



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 24, 2011

Ms. Jill Hoffman
Assistant City Attorney
City of Jarrell
Bojorquez Law Firm, PLLC
12325 Hymeadow Drive, Suite 2-100
Austin, Texas 78750

OR2011-04058

Dear Ms. Hoffman:

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# 412307.

The City of Jarrell (the "city"), which you represent, received a request for information relating to a named former city employee including (1) her job application and any attachments, (2) her resume, (3) her licenses and certifications, (4) interview questions and answers, (5) interview, pre-interview, or post-interview exercises, (6) her references, (7) her starting and ending gross pay, (8) her resignation letter or termination letter, (9) her job evaluations, performance, or appraisal, and (10) her complete personnel file. You state the city has no information responsive to items two, four, five, and six of the request.¹ You claim that the submitted information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments from an interested third party. *See Gov't Code § 552.304* (any person may submit written comments stating why information at issue in request for Attorney General ruling should or should not be released).

¹The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

Initially, we address the third party's assertion that the city failed to comply with the requirements of the Act. The third party states, and has provided evidence showing, that he requested the named employee's "job application and any supporting documents" on October 13, 2010. The third party has provided a letter from the city showing that, in response to that request, the city stated that the requested job application and supporting documents did not exist. The instant request, which was received on January 4, 2011, seeks the "job application and any attachments." In its request for a ruling from our office on the January 4 request, the city submitted a letter, which is dated February 11, 2010, as responsive to this portion of the request for information. Based on the submitted information and the interested third party's comments, we conclude the submitted letter, which you have labeled Exhibit B, was also responsive to the October 13, 2010 request.

Section 552.301 of the Government Code prescribes the procedures a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(b) of the Government Code, the governmental body must request a ruling from this office and state the exceptions to disclosure that apply within ten business days after receiving the request. *See id.* § 552.301(b). Under section 552.301(e), a governmental body must submit to this office within fifteen business days of receiving the request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See id.* § 552.301(e). Because the letter submitted as Exhibit B was responsive to the October 13 request, but the city did not request a ruling from this office or submit this information until January 18, 2011, we find the city failed to comply with the requirements of section 552.301 with respect to the information in Exhibit B.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the requirements of section 552.301 results in the legal presumption the requested information is public and must be released unless a compelling reason exists to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); *see also* Open Records Decision No. 630 (1994). Generally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third-party interests are at stake. Open Records Decision No. 150 at 2 (1977). You assert that Exhibit B is excepted from disclosure under section 552.103 of the Government Code. However, section 552.103 is a discretionary exception to disclosure that protect a governmental body's interests and generally is not a compelling reason to withhold information. *See Gov't Code* § 552.007; *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.)

(section 552.103 may be waived); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions in general), 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions). In failing to comply with section 552.301, the city has waived its claim under section 552.103 for this information, and may not withhold the Exhibit B on that basis. As the city claims no other exception to disclosure for Exhibit B, it must be released.

Next, we note the employee's resignation letter was the subject of a previous request for information, as a result of which our office issued Open Records Letter No. 2011-02606 (2011). In that ruling, we held the city must withhold the information we marked in the letter under section 552.101 of the Government Code in conjunction with common-law privacy, but must release the remaining information. As we have no indication that the law, facts, and circumstances on which the prior ruling was based have changed, we conclude the city must continue to rely on that ruling as a previous determination and withhold or release the previously ruled upon information in accordance with Open Records Letter No. 2011-02606. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

Next, we note the submitted information contains a completed employee evaluation subject to section 552.022(a)(1) of the Government Code. Section 552.022(a)(1) provides for required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body [,]" unless the information is expressly confidential under "other law" or excepted from disclosure under section 552.108 of the Government Code. Gov't Code § 552.022(a)(1). Although you seek to withhold this information under section 552.103 of the Government Code, this section is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See Dallas Area Rapid Transit*, 4 S.W.3d 469, 475-76; ORD 665 at 2 n.5. As such, section 552.103 is not "other law" that makes information confidential for the purposes of section 552.022. Therefore, the city may not withhold the completed evaluation under section 552.103. As you raise no further exceptions to the disclosure of this information, it must be released.

We now turn to your argument under section 552.103 of the Government Code for the remaining information. Section 552.103 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.

(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 that claims an exception to disclosure under section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate that (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) the information at issue is related to the pending or anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See Open Records Decision No. 551 at 4 (1990).*

You contend that the information at issue is related to anticipated litigation. Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See Open Records Decision No. 452 at 4 (1986).* To establish that litigation is reasonably anticipated, a governmental body must provide this office with “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” *Id.* Furthermore, this office has stated that a pending Equal Employment Opportunity Commission (“EEOC”) complaint indicates that litigation is reasonably anticipated. *See Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982).*

You have submitted information to this office showing that, prior to the city’s receipt of the request for information, the former employee at issue filed an EEOC complaint against the city with the Texas Workforce Commission. Based on your representations and our review of the submitted documents, we find you have demonstrated litigation was reasonably anticipated when the city received the request for information. Our review of the information at issue also shows it is related to the anticipated litigation for purposes of section 552.103(a).

However, the information the city seeks to withhold is information that the former employee at issue, as the opposing party to the anticipated litigation, has already seen or had access to. Once an opposing party in the anticipated litigation has seen or had access to information that is related to litigation, there is no interest in withholding such information from public disclosure under section 552.103. *See Open Records Decision Nos. 349 (1982), 320 (1982).* Thus, the information the opposing party in the anticipated litigation has seen or had access to is not excepted from disclosure under section 552.103(a). Therefore, the information at issue may not be withheld under section 552.103 of the Government Code.

Section 552.101 of the Government Code exempts 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 information made confidential by federal law. This office has held that section 6103(a) of title 26 of the United States Code renders tax return information confidential. Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision No. 600 (1992) (W-4 forms), 226 (1979) (W-2 forms). Section 6103(b) defines the term "return information" as a taxpayer's "identity, the nature, source, or amount of his income[.]" See 26 U.S.C. § 6103(b)(2)(A). Federal courts have construed the term "return information" expansively to include any information gathered by the Internal Revenue Service regarding a taxpayer's liability under title 26 of the United States Code. See *Mallas v. Kolak*, 721 F. Supp. 748, 754 (M.D.N.C. 1989), *aff'd in part*, 993 F.2d 1111 (4th Cir. 1993). Accordingly, the city must withhold the W-4 form we have marked under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code.

Section 552.101 also encompasses section 1324a of title 8 of the United States Code. This section provides that an Employment Eligibility Verification I-9 Form "may not be used for purposes other than for enforcement of this chapter" and for enforcement of other federal statutes governing crime and criminal investigations. See 8 U.S.C. § 1324a(b)(5); see also 8 C.F.R. § 274a.2(b)(4). The remaining information contains an I-9 form. Release of this document in this instance would be "for purposes other than for enforcement" of the referenced federal statutes. Accordingly, we find the submitted I-9 form, which we have marked, is confidential under section 1324a of title 8 of the United States Code and must only be released in compliance with the federal laws and regulations governing the employment verification system.

Section 552.101 also encompasses the Medical Practice Act ("MPA"), subtitle B of title 3 of the Occupations Code. Occ. Code §§ 151.001-167.202. Section 159.002 of the MPA provides in pertinent 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.
- (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.

Id. § 159.002(a), (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). Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See* Occ. Code §§ 159.002, .004; Open Records Decision No. 598 (1991). Upon review, we find the information we have marked constitutes confidential medical records subject to the MPA. Accordingly, the city may only release the marked information in accordance with the MPA.

Section 552.101 of the Government Code also 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 type 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. Whether information is subject to a legitimate public interest and therefore not protected by common-law privacy must be determined on a case-by-case basis. *See* Open Records Decision No. 373 (1983). This office has also found that personal financial information not relating to a financial transaction between an individual and a governmental body is excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 600 (1992) (public employee's withholding allowance certificate, designation of beneficiary of employee's retirement benefits, direct deposit authorization, and employee's decisions regarding voluntary benefits programs, among others, are protected under common-law privacy), 373 at 4 (determination of whether public's interest in obtaining personal financial information is sufficient to justify its disclosure must be made on case-by-case basis). Upon review, we find that the information we have marked is highly intimate or embarrassing and not of legitimate public concern. Therefore, the city must withhold the information we have marked pursuant to section 552.101 of the Government Code in conjunction with common-law privacy.

We note a portion of the remaining information may be subject to section 552.117 of the Government Code. 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. *See* Gov't Code §§ 552.117(a)(1), .024. We note section 552.117 also encompasses a personal cellular telephone number, unless the cellular service is paid for by a governmental body. *See* Open Records Decision Nos. 670 at 6 (2001), 506 at 5-7 (1988) (statutory predecessor to section 552.117 not applicable to cellular telephone numbers provided and paid for by governmental body and intended for official use). 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). The city may only withhold information under

section 552.117(a)(1) on behalf of a former or current employee who has made a request for confidentiality under section 552.024 prior to the date on which the request for information was made. In this instance, we have marked the personal information of the former employee that may be subject to section 552.117. You have not informed us whether this employee timely elected to keep her personal information confidential. Therefore, we must rule conditionally. To the extent the individual whose personal information we have marked timely elected to withhold the personal information we marked under section 552.024, the marked information must be withheld under section 552.117(a)(1); however, the city may only withhold the marked cellular telephone number we marked if the employee at issue paid for the cellular telephone service with her own funds. To the extent the individual did not timely elect confidentiality, the marked information may not be withheld under section 552.117(a)(1).

In summary, with respect to the previously ruled upon resignation letter, the city must continue to rely on Open Records Letter No. 2011-02606 as a previous determination and withhold or release that information in accordance with Open Records Letter No. 2011-02606. The city must withhold the W-4 form we have marked under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code. The I-9 form we marked is confidential under section 1324a of title 8 of the United States Code and must only be released in compliance with the federal laws and regulations governing the employment verification system.² The city may only release the marked medical records in accordance with the MPA. The city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. To the extent the former employee timely elected confidentiality under section 552.024 of the Government Code for the personal information we have marked, the city must withhold this information under section 552.117(a)(1) of the Government Code; however, the city may only withhold the marked cellular telephone number if the former employee paid for the service with her own funds. 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,

²We note Open Records Decision No. 684 (2009) is a previous determination issued to all governmental bodies authorizing them to withhold ten categories of information, including a Form I-9 under section 552.101 in conjunction with section 1324a of title 8 of the United States Code and a W-4 form under section 552.101 in conjunction with section 6103(a) of title 26 of the United States Code, without the necessity of requesting an attorney general decision.

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
Open Records Division

KH/em

Ref: ID# 412307

Enc. Submitted documents

c: Requestor
(w/o enclosures)