



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

January 11, 2011

Ms. Zeena Angadicheril  
Attorney  
University of Texas System  
201 West Seventh Street  
Austin, Texas 78701-2902

OR2011-00559

Dear Ms. Angadicheril:

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# 405585 (OCG# 133900).

The University of Texas Health Science Center at Houston (the "university") received a request for the fiscal year 2009-2010 appointment letters or employment agreements of every faculty member receiving a notice of non-reappointment between April 1, 2010 and September 2, 2010; all documents created or received by the university in the last year regarding any complaint or objection to billing practices at the university's Harris County Psychiatric Center (the "center"); all documents created or received by the university in the last year describing complaints from employees of violations of any rights and/or privileges of any patient committed to, confined to, or treated by the center; and copies of all documents created or received by the university over the last year describing appeals, complaints, and/or grievances by any employees receiving notices of non-reappointment in the last year. You claim a portion of the requested information is not subject to the Act. You also claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.111, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>1</sup> We have also received and considered comments from an interested third party. *See Gov't Code*

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<sup>1</sup>We assume 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 those records contain substantially different types of information than that submitted to this office.

§ 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we address your assertion that pursuant to section 181.006 of the Health and Safety Code, the information you have marked is not subject to the Act. Section 181.006 provides in part that “[f]or a covered entity that is a governmental unit, an individual’s protected health information . . . is not public information and is not subject to disclosure under [the Act].” Health & Safety Code § 181.006(2). We will assume, without deciding, that the university is a covered entity. Section 181.006(2) does not remove protected health information from the Act’s application, but rather states that such information is “not public information and is not subject to disclosure under [the Act].” We interpret this language to mean that a covered entity’s protected health information is subject to the Act’s application. Furthermore, section 181.006, when demonstrated to be applicable, makes confidential information it covers. Thus, we will consider your arguments for the information you have marked, along with the rest of the submitted information.

Next, we note a portion of the submitted information consists of a completed abuse/neglect/exploitation investigation report, which is subject to section 552.022(a)(1) of the Government Code. Section 552.022(a)(1) provides for the required public disclosure of “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). Pursuant to section 552.022(a)(1), a completed report is expressly public unless it is either excepted under section 552.108 of the Government Code or is expressly confidential under other law. You raise section 552.103 of the Government Code for this information. However, section 552.103 is a discretionary exception to disclosure that protects a governmental body’s interests and may be waived. *See id.* § 552.007; *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 No. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 (1999) (governmental body may waive section 552.103). As such, section 552.103 is not “other law” that makes information confidential for the purposes of section 552.022. Therefore, the university may not withhold the completed investigation report under section 552.103 of the Government Code. However, you also raise section 552.101 of the Government Code, which is “other law” for the purposes of section 552.022. Therefore, we will consider the applicability of this section to the information subject to section 552.022(a)(1).

You claim the abuse/neglect/exploitation investigation report is excepted from disclosure under section 552.101 in conjunction with the doctrines of common-law privacy and constitutional privacy. The doctrine of common-law privacy excepts from public disclosure private information about an individual if the information (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 or 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.

Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. *See Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); Open Records Decision Nos. 600 at 3-5 (1992), 478 at 4 (1987), 455 at 3-7 (1987). The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. ORD 455 at 4. The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* at 7. The scope of information protected is narrower than that under the common-law doctrine of privacy; constitutional privacy under section 552.101 is reserved for "the most intimate aspects of human affairs." *Id.* at 5 (quoting *Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5th Cir. 1985)).

Upon review, we find the information we have marked in the abuse/neglect/exploitation investigation report is highly intimate or embarrassing and of no legitimate public interest. Accordingly, the university must withhold this information under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find you have failed to demonstrate how any of the remaining information in this report is highly intimate or embarrassing and of no legitimate public concern. Thus, none of the remaining information in the report may be withheld under section 552.101 of the Government Code on the basis of common-law privacy. Further, you have not demonstrated how any of the remaining information at issue falls within the zones of privacy or implicates privacy interests for purposes of constitutional privacy. Thus, none of the remaining information in the report may be withheld under section 552.101 in conjunction with constitutional privacy. As you raise no further exceptions to the disclosure of the remaining information in the abuse/neglect/exploitation report, it must be released.

Next, we will address your arguments under section 552.103 for the remaining information not subject to section 552.022(a)(1). 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 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 that 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). The governmental body must meet both prongs of this test for information to be excepted under section 552.103.

To establish 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. 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. 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). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. ORD 452 at 4.

You inform us the university received the present request for information on October 20, 2010. You also inform us the university received notice that a lawsuit had been filed by a former university employee on December 2, 2010, which we note is after the date the university received the request. Thus, we conclude that litigation to which the university is a party was not pending when the university received the request for information. However, you also assert that litigation was reasonably anticipated when the university received the request. In support of this assertion, you state, and provide an e-mail dated August 30, 2010 showing, that an attorney representing the former employee notified the university that he had been retained by the former employee to pursue her contract claims against the university regarding her termination. The next day, you state, and provide documentation showing, that the former employee filed a formal grievance against the university. You also state prior to the university's receipt of the present request, her attorney contacted the university's Office of Legal Affairs to discuss his client's whistleblower claims. Upon review of your arguments and the submitted information, we agree that the university reasonably anticipated litigation on the date it received the present request for information. Further, we conclude the submitted information is related to the anticipated litigation. Accordingly, we conclude the

university may generally withhold the information not subject to section 552.022(a)(1) under section 552.103 of the Government Code.<sup>2</sup>

We note 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 to the anticipated or pending litigation has seen or had access to information relating to the 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 the remaining information includes e-mails and letters sent and received by the former employee and her attorney. Accordingly, because the opposing party to the anticipated litigation has seen this information, the university may not withhold this information, which we have marked, under section 552.103 of the Government Code. Further, the applicability of section 552.103(a) ends once the litigation has concluded or is no longer anticipated. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

You raise section 552.137 of the Government Code for the e-mail addresses you have marked in documents seen by the former employee and her attorney. Section 552.137 excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body," unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov't Code § 552.137(a)-(c). The e-mail addresses you have marked are not specifically excluded by section 552.137(c). As such, the marked e-mail addresses must be withheld under section 552.137, unless the owners of the addresses have affirmatively consented to their release.<sup>3</sup> *See id.* § 552.137(b).

In summary, the university must withhold the information we have marked in the abuse/neglect/exploitation investigation report under section 552.101 of the Government Code in conjunction with common-law privacy. With the exception of the e-mails and letters sent or received by the former employee or her attorney, the university may withhold the remaining information under section 552.103 of the Government Code. The university must withhold the e-mail addresses you have marked under section 552.137 of the Government Code. The remaining information must be released.

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<sup>2</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

<sup>3</sup>We note this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

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](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 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,



Kate Hartfield  
Assistant Attorney General  
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KH/em

Ref: ID# 405585

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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