ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 1, 2009

Mr. Mark D. Kennedy
ADA, Chief – Civil Division
Hays County Criminal District Attorney
Hays County Courthouse
111 East San Antonio Street, Suite 204
San Marcos, Texas 78666

OR2009-13820

Dear Mr. Kennedy:

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# 357071.

Hays County (the "county"), received a request for information relating to Equal Employment Opportunity Commission ("EEOC") claims filed against county elected officials during the time period of 2008 to 2009. You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, and 552.103 of the Government Code.[1] We have considered the exceptions you claim and reviewed the submitted representative sample of information.[2]

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[1]Although you claim the responsive information is contained within Exhibit D, you state that "Exhibit C would also be representative of responsive information [the county] might have in its possession. Typically, responsive information that [the county] would have in its possession would consist of the original EEOC charge, administrative documents pertaining to a complaint, and the county's Position Statement regarding a complaint. . . . [The county] contends that all such information related to pending EEOC or TWC/EEOC complaints should be excepted from disclosure." Thus, we understand the EEOC charges you have submitted in Exhibit C to be responsive to this request and we will consider your arguments for this information, as well as for the information you have submitted in Exhibit D.

[2]We 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.

Initially, we note that a portion of the submitted information, which we have marked, is not responsive as it was not received by the county until after the date of the request. The county need not release non-responsive information in response to this request, and this ruling will not address that information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W. 2d 266 (Tex. Civ. App.– San Antonio 1978, writ dism'd).

Section 552.103 of the Government Code provides in pertinent 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.
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> . . .
>
> (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 county 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 county must meet both prongs of this test for information to be excepted under 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). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. ORD 452 at 4. This office has stated that a pending EEOC complaint indicates that litigation is reasonably anticipated. *See* Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982).

You state, and provide documentation showing, that the individuals listed in the submitted information filed discrimination claims with the EEOC and the Texas Workforce Commission (the "TWC") prior to the county's receipt of this request. You explain how the information at issue relates to these claims. You indicate, however, that one of the

individuals at issue has settled her claim with the county. Thus, we find that you have failed to demonstrate that the county anticipates litigation with regard to this claim. Accordingly, the information pertaining to this claim, which we have marked, may not be withheld on the basis of section 552.103. However, based on your representations and our review, we find that you have demonstrated that the remaining submitted information relates to anticipated litigation against the county. Therefore, the county may generally withhold the remaining submitted information under section 552.103.

We note, however, that the purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. *See* ORD 551 at 4-5. Thus, if the opposing party has seen or had access to information relating to litigation, through discovery or otherwise, then there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). We note that several of the documents you seek to withhold are EEOC charges of discrimination signed by the potential opposing party in the anticipated litigation. As such, these documents, which we have marked, may not be withheld under section 552.103. We further note that the applicability of section 552.103(a) ends when the litigation has concluded or is no longer anticipated. *See* Attorney General Opinion MW-575 at 2 (1982); Open Records Decision Nos. 350 at 3 (1982).

Next, you contend that the EEOC documents are confidential under section 552.101 of the Government Code, which excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses section 2000e-5 of Title 42 of the United States Code, which provides in relevant part:

> Whenever a charge is filed by or on behalf of a person claiming to be aggrieved . . . alleging that an employer . . . has engaged in an unlawful employment practice, the [EEOC] shall serve a notice of the charge . . . and shall make an investigation thereof. . . . Charges shall not be made public *by the [EEOC]*. . . .

42 U.S.C. § 2000e-5(b) (emphasis added). This office has held that section 2000e-5 only restricts disclosure by those who enforce the Equal Employment Opportunity Act and does not make information in the hands of the state reporting agency confidential. *See, e.g.,* Open Records Decision Nos. 245 at 2 (1980) (City of Rio Hondo may not withhold information under section 2000e-5 or 2000e-7 of title 42 of the United States Code), 155 at 2 (1977) (City of Austin may not withhold information under section 2000e-5), 59 at 2 (1974) (Dallas County may not withhold information under section 2000e-8); *see also Whitaker v. Carney*, 778 F. 2d 216 (1985) (title VII proscribes release of information only when held by EEOC or EEOC employees, and not when held by employer). The remaining information is maintained by the county and not by employees of the EEOC; therefore, we conclude that

the county may not withhold the information at issue pursuant to section 552.101 of the Government Code in conjunction with section 2000e-5 of title 42 of the United States Code.

You also raise section 552.101 of the Government Code in conjunction with section 21.304 of the Labor Code. Section 21.304 of the Labor Code, which relates to public release of information obtained by the TWC, provides as follows:

> An officer or employee of the [TWC] may not disclose to the public information obtained by the [TWC] under Section 21.204 except as necessary to the conduct of a proceeding under this chapter.

Labor Code § 21.304. We note that this section, by its own terms, only applies to officers and employees of the TWC. *See* Open Records Decision Nos. 478 at 2 (1987) (language of confidentiality statute controls scope of protection), 465 at 4-5 (1987) (statute explicitly required confidentiality). Therefore, section 21.304 does not apply to the county and the remaining information may not be withheld under this provision.

We note that a portion of the remaining information is subject to the Medical Practice Act (the "MPA") subtitle B of title 3 of the Occupations Code. *See* Occ. Code § 151.001. Section 552.101 encompasses information made confidential by the MPA. Section 159.002 of the MPA provides in part:

> (a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.
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> (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.
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> (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.

Id. § 159.002(a)-(c). This office has concluded that the protection afforded by section 159.002 extends 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). Information taken directly from medical records and contained in other documents can be withheld in accordance with the MPA. *See* Occ. Code §§ 159.002, .004; Open Records Decision No. 598 (1991). Medical records must be released on 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. Any subsequent release of medical records must be consistent with the purposes for which the governmental body obtained the records. *See id.* § 159.002(c); Open Records Decision No. 565 at 7 (1990). We have marked information taken from medical records that is confidential pursuant to the MPA and may only be released in accordance with the MPA. *See* Open Records Decision No. 598 (1991).

You claim portions of the remaining information are excepted under sections 552.101 and 552.102 of the Government Code. Section 552.101 encompasses the doctrine of common-law privacy. Section 552.102(a) of the Government Code excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 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(a) is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Bd.*, 540 S.W.2d 668 (Tex. 1976) for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101. Accordingly, we will address your privacy claims under sections 552.101 and 552.102 together.

Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *See Indus. Found.*, 540 S.W.2d 668 at 685. To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. The type 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. *See* 540 S.W.2d at 683. We note that, generally, the public has a legitimate interest in information that relates to public employment and public employees. *See* Open Records Decisions Nos. 562 at 10 (1990) (personnel file information does not involve most intimate aspects of human affairs, but in fact touches on matters of legitimate public concern), 542 (1990), 470 at 4 (1987) (public has legitimate interest in job qualifications and performance of public employees), 444 at 5-6 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees), 423 at 2 (1984) (scope of public employee privacy is narrow).

You contend that some of the information requested could be excepted from disclosure on the basis of privacy if "the information does not relate to how a particular employee or elected official performs his/her duties." Upon review, we find that the information at issue does pertain to the work conduct of public employees; thus, there is a legitimate public interest in most of the information at issue. However, some of the remaining information is intimate or embarrassing and of no legitimate public interest. Therefore, we conclude that

the county must withhold the information we have marked pursuant to section 552.101 of the Government Code in conjunction with common-law privacy. We find that none of the remaining information is intimate or embarrassing and of no legitimate public interest. Therefore, the county may not withhold any of the remaining information on the basis of common-law privacy.

We note that a portion of the remaining information may be subject to section 552.117(a)(1).[3] Section 552.117(a)(1) 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. Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). You do not inform us whether the individuals whose personal information is at issue timely elected confidentiality under section 552.024. Thus, we must rule conditionally. To the extent the individuals concerned timely elected to keep the marked information confidential, the county must withhold that information under section 552.117(a)(1) of the Government Code. To the extent these individuals did not make a timely election to keep the marked information confidential, the information may not be withheld under section 552.117(a)(1).

In summary, except for the information we have marked for release, the county may withhold the submitted information under section 552.103 of the Government Code. The county must withhold the information we have marked under section 552.101 in conjunction with section 159.002 of the Occupations Code. The county must withhold the information we have marked under section 552.101 in conjunction with common-law privacy. The county must withhold the information we have marked under section 552.117(a)(1) of the Government Code to the extent the individuals at issue timely elected to keep this information confidential. The remaining information must be released.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public

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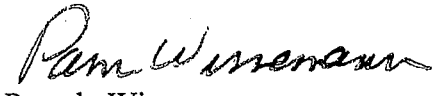
[3]The Office of the Attorney General will raise a mandatory exception like section 552.117 on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Pamela Wissemann
Assistant Attorney General
Open Records Division

PFW/jb

Ref: ID# 357071

Enc. Submitted documents

c: Requestor
(w/o enclosures)