



July 30, 2002

Ms. Lynn Rossi Scott
Bracewell & Patterson
500 North Akard Street, Suite 4000
Dallas, Texas 75201-3387

OR2002-4162

Dear Ms. Scott:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 166358.

The Grand Prairie Independent School District (the "district"), which you represent, received a request for copies of "Barbosa's Bulletin" and "Barbosa's Blast" from March 15, 2002 through May 10, 2002. You explain that these documents are weekly communications from the district superintendent to the members of the district school board. In addition, you inform us that the requestor has confirmed that she is not requesting the supporting documentation relating to these communications. *See* Gov't Code § 552.222 (providing that a governmental body may ask the requestor to clarify the request if what information is requested is unclear to the governmental body). You indicate that you will provide all of the requested copies of "Barbosa's Bulletin" and most of the requested copies of "Barbosa's Blast" to the requestor. You claim, however, that the remainder of the requested information is excepted from disclosure under sections 552.026, 552.101, 552.103, 552.107, 552.111, and 552.114 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. You claim that a portion of the information consists of medical records made confidential under the Medical Practice Act ("MPA"), chapter 159 of the Occupations Code. Section 159.002 of the MPA provides:

(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.

Information subject to the MPA includes both medial records and information obtained from those medical records. *See* Occ. Code § 159.002(a), (b), (c). The documents at issue were not created or maintained by a physician. Moreover, you do not argue, nor do the documents indicate, that the information you have marked as protected by the MPA was obtained from medical records. Therefore, we determine that no portion of the information is subject to the MPA.

Section 552.101 also encompasses the doctrine of common-law privacy. 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. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The common-law right of privacy protects the privacy of individual persons. *See* Open Records Decision No. 432 (1985). Consequently, a person's right of privacy lapses upon death. *See Moore v. Charles B. Pierce Film Enterprises Inc.*, 589 S.W.2d 489 (Tex. Civ. App.--Texarkana 1979, writ ref'd n.r.e.); *see also* Attorney General Opinions JM-229 (1984); H-917 (1976). Upon review of the information you have marked under common-law privacy, we note that the information does not refer to any individual person by name, nor do the marked portions of the documents contain other information that in any way identifies any particular person. Moreover, some of the information you seek to protect under common-law privacy relates to individuals who are deceased. Thus, the district may not withhold any portion of the information under section 552.101 in conjunction with the common-law right to privacy.

Next, you contend that portions of the information, which you have marked, are excepted from disclosure under section 552.103 of the Government Code. Section 552.103(a) excepts from disclosure information relating to litigation to which the state or a political subdivision is or may be a party. A governmental body 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 was pending or reasonably anticipated on the date the governmental body received the request for information, 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, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). 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." 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.¹ 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. *See* Open Records Decision No. 331 (1982). Open Records Decision No. 452 at 4 (1986). A governmental body must meet both prongs of this test for information to be excepted under 552.103(a).

With respect to the first entry you have marked under section 552.103, you state that the district is a defendant in a pending lawsuit filed by a district parent in the 160th Judicial District Court of Dallas County, Cause No. 02-3663. Regarding the second entry you have marked under section 552.103, you state that this information relates to the grievance of a district employee who has filed an appeal with the Commissioner of Education. You indicate that the administrative hearing relating to this grievance is a contested case conducted under the Administrative Procedure Act, chapter 2001 of the Government Code. *See* Open Records Decision No. 588 at 7 (1991) (contested cases conducted under the Administrative Procedure Act considered litigation under section 552.103). Based your representations and our review of the submitted information, we agree that the district was involved in pending litigation with respect to the first entry, and that the district reasonably anticipated litigation with respect to the second entry, on the date the district received the present request for information. Further, we find that the information you have marked is related to the pending and anticipated litigation. Therefore, we agree that the district may withhold this information under section 552.103 of the Government Code.

We note, however, that once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to all opposing parties in all the pending lawsuits is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, 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).

Next you assert that some of the information may be withheld from disclosure under section 552.107(1) and the attorney-client privilege. Section 552.107(1) excepts information that an attorney cannot disclose because of a duty to the attorney's client. In Open Records

¹In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only “privileged information,” that is, information that reflects either confidential communications from the client to the attorney or the attorney’s legal advice or opinions; it does not apply to all client information held by a governmental body’s attorney. *Id.* at 5. When communications from attorney to client do not reveal the client’s communications to the attorney, section 552.107 protects them only to the extent that such communications reveal the attorney’s legal opinion or advice. *Id.* at 3. You state that the information you have marked under the attorney-client privilege represents a communication between district staff and legal counsel. Upon review, we find that this information reveals a privileged communication. The district may, therefore, withhold this information from public disclosure pursuant to section 552.107(1) of the Government Code.

Finally, you contend that portions of the submitted information are excepted under section 552.111 of the Government Code. Section 552.111 excepts from disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. An agency’s policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. Open Records Decision No. 615 at 5-6 (1993). Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Id.* at 4-5. We agree that the information you seek to withhold is protected under section 552.111. We have marked the information the district may withhold under section 552.111 of the Government Code.

In summary, the marked attorney-client communication may be withheld under section 552.107 of the Government Code. The marked information reflecting the policymaking process of the district may be withheld under section 552.111 of the Government Code. We have marked information that the district may withhold under section 552.103 of the Government Code. The remaining information must be released to the requestor.

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 Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



David R. Saldivar
Assistant Attorney General
Open Records Division

DRS/seg

Ref: ID# 166358

Enc: Submitted documents

c: Ms. Jennifer Arend
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(w/o enclosures)