



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 30, 2009

Mr. William R. Crow, Jr.  
Corporate Counsel  
San Antonio Water System  
P.O. Box 2449  
San Antonio, Texas 78298-2449

OR2009-09063

Dear Mr. Crow:

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# 347537.

The San Antonio Water System (the "system") received a request for information related to specified audit projects, correspondence between named individuals, and information related to the requestor. You state the system has released some information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.103 and 552.116 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>2</sup>

Initially, we note that some of the submitted information is not responsive to the instant request. You state, and provide documentation showing, that you sought and received clarification from the requestor for portions of the requested information. *See Gov't Code*

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<sup>1</sup>We note that in your brief dated May 4, 2009, you withdrew your assertion of sections 552.101, 552.107, and 552.111 of the Government Code.

<sup>2</sup>We 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.

§ 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information). Based on the requestor's response to the clarification request, you state, and the submitted information reflects, that the requestor withdrew his request for certain e-mail attachments and audits, and narrowed his request for the date range of other e-mails. This information, which we have marked, is not responsive to the request. This ruling does not address the public availability of any information that is not responsive to the request and the system is not required to release that information in response to the request.

Next, you raise section 552.103 of the Government Code for the responsive information in Exhibit D. Section 552.103 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.

*Id.* § 552.103(a), (c). The system has the burden of providing relevant facts and documents to show that the section 552.103 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. *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.); Open Records Decision No. 551 at 4 (1990). The system must meet both prongs of this test for information to be excepted under section 552.103.

You state, and provide documentation showing, that the requestor filed a claim of discrimination with the Equal Employment Opportunity Commission (the "EEOC") prior to the date of the system's receipt of this request for information. This office has stated that a pending EEOC complaint indicates that litigation is reasonably anticipated. *See* Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982). Thus, we agree the system reasonably anticipated litigation on the date it received the present request for information. You indicate the information at issue is related to the anticipated litigation. Based on your

representations and our review, we conclude section 552.103 is generally applicable to the responsive information in Exhibit D.

We note, however, it appears the requestor, who is also the opposing party, has seen or had access to some of the responsive information in Exhibit D. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to the litigation to obtain such information through discovery procedures. *See* ORD 551 at 4-5. Thus, when the opposing party has seen or had access to information relating to pending litigation, there is no interest in withholding that information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). We further note that the applicability of section 552.103 ends once the related litigation concludes. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982). Accordingly, the responsive information in Exhibit D that the requestor has not seen or had access to may be withheld under section 552.103 of the Government Code. The information the requestor has seen or had access to, which we have marked, may not be withheld under section 552.103.

We next address your argument under section 552.116 of the Government Code for Exhibit E. Section 552.116 provides:

(a) An audit working paper of an audit of the state auditor or the auditor of a state agency, an institution of higher education as defined by Section 61.003, Education Code, a county, a municipality, a school district, or a joint board operating under Section 22.074, Transportation Code, including any audit relating to the criminal history background check of a public school employee, is excepted from the requirements of Section 552.021. If information in an audit working paper is also maintained in another record, that other record is not excepted from the requirements of Section 552.021 by this section.

(b) In this section:

(1) "Audit" means an audit authorized or required by a statute of this state or the United States, the charter or an ordinance of a municipality, an order of the commissioners court of a county, a resolution or other action of a board of trustees of a school district, including an audit by the district relating to the criminal history background check of a public school employee, or a resolution or other action of a joint board described by Subsection (a) and includes an investigation.

(2) "Audit working paper" includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

Gov't Code § 552.116. A governmental body that invokes section 552.116 must demonstrate that the audit working papers are from an audit authorized or required by statute by identifying the applicable statute. Here, you have not demonstrated that the system is one of the entities enumerated in section 552.116(a) that may assert section 552.116, nor have you identified the applicable statute that authorized or required the audits in Exhibit E. *See id.* §§ 552.116(a), (b)(1), (b)(2). Therefore, no portion of Exhibit E may be withheld under section 552.116 of the Government Code.

We note the information already seen by the requestor in Exhibit D, as well as the information in Exhibit E, may be subject to sections 552.101, 552.117, 552.130, and 552.136 of the Government Code.<sup>3</sup> Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision" and encompasses information that is made confidential by statute. Gov't Code § 552.101. Section 552.101 encompasses information made confidential by other statutes, including the Medical Practice Act ("MPA"). Occ. Code §§ 151.001-165.160. Section 159.002 provides in pertinent 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, 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.

*Id.* § 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). We have also found that when a file is created as the result of a hospital stay, all the

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<sup>3</sup>The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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). 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). We have marked a medical record in Exhibit E that is subject to the MPA. The system may only disclose the marked record in accordance with the MPA.

Section 552.101 also encompasses the common-law right of privacy, which protects information 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 legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The types 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. In addition, this office has found that some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Accordingly, the system must withhold the information that we have marked in Exhibit E under section 552.101 in conjunction with common-law privacy.

Section 552.117(a)(1) of the Government Code excepts from public disclosure the home address and 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. Section 552.117 excepts from public disclosure the present and former home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Gov't Code § 552.117(a)(1). Section 552.117 also encompasses personal cellular telephone numbers, provided that the cellular phone service is paid for by the employee with his or her own funds. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular mobile numbers paid for by governmental body and intended for official use). Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for information. Therefore, to the extent the cellular telephone numbers we have marked are personal cellular telephone numbers of current or former system employees, such information must be withheld under section 552.117(a)(1) if the

employees at issue timely elected confidentiality under section 552.024. Further, to the extent the employees to whom this information pertains timely elected confidentiality for their information under section 552.024, the system must withhold the home addresses, home telephone numbers, and social security numbers we have marked under section 552.117(a)(1).<sup>4</sup>

Section 552.130 of the Government Code excepts from disclosure "information [that] relates to . . . a motor vehicle operator's or driver's license or permit issued by an agency of this state [or] a motor vehicle title or registration issued by an agency of this state[.]" Gov't Code § 552.130. Thus, the system must withhold the Texas license plate numbers we have marked pursuant to section 552.130 of the Government Code.

Finally, section 552.136 of the Government Code states that "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." *Id.* § 552.136. Accordingly, the system must withhold the customer account numbers we have marked under section 552.136 of the Government Code.

In summary, except for the information the requestor has seen or had access to, the system may withhold the responsive information in Exhibit D pursuant to section 552.103 of the Government Code. The medical record we have marked may only be released in accordance with the MPA. The system must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The system must withhold the information we have marked under section 552.117 of the Government Code, to the extent the employees to whom this information pertains timely elected confidentiality for their information under section 552.024. The system must withhold the information we have marked under sections 552.130 and 552.136 of the Government Code. The remaining information must be released.

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](http://www.oag.state.tx.us/open/index_orl.php), or call the Office of the Attorney General's Open Government Hotline, toll free,

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<sup>4</sup>Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

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,

A handwritten signature in cursive script that reads "Jordan Hale".

Jordan Hale  
Assistant Attorney General  
Open Records Division

JH/cc

Ref: ID# 347537

Enc. Submitted documents

cc: Requestor  
(w/o enclosures)