit D, we will therefore consider your attorney-client privilege argument under Rule 503 of the Texas Rules of Evidence. In addition, we will address your claims under sections 552.101 and 552.102 of the Government Code for the information subject to section 552.022 as well as the remaining information.

We turn to the exceptions to disclosure you raise. For the information that is not subject to section 552.022, we consider your section 552.103 claim. 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). The city 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 city 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.¹ 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). In addition, 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 contend that the requested information "relates to a potential lawsuit and a possible EEOC claim." However, you have provided no facts or evidence to establish that litigation

¹In 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).

is reasonably anticipated in this case. Thus, we conclude that the city may not withhold any portion of the requested information based on section 552.103.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This section encompasses the doctrine of common-law privacy, which protects information that (1) contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The types of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683.

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* for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the act. *See Industrial Found.*, 540 S.W.2d 668 (Tex. 1976). Accordingly, we will consider your section 552.101 and section 552.102 claims together.

In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied), the court addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment. The investigation files in *Ellen* contained individual witness statements, an affidavit by the individual accused of the misconduct responding to the allegations, and conclusions of the board of inquiry that conducted the investigation. *Id.* at 525. The court ordered the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the public’s interest was sufficiently served by the disclosure of such documents. *Id.* In concluding, the *Ellen* court held that “the public did not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released.” *Id.* Thus, if there is an adequate summary of an investigation of alleged sexual harassment, the investigation summary must be released under *Ellen*, but the identities of the victims and witnesses of the alleged sexual harassment must be redacted, and their detailed statements must be withheld from disclosure. *See* Open Records Decision Nos. 393 (1983), 339 (1982). However, common-law privacy does not protect information about a public employee’s alleged misconduct on the job or complaints made about a public employee’s job performance. *See* Open Records Decision Nos. 438 (1986), 405 (1983), 230 (1979), 219 (1978).

The submitted information contains an adequate summary of an investigation into alleged sexual harassment and statements by the person who was accused of sexual harassment. The summary and statements are thus not confidential; however, any information within these documents identifying the victim and witnesses is confidential under common-law privacy and must be withheld pursuant to section 552.101 of the Government Code. *See Ellen*, 840 S.W.2d at 525. We further note that supervisors are not witnesses for purposes of *Ellen*, and thus, supervisors' identities may generally not be withheld under section 552.101 of the Government Code and common-law privacy. We have marked the information the city must withhold under section 552.101 in conjunction with common-law privacy and the *Ellen* case. *See id.*

In addition, the information includes private financial information. Prior decisions of this office have found that personal 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)*. For example, a public employee's allocation of his salary to a voluntary investment program or to optional insurance coverage which is offered by his employer is a personal investment decision and information about it is excepted from disclosure under the common-law right of privacy. *See ORD 545* (attorney general has found kinds of financial information not excepted from public disclosure by common-law privacy to generally be those regarding receipt of governmental funds or debts owed to governmental entities). However, information revealing that an employee participates in a group insurance plan funded partly or wholly by the governmental body is not excepted from disclosure. *See ORD 600* at 10. With regard to the Texas Municipal Retirement System form that shows tax deferred accumulated deposits, we conclude that the form is private and excepted from disclosure if the tax deferral of deposits was a choice of the employee. The form is not private and excepted from disclosure if the tax deferral was not the employee's choice. However, in either case, information on the form about the beneficiary is private and excepted from disclosure. *See id.* We have marked the private financial information the city must withhold.

The information includes one document that is subject to the Medical Practices Act (the "MPA"), chapter 159 of the Occupations Code. Section 159.002 of the MPA provides:

(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). Medical records must be released upon 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. 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. Open Records Decision No. 565 at 7 (1990). Medical records are confidential and may be released only as provided under the MPA. Open Records Decision No. 598 (1991). Section 552.101 also excepts from disclosure information that is deemed confidential by statute. *See* Gov't Code § 552.101. We have marked the medical record that is excepted from disclosure under section 552.101 in conjunction with section 159.002(b).

For the remaining information in Exhibit D, we next consider your attorney-client privilege claim under Rule 503(b)(1), which provides as follows:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;

(B) between the lawyer and the lawyer's representative;

(C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is "confidential" if 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). In order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must do the following:

(1) reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. *See* Open Records Decision No. 676 (2002). Upon a demonstration of all three factors, the entire communication is confidential under rule 503 provided the client has not waived the privilege or the communication does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein); *In re Valero Energy Corp.*, 973 S.W.2d 453, 4527 (Tex. App.—Houston [14th Dist.] 1998, no pet.) (privilege attaches to complete communication, including factual information). 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.

You inform us that the city manager assigned an independent investigator to investigate the allegations in the complaint in anticipation of litigation and simultaneously retained your law firm to provide professional legal services to the city with respect to the allegations and anticipated litigation. You state any information from the investigation was intended to be confidential and not disclosed to third persons. You also say that

Moreover, the investigator provided her findings from the investigation to undersigned counsel. The confidential investigation has been used by undersigned counsel to provide legal services in the form of legal counsel to the City of Odessa. Consequently, the investigation conducted by the client representative was in anticipation of litigation and used by outside counsel to provide legal services to the City and is thus excepted from disclosure under section 552.107 and the attorney-client privilege.

While you also state that information contained in the investigative notes consists of communication exchanged between and among clients, client representative, lawyers and lawyer's representatives for the purpose of facilitating the rendition of professional legal services, you do not state that the investigative notes at issue were provided to your firm as counsel for the city or to any other privileged communicant. Thus, we conclude that you have not shown that the remaining information in Exhibit D is a confidential attorney-client communication. Therefore, you may not withhold the information under Rule 503.

The submitted information includes information that may be protected from disclosure under section 552.117 of the Government Code. Section 552.117 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. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the city may only withhold information under section 552.117 on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. For those employees who timely elected to keep their personal information confidential, the city must withhold the employees' home addresses and telephone numbers, social security numbers, and any information that reveals whether these employees have family members. The city may not withhold this information under section 552.117 for those employees who did not make a timely election to keep the information confidential. We note that you have submitted a personal information election form from the named employee's personnel file, and that in that form, the individual failed to elect to have his personal information withheld. Therefore, we find that the named individual's personal information may not be withheld under section 552.117, and is subject to public disclosure. *See* Gov't Code § 552.024(d). The submitted information includes the personal information of another employee, whose information may be excepted from disclosure under section 552.117 if confidentiality was the employee's choice under section 552.024. We have marked the information the city must withhold under section 552.117 if the relevant employee timely elected to keep the information confidential.

The information includes a driver's license number. Section 552.130 provides in relevant part:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

- (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]

You must withhold the marked Texas driver's license number under section 552.130.

Finally, the submitted information contains social security numbers. Section 552.147 of the Government Code provides that "[t]he social security number of a living person is excepted from" required public disclosure under the Public Information Act (the "Act"). Therefore, the city may withhold the social security numbers contained in the submitted information under section 552.147.²

In conclusion, the city must withhold the following information: the private information we have marked under section 552.101; the medical record subject to the MPA; the information we have marked as covered by section 552.117 if the relevant employee has timely elected confidentiality for the information; and, the marked driver's license number under section 552.130. The city may withhold the social security numbers based on section 552.147. The city must release the remaining information.

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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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

²552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

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 challenge 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,



Kay Hastings
Assistant Attorney General
Open Records Division

KH/sdk

Ref: ID# 298128

Enc: Submitted documents

c: Mr. Mike Barker
CBS 7
4101 East 42nd Street, Suite J7, Box 107
Odessa, Texas 79762
(w/o enclosures)