



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

July 27, 2020

Mr. Scott Merchant
General Counsel
Texas Civil Commitment Office
4616 West Howard Lane, Building 2, Suite 350
Austin, Texas 78728

OR2020-18678

Dear Mr. Merchant:

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# 836346 (Ref. No. 2020-0010).

The Texas Civil Commitment Office (the "TCCO") received a request for information related to individuals housed in a specified facility, including information pertaining to the requestor, as well as certain policies. You claim some of the submitted information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered the submitted arguments and reviewed the submitted representative sample of information.¹

Initially, we note some of the submitted information is subject to section 552.022 of the Government Code, which provides, in relevant part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

¹We 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.

- (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). We note the submitted information contains completed reports subject to section 552.022(a)(1). This information must be released unless it is excepted from disclosure under section 552.108 of the Government Code, or is made confidential under the Act or other law. *See id.* Although you assert the information subject to section 552.022(a)(1) is excepted from disclosure under section 552.103 of the Government Code, this section is discretionary and does not make information confidential under the Act. *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 No. 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, none of the information subject to section 552.022(a)(1) may be withheld under section 552.103 of the Government Code. However, as section 552.101 of the Government Code makes information confidential under the Act, we will consider the applicability of this section to the information subject to section 552.022(a)(1), which we marked. We will also consider your argument under section 552.103 for the information not subject to section 552.022(a)(1) of the Government Code.

Section 552.103 of the Government Code provides, in relevant part:

(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 governmental body claiming section 552.103 has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information it seeks to withhold. To meet this burden, the governmental body must demonstrate: (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 that litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, orig. proceeding); *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).

The TCCO states, and provides documentation showing, prior to its receipt of the instant request, a lawsuit styled *Welsh v. Correct Care Recovery Solutions*, Cause No. 5:18 -CV-00020-35287, was pending against TCCO in the United States District Court, Northern District of Texas, Lubbock Division and another lawsuit styled *Welsh v. Bryan Collier*, Cause No. 1:20-cv-00337-RP-ML, was pending against TCCO in the United States District Court, Western District of Texas when the TCCO received the request. Therefore, we agree litigation was pending on the date the TCCO received the present request for information. The TCCO also states the information at issue pertains to the substance of the lawsuit claims. Based on these representations and our review, we find the information at issue is related to the pending litigation. Therefore, we conclude the TCCO may withhold the information we marked under section 552.103 of the Government Code.

Generally, however, once information has been obtained by all parties to the litigation though discovery or otherwise, no section 552.103(a) interest exists with respect to that information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to all parties to the pending litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

Section 552.101 of the Government Code excepts from public 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 841.0833 of the Health and Safety Code, which reads as follows:

- (a) The office shall develop procedures for the security and monitoring of committed persons in each programming tier.
- (b) Information regarding the security and monitoring procedures developed under Subsection (a) is confidential and not subject to disclosure under [the Act].

Health & Safety Code § 841.0833. The TCCO states the remaining information consists of policies and procedures related to the security and monitoring of sexually violent predators. However, upon review, we find the TCCO has failed to establish any of the remaining information consists of procedures for the security or monitoring of committed persons for purposes of section 841.0833. Therefore, the TCCO has not demonstrated the remaining information is confidential under section 841.0833 of the Health and Safety Code, and the TCCO may not withhold it under section 552.101 on that ground.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both

prongs of this test must be satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987). The court of appeals has concluded public citizens' dates of birth are protected by common-law privacy pursuant to section 552.101. *See Paxton v. City of Dallas*, No. 03-13-00546-CV, 2015 WL 3394061, at *3 (Tex. App.—Austin May 22, 2015, pet. denied) (mem. op.). We note the requestor has a right of access to information pertaining to himself that would otherwise be confidential under common-law privacy. *See* Gov't Code § 552.023(a) ("a person or person's authorized representative has a special right of access, beyond the right of the general public, to information held by a governmental body that relates to a person and that is protected from public disclosure by laws intended to protect that person's privacy interests"); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning herself). The TCCO may not withhold private information pertaining to the requestor on the basis of common-law privacy. Additionally, we find you have failed to demonstrate any portion of the remaining information is highly intimate or embarrassing and not of legitimate public concern. Thus, none of the remaining information may be withheld under section 552.101 in conjunction with common-law privacy.

In summary, the TCCO may withhold the information we marked under section 552.103 of the Government Code. The TCCO must release the remaining information.²

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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,

Sean McCormick
Assistant Attorney General
Open Records Division

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² We note the requestor has a right of access to some of the information being released. *See* Gov't Code § 552.023(a); ORD 481 at 4. Thus, if the TCCO receives another request for the same information from a different requestor, the TCCO must again seek a decision from this office.

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Enc. Submitted documents

c: Requestor
(w/o enclosures)