



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 11, 2009

Mr. Joe R. Anderson
Burns, Anderson, Jury, & Brenner, L.L.P.
P.O. Box 26300
Austin, Texas 78755-6300

OR2009-06309

Dear Mr. Anderson:

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# 342582 (your ID# 020.23598).

The Texas Association of School Boards Risk Management Fund (the "fund"), which you represent, received four requests for information pertaining to a specified insurance claim. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

You assert Exhibit B is subject to 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." Gov't Code § 552.101. This section encompasses information protected by other statutes. Section 552.101 encompasses section 402.083(a) of the Labor Code, which provides that "[i]nformation in or derived from a claim file regarding an employee is confidential and may not be disclosed by the [Division of Workers' Compensation of the Texas Department of Insurance (the "division")] except as provided by this subtitle[.]" Labor Code § 402.083(a). In Open Records Decision No. 533 (1989), the City of Brownsville had received a request for similar information. This office construed the predecessor to section 402.083(a) to apply only to information that the governmental body obtained from the Industrial Accident Board, subsequently the Texas Workers' Compensation Commission, and now the division. *See* Open Records Decision No. 533 at 3-6; *see also* Labor Code § 402.086 (transferring confidentiality conferred by Labor Code § 402.083(a) to information that other parties obtain from division files). Accordingly, information in the possession of the fund that was not obtained from the division may not be withheld on the basis of section 402.083(a). Upon review, we find that you have failed to explain or represent that the fund received the documents at issue from the division. Therefore, none of Exhibit B may be withheld under section 552.101 in conjunction with section 402.083(a).

We note, however, that Exhibit B contains records subject to the Medical Practice Act (the "MPA"). Section 552.101 encompasses the MPA, Occ. Code §§ 151.001-165.160. Section 159.002 of the MPA provides:

(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, 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. This office has concluded that the protection afforded by section 59.002 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). We have also found that when a file is created as the result of a hospital stay, all the documents in the file relating to diagnosis and treatment constitute physician-patient communications or "[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician." Open Records Decision No. 546 (1990). We note that section 159.001 of the MPA defines "patient" as a person who consults with or is seen by a physician to receive medical care. *See* Occ. Code § 159.001(3). Under this definition, a deceased person cannot be a "patient" under section 159.002 of the MPA. Thus, section 159.002 is applicable only to the medical records of a person who was alive at the time of the diagnosis, evaluation, or treatment.

Upon review, we have marked medical records that are subject to the MPA. We note, however, that the requestors are relatives of the individual to whom the medical records pertain. Medical records pertaining to a deceased individual may be released only on the signed consent of the personal representative of the deceased. *Id.* § 159.005(a)(5). The consent must specify (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. *Id.* §§ 159.004, .005. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Accordingly, the submitted medical records may only be released in accordance with the MPA.

We now turn to your arguments regarding the remaining information at issue, including Exhibits C and D.¹ You assert Exhibit D is subject to section 552.103 of the Government Code, which provides in relevant part 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.

Gov't Code § 552.103(a), (c). The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. *See* Open Records Decision No. 551 at 4-5 (1990). 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 that the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Thomas v. Cornyn*, 71 S.W.3d 473, 487 (Tex. App.—Austin 2002, no pet.); *Univ. of Tex. Law Sch. v. Tex. 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.*); ORD 551 at 4. A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

To establish that litigation is reasonably anticipated for purposes of section 552.103, a governmental body must provide this office with "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." *See* 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. 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,

¹We note that you have also submitted the documents within Exhibits C and D within Exhibit B. This office will consider the documents within Exhibits C and D separate and apart from Exhibit B.

but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982).

You inform this office that Exhibit D pertains to an insurance claim that was denied by the fund. You state you anticipate litigation regarding this exhibit because the claimants have informed your office that they plan on disputing the fund's finding in a contested case under the Administrative Procedure Act. However, you do not indicate, nor does the information reflect, that an individual has taken any objective steps towards initiating litigation against the fund. *See* Open Records Decision No. 361 (1983). Therefore, we find the fund has not demonstrated that litigation was pending or reasonably anticipated on the date it received the instant request for information. Accordingly, the fund may not withhold any portion of Exhibit D under section 552.103 of the Government Code.

Section 552.107(1) protects information that comes within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services, to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. *See* TEX. R. EVID. 503(b)(1). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication, meaning it was "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." *Id.* 503(a)(5). Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state that Exhibit C constitutes a confidential communication between the fund and the fund's attorneys, all of whom you have identified. You explain the yellow-highlighted information within Exhibit D encompasses the entire text of Exhibit C. You state that this

communication was made in furtherance of the rendition of legal services to the fund, and you inform this office that this communication has remained confidential. Based on your representations and our review, we agree that Exhibit C and the yellow-highlighted portion of Exhibit D constitute a privileged attorney-client communication. Accordingly, the fund may withhold this information under section 552.107 of the Government Code.

You have also marked information within Exhibit D under section 552.111 of the Government Code. Section 552.111 of the Government Code 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." Gov't Code § 552.111. This section encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Open Records Decision No. 677 at 4-8 (2002). Rule 192.5 defines work product as

- (1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or
- (2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX. R. CIV. P. 192.5. A governmental body seeking to withhold information under this exception bears the burden of demonstrating that the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. TEX. R. CIV. P. 192.5; ORD 677 at 6-8 (2002). In order for this office to conclude that the information was made or developed in anticipation of litigation, we must be satisfied that:

- (a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and
- (b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

Nat'l Tank Co. v. Brotherton, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204; ORD 677. We note that this test differs from the anticipated litigation test of section 552.103, which requires a showing that, on the date a request for information is received, a potential opposing party has taken an objective step towards litigation. Under the anticipated litigation test of the attorney work product privilege under section 552.111, a governmental body only need show that, when

documents at issue were created or obtained, the governmental body believed that litigation would ensue. *See* ORD 677 (describing differences between section 552.103 and the attorney work product privilege under section 552.111).

You represent that the information you highlighted in blue within Exhibit D consists of attorney notes and work product produced during the claim investigation at issue. Furthermore, you have demonstrated that when this information was created, the fund believed litigation regarding the insurance claim specified in the request would ensue. Therefore, we conclude that the fund may withhold the information you highlighted in blue within Exhibit D under section 552.111 of the Government Code.

In summary, the fund may only release the marked medical records within Exhibit B in accordance with the MPA. The fund may withhold Exhibit C, as well as the information you highlighted in yellow within Exhibit D, under section 552.107 of the Government Code. The fund may also withhold the information you highlighted in blue within Exhibit D under section 552.111 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,



Ana Carolina Vieira
Assistant Attorney General
Open Records Division

ACV/eeg

Ref: ID# 342582

Enc. Submitted documents

c: 4 Requestors
(w/o enclosures)