



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 10, 2009

Mr. Brett Norbraten
Open Records Attorney
Texas Department of Aging and Disability Services
P.O. Box 149030
Austin, Texas 78714-9030

OR2009-01769

Dear Mr. Norbraten:

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# 334621 (Department #2008SOLEG0251).

The Texas Department of Aging and Disability Services (the "department") received a request for seven categories of information pertaining to the Austin State School, including workers' compensation reports and forms; abuse, neglect, and exploitation investigations; and superintendent e-mails. You state that you do not possess any information responsive to categories four and seven of the request.¹ You claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.117, and 552.147

¹The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990).

of the Government Code.² We have considered the exceptions you claim and reviewed the submitted information, some of which is a representative sample.³

Initially, we note that some of the submitted information is not responsive to the instant request for information because it was created after the date of the request. We have marked the non-responsive information. This ruling does not address the public availability of any information that is not responsive to the request and the department is not required to release that information in response to the request.

We first address your argument under section 552.103 of the Government Code, as it is potentially the most encompassing section you raise. Section 552.103 of the Government Code provides:

(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 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, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—

²We note that although you did not timely raise sections 552.101, 552.102, and 552.117 of the Government Code, these provisions may constitute compelling reasons to withhold information, and we will consider your arguments under these exceptions. See Gov't Code §§ 552.301, .302. We also note that although you do not raise section 552.147 in your brief to this office, you have marked portions of the submitted information under this exception. Thus, we understand you to raise section 552.147.

³We 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.

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). A governmental body must meet both prongs of this test for information to be excepted under 552.103(a).

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To demonstrate that litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* 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. 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).

The department states that prior to the instant request, it was subject to action by the United States Department of Justice ("DOJ") "under the Civil Rights of Institutionalized Persons Act ("CRIPA") . . . by virtue of the DOJ's investigation into and report on conditions at the Lubbock State School." The department states that under CRIPA, the DOJ's time frame for filing a lawsuit has not elapsed, and "it is likely that the DOJ will file a lawsuit in federal court to incorporate the settlement agreement into a judgment enforceable by the court, as that is the DOJ's usual practice in CRIPA investigations." The department further explains that it is currently "anticipating federal CRIPA litigation and/or settlement negotiations with respect to the [Austin State School]" as well because on March 11, 2008, the DOJ informed Governor Rick Perry that it was commencing an investigation into the care and treatment of residents at yet another state school "pursuant to [its] authority under [CRIPA]." The department argues that this letter to the Governor is analogous to a notice letter under the Texas Tort Claims Act. In addition, the department states that on December 1, 2008, the DOJ issued a report titled, "Statewide CRIPA Investigation of the Texas State Schools and Centers." The department asserts that as a result of the findings of the report, "the rest of the state schools and centers, including the Austin State School, now finds themselves in a similar position to the Lubbock State School." Based on your representations and our review, we determine that the department reasonably anticipated litigation on the date that it received this request for information. You state the information in Exhibit A relates to the anticipated litigation because it is one of the types of information the DOJ sought in their investigation. Thus, we find the submitted information is related to the anticipated litigation. Therefore, the department may withhold Exhibit A under section 552.103 of the Government Code.

Generally, however, 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 the opposing party in the anticipated litigation 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).

You assert the information you have marked in Exhibit B is excepted under section 552.101 of the Government Code, which 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, including the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. Section 159.002 of the MPA provides in part the following:

(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.

Occ. Code § 159.002(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). Further, information that is subject to the MPA also includes information that was obtained from medical records. See Occ. Code. § 159.002(a), (b), (c); see also Open Records Decision No. 598 (1991).

Medical records must be released upon the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Occ. Code §§ 159.004, .005. Any subsequent release of medical records must be consistent with the purposes for which the governmental body obtained the records. See *id.* § 159.002(c); Open Records Decision No. 565 at 7 (1990). We have marked the medical records in the remaining information that are subject to the MPA. The department may only disclose these records in accordance with the MPA.

Section 552.102(a) excepts from public disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]"

Gov't Code § 552.102(a). Section 552.102 is applicable to information that relates to public officials and employees. *See* Open Records Decision No. 327 at 2 (1982) (anything relating to employee's employment and its terms constitutes information relevant to person's employment relationship and is part of employee's personnel file). The privacy analysis under section 552.102(a) is the same as the common-law privacy standard under section 552.101. *See Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref'd n.r.e.) (addressing statutory predecessor). In *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), the Texas Supreme Court held that information is protected by common-law privacy if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of a legitimate concern to the public. To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. The type of information considered intimate and 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. Upon review, we agree the submitted documents contain information about employees which may be considered intimate and embarrassing. However, because this information pertains to workers' compensation claims, we find there is a legitimate public interest in this information. *See* Open Records Decision Nos. 545 at 4 (1990) (attorney general has found kinds of financial information not excepted from public disclosure by common law privacy to generally be those regarding receipt of governmental funds or debts owed to governmental entities), 423 at 2 (1984) (scope of public employee privacy is narrow). Accordingly, none of the remaining information may be withheld under either section 552.101 or section 552.102 on the basis of common-law privacy.

Next, you state that some of the remaining information in Exhibit B is excepted from disclosure under section 552.117(a)(1) of the Government Code. Section 552.117(a)(1) excepts from disclosure the home address, home telephone number, social security number, and family member information of a current or former official or employee of a governmental body who requests that this information be kept confidential under section 552.024 of the Government Code. 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). If the employee at issue timely elected to keep her personal information confidential under section 552.024, the department must withhold the information you have marked, in addition to the information we have marked, pursuant to section 552.117(a)(1). If the employee at issue did not make a timely request for confidentiality, the information at issue may not be withheld on this basis, and we will address your remaining argument against disclosure of this information.

To the extent that the employee at issue did not timely elect confidentiality in regards to the information we have marked under section 552.117, section 552.147 of the Government Code provides that “[t]he social security number of a living person is excepted from”

required public disclosure under the Act. Gov't Code § 552.147. Accordingly, if the employee at issue did not make a timely election, the department may withhold the social security numbers contained in the remaining information under section 552.147 of the Government Code.

In summary, the department may withhold the submitted information in Exhibit A under section 552.103 of the Government Code. The department may only disclose the medical records we have marked in accordance with the MPA. If the employee at issue timely elected to keep her personal information confidential under section 552.024 of the Government Code, the department must withhold the information you have marked, in addition to the information we have marked, pursuant to section 552.117(a)(1) of the Government Code. If the employee did not make a timely election, then the department may withhold the social security numbers you have marked under section 552.147 of the Government Code. The remaining information must be released to the requestor.

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, 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 at (512) 475-2497.

Sincerely,



Greg Henderson
Assistant Attorney General
Open Records Division

GH/eeg

Ref: ID# 334621

Enc. Submitted documents

c: Requestor
(w/o enclosures)