



OFFICE *of the* ATTORNEY GENERAL  
GREG ABBOTT

April 23, 2003

Mr. Joe A. De Los Santos  
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P.O. Box 460606  
San Antonio, Texas 78246-0606

OR2003-0949A

Dear Mr. Santos:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 179852. This office issued Open Records Letter No. 03-0949 on February 12, 2003. In that decision, we determined that the Comal Independent School District (the "district"), which you represent, did not request a decision from this office within the deadline mandated by section 552.301(b) of the Government Code. Accordingly, we concluded that the responsive information could not be withheld pursuant to section 552.103 of the Government Code, although portions of the requested information were protected under 552.101, 552.117, and 552.130. Since that ruling was issued, we have received your letter of February 19, 2003, containing a written representation from the requestor that the request was faxed to the district, and thus received by the district, one day later than the district stated in its brief. This additional information establishes that the district mailed its request for an attorney general decision within the ten business day deadline required by section 552.301(b) of the Government Code. We have re-examined our ruling in Open Records Letter No. 03-0949. This decision substitutes the decision issued on February 12, 2003.

The Comal Independent School District (the "district"), which you represent, received a request for the following six categories of information relating to an automobile accident:<sup>1</sup>

1. any incident or accident report generated by the district;

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<sup>1</sup>We note that the district received a second request for information and that the documents responsive to the second request received by the district are a subset of the documents responsive to the first request received by the district.

2. the name, address and telephone number and insurance information regarding the bus driver;
3. identification information, including bus number, license plate number, vehicle identification number, make and model of school bus involved in the collision;
4. medical payment benefits claims forms applicable to the incident;
5. copies of any governmental reports prepared or to be prepared by the district to any governmental entity concerning the incident; and
6. any insurance/self insurance information, including identification of applicable policies, claim numbers, names, addresses and telephone numbers of the district's claims representatives.

Although you state that the district is providing some responsive information to the requestor, you claim that the submitted documents contain information that is excepted from disclosure under sections 552.101, 552.103, 552.117 and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.103 provides 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.

The district 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 is pending or reasonably anticipated at the time the request is received, 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). The district must meet both prongs of this test for information to be excepted under section 552.103(a).

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." 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.<sup>2</sup> 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). 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).

The district relies on the request itself as evidence of anticipated litigation. Quoting from the request, you state that the requestor "has been retained by his clients in regard to the 'personal injuries and wrongful death claims' arising from an automobile collision involving his clients and the [d]istrict." However, the request only indicates that an attorney has been retained and is seeking information. As noted above, 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. *Id.* Based on our review of the arguments and the submitted information, we conclude that the district has not demonstrated that litigation was anticipated on the date the request was received. Accordingly, we conclude that the district may not withhold the requested information from disclosure pursuant to section 552.103 of the Government Code.

You also claim exception under section 552.101 of the Government Code. Section 552.101 excepts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses information that is made confidential under other statutes. In this instance, you assert that portions of the submitted information are confidential and must be withheld from the requestor under the Medical Practice Act (the "MPA"). Section 159.002 of the MPA provides in relevant part:

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<sup>2</sup>In 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).

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

Occ. Code § 159.004. 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). 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). Upon review of the submitted information, we conclude that some of the submitted information, which we have marked, constitutes medical records subject to the MPA.

You also contend that the insurance information in the submitted documents is confidential under section 101.104 of the Texas Civil Practice and Remedies Code. This section of the Texas Civil Practice and Remedies Code provides:

(a) Neither the existence nor the amount of insurance held by a governmental unit is admissible in the trial of a suit under [the Texas Tort Claims Act].

(b) Neither the existence nor the amount of the insurance is subject to discovery.

Tex. Civ. Prac. & Rem. Code § 101.104; *see In re Sabine Valley Center*, 986 S.W.2d 612 (Tex. 1999) (statute “prohibits discovery of insurance covering claims against a governmental unit and against its employees for which it could be liable, directly or vicariously, under the [Texas Tort Claims] Act”). Although the statute provides that the information at issue is not subject to discovery, the statute does not make the information expressly confidential. *See* Open Records Decision No. 551 at 3 (1990) (provisions of section 101.104 “are not relevant to the availability of the information to the public”). Therefore, we conclude that the district may not withhold any of the submitted information under section 101.104 of the Texas Civil Practice and Remedies Code as section 101.104 is not a confidentiality statute.

You also argue that the submitted records contain information that is excepted from disclosure under section 552.117 of the Government Code. Section 552.117(1) excepts from disclosure information relating to the home address, home telephone number, and social security number of a current or former government employee, as well as information revealing whether the employee has family members, if the current or former employee requested that this information be kept confidential under section 552.024. *See* Open Records Decision Nos. 622 (1994), 455 (1987). However, you may not withhold this information in the case of a current or former employee who made the request for confidentiality under section 552.024 after the request for information was made. Whether a particular piece of information is public must be determined at the time the request for it is made. Open Records Decision No. 530 at 5 (1989). As the submitted information demonstrates that the employee at issue made a timely election under section 552.024, the district must withhold the information that we have marked under section 552.117(1).

Lastly, you contend that the motor vehicle information contained in the submitted documents is confidential under section 552.130 of the Government Code. Section 552.130 provides in relevant part:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

(1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]

(2) a motor vehicle title or registration issued by an agency of this state[.]

Thus, pursuant to section 552.130, the district must withhold the motor vehicle information that we have marked.

In summary, we have marked the information that may be released only in accordance with the MPA. We have also marked the personal information that must be withheld under section 552.117 and the motor vehicle information that must be withheld under section 552.130. The remaining information must be released.

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 Dep't of Pub. 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,



Heather Pendleton Ross  
Assistant Attorney General  
Open Records Division

HPR/sdk

Ref: ID# 179852

Enc: Submitted documents

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