



January 16, 2001

Mr. G. Chadwick Weaver
First Assistant City Attorney
City of Midland
P.O. Box 1152
Midland, Texas 79702-1152

OR2001-0153

Dear Mr. Weaver:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 143572.

The City of Midland (the "city") received a request for the employment records of a city employee. You claim that the requested information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We first note that the submitted materials include records which are subject to release provisions independent of the Public Information Act. Release of medical records is governed by section 159.002 of the Occupations Code, the Medical Practices Act ("MPA"), rather than by chapter 552 of the Government Code. The MPA provides in relevant part:

(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 . . . may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

The MPA requires that any subsequent release of medical records be consistent with the purposes for which a governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Moreover, information that is subject to the MPA includes both medical records and information obtained from those medical records. *See* Occ. Code § 159.002(a), (b), (c); Open Records Decision No. 598 (1991). The MPA provides specific release provisions. *See* Occ. Code §§ 159.004(5), 159.005(1) (providing that otherwise

confidential medical information may be released to a person who bears a written consent of the patient that complies with the requirements of the MPA). We have marked the information which is governed by the MPA. You may release this marked information only in accordance with the MPA.

The submitted materials also include information that may not be withheld unless made confidential by law outside of the Public Information Act. Section 552.022 of the Government Code lists several such categories of information. In pertinent part this section provides:

- (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:

...

- (3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body

We have marked the information which we consider to be subject to section 552.022(a)(3).¹ This marked information is not made confidential by other law and must therefore be released.

Information considered to be confidential by law, either constitutional, statutory, or by judicial decision is excepted from required disclosure by section 552.101 of the Government Code. This section encompasses information protected by other statutes. Records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a mental health professional are confidential by statute. Health & Safety Code § 611.002(a). The Health & Safety Code defines "patient" as "a person who consults or is interviewed by a professional for diagnosis, evaluation, or treatment of any mental or emotional condition or disorder, including alcoholism or drug addiction; "professional" is defined in part as "a person licensed or certified by this state to diagnose, evaluate, or treat any mental or emotional condition or disorder." Health and Safety Code § 611.001. We have marked the submitted information that is subject to section 611.002(a) of the Health & Safety Code. This marked information must be withheld under section 552.101 of the Government Code. Section 552.103(a) of the Government Code excepts from disclosure information relating to litigation to which the state or a political subdivision is or may be a party. To secure the

¹The responsive information subject to section 552.022(a)(3) of the Government Code includes records of disbursements from the Texas Municipal League Intergovernmental Risk Pool. These disbursements are expenditures of city funds made through the city's agent for Workers' Compensation Insurance benefits.

protection of section 552.103(a), a governmental body has the burden of providing relevant facts and documents to show 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 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.). Further, to be excepted under section 552.103, the information must relate to litigation that is pending or reasonably anticipated on the date that the information was requested. Gov't Code § 552.103(c).

Workers' compensation insurance for employees of municipalities and other political subdivisions of the state is governed by chapter 504 of the Labor Code. Joint insurance funds are authorized under section 504.016 of that code. Chapters 409-417 of the Labor Code are made to apply to chapter 504 by section 504.002(7) of the Labor Code. Chapter 417 of the Labor Code governs third party liability for damages of workers covered by workers' compensation insurance. Section 417.001 of that chapter provides in relevant part:

(b) If a [workers' compensation] benefit is claimed by an injured employee or a legal beneficiary of the employee, the insurance carrier is subrogated to the rights of the injured employee and may enforce the liability of the third party in the name of the injured employee or the legal beneficiary. . .

"Insurance carrier" is defined by this code to include "a governmental entity that self-insures, either individually or collectively." Labor Code § 401.011(27)(C).

You relate that the subject city employee was injured on the job, received payments through the city's workers' compensation agent based on that injury, and is now the plaintiff seeking recovery for those injuries in a pending law suit brought against third parties. You further relate that the city has filed subrogation claims in that lawsuit, and that legal counsel represents the city in those claims. You do not indicate that the city has intervened in the pending litigation. You indicate that the city self-insures for workers' compensation risks collectively via the joint insurance fund administered by the Texas Municipal League. We note that the workers' compensation payments responsive to the subject request for information were made to a city employee by the Texas Municipal League Intergovernmental Risk Pool. Therefore, you have established that the city has a statutory right to sue, in the name of the injured worker, any party which is allegedly liable for the injured worker's damages, as well as a right to intervene in the pending case. We construe your position to be that the city intends to exercise its statutory remedies to recover the payments made to the injured worker. We conclude that the city has demonstrated from the totality of circumstances that litigation was reasonably anticipated at the time that the city received the request for information.

To determine that information relates to anticipated or pending litigation, we follow the rule that “ordinarily, the words ‘related to’ mean ‘pertaining to,’ ‘associated with’ or ‘connected with.’” *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.). From our review of the submitted information, we conclude that it relates to the anticipated litigation.

We conclude that responsive information may be withheld under section 552.103 of the Government Code. However, absent special circumstances, where the opposing party to the anticipated litigation has had access to the records at issue, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). If the opposing parties in the anticipated litigation have seen or had access to any of the information in these records, there is no justification for now withholding that information from the requestor pursuant to section 552.103(a). Also note that the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982). The submitted information which is subject to the release requirements of the Public Information Act, has not been designated in this decision as subject to required release, and has not been made available to an opposing party in the anticipated litigation, may be withheld under section 552.103 of the Government Code.

In summary, you must release the information which we have marked to indicate that it falls within section 552.022(a)(3) of the Government Code, as well as any information which an opposing party in the anticipated litigation has had access to and that is not made confidential by law. You must withhold the information that we have identified as subject to Health & Safety Code § 611.002(a). You may release the information which we have identified as subject to the MPA only in accordance with the release provisions of the MPA. While litigation is pending or anticipated you may withhold the remaining information under section 552.103(a) of the Government Code.

As the above discussion disposes of this request, we do not address your arguments raised under other sections of the Government Code. 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 appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, 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 statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, 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 appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public 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 General Services Commission 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,



Michael Jay Burns
Assistant Attorney General
Open Records Division

MJB/er

Ref: ID# 143572

Encl: Submitted documents

cc: Mr. Bill Harriger
Murchison, Hund & Harriger, L.L.P.
P.O. Box 54390
Lubbock, Texas 79453-4390
(w/o enclosures)