



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

July 21, 2009

Mr. Robert L. Blumenfeld  
Mendel Blumenfeld, L.L.P.  
5809 Acacia Circle  
El Paso, Texas 79912

OR2009-10104

Dear Mr. Blumenfeld:

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# 349992.

El Paso County Mental Health and Mental Retardation ("EPMHMR"), which you represent, received a request for information relating to a warrant involving the requestor. You claim that the requested information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the information you submitted. We also have considered the comments that we received from the requestor. *See* Gov't Code § 552.304 (any person may submit written comments stating why information at issue in request for attorney general decision should or should not be released).

We first note that some of the submitted information falls within the scope of section 552.022(a)(1) of the Government Code. Section 552.022(a)(1) provides for required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body[,]" unless the information is expressly confidential under other law or excepted from disclosure under section 552.108 of the Government Code. Gov't Code § 552.022(a)(1). In this instance, the submitted information includes a completed evaluation of the requestor that was made for or by EPMHMR. You do not claim an exception to disclosure of the evaluation under section 552.108. Although you do seek to withhold that information under section 552.103 of the Government Code, that section is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See id.* § 552.007; *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive Gov't Code § 552.103); Open Records Decision No. 665 at 2 n.5 (2000) (discretionary

exceptions generally). As such, section 552.103 is not other law that makes information expressly confidential for the purposes of section 552.022(a)(1). Therefore, EPMHMR may not withhold any of the information in the completed evaluation under section 552.103 of the Government Code.

Next, we address your claim for the rest of the submitted information under section 552.103. This exception provides in part:

(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.

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(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 that claims an exception to disclosure under section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information at issue. To meet this burden, the governmental body must demonstrate that litigation was pending or reasonably anticipated on the date of its receipt of the request for information and that the information at issue is related to the pending or anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1<sup>st</sup> Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See Open Records Decision No. 551 at 4 (1990).*

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 establish that litigation is reasonably anticipated, a governmental body must provide this office with "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." *Id.*<sup>1</sup> You inform us that the requestor was detained by a court for a mental evaluation. You state

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<sup>1</sup>Among other examples, this office has concluded that litigation was reasonably anticipated where the opposing party took the following objective steps toward litigation: (1) filed a complaint with the Equal Employment Opportunity Commission ("EEOC"), *see Open Records Decision No. 336 (1982)*; (2) 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 (3) threatened to sue on several occasions and hired an attorney, *see Open Records Decision No. 288 (1981)*.

that the requestor has informed EPMHMR that he has referred issues relating to that incident to his attorney. You also state that the requestor has informed EPMHMR of his intent to file complaints with federal, state, and local authorities. You contend that "this matter presents itself as more than a chance that litigation will occur." Having considered your arguments, we find that you have not demonstrated that the requestor had taken any concrete steps toward litigation with EPMHMR on the date of its receipt of this request for information. Thus, we find that you have not established that EPHMR reasonably anticipated litigation with the requestor when it received his request for information. *See* Gov't Code § 552.103(c); Open Records Decision No. 331 (1982) (reasonable anticipation of litigation not established by requestor's public statements on more than one occasion of intent to file suit). We therefore conclude that EPMHMR may not withhold any of the remaining information under section 552.103 of the Government Code.

We note, however, that section 552.101 of the Government Code is applicable in this instance.<sup>2</sup> Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information that other statutes make confidential. The submitted evaluation of the requestor is governed by provisions of chapter 611 of the Health and Safety Code. Section 611.002 provides in part:

- (a) Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.
- (b) Confidential communications or records may not be disclosed except as provided by Section 611.004 or 611.0045.

Health and Safety Code § 611.002(a)-(b); *see id.* § 611.001 (defining "patient" and "professional"). Sections 611.004 and 611.0045 of the Health and Safety Code provide for access to information that section 611.002 makes confidential only by certain individuals. *See id.* §§ 611.004, 611.0045; Open Records Decision No. 565 (1990). We find that the submitted evaluation of the requestor, which we have marked, is confidential under section 611.002 of the Health and Safety Code. We therefore conclude that EPMHMR must withhold that information under section 552.101 of the Government Code in conjunction with section 611.002 unless the requestor is authorized to obtain the evaluation under sections 611.004 and 611.0045 of the Health and Safety Code. *See* Health and Safety Code § 611.004(a)(4) (professional may disclose confidential information to person who has patient's written consent).

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<sup>2</sup>Unlike other exceptions to disclosure, this office will raise section 552.101 on behalf of a governmental body, because the Act prescribes criminal penalties for the release of confidential information. *See* Gov't Code §§ 552.007, .352; Open Records Decision No. 325 at 2 (1982).

Section 552.101 of the Government Code also encompasses section 576.005 of the Health and Safety Code, which provides that “[r]ecords of a mental health facility that directly or indirectly identify a present, former, or proposed patient are confidential unless disclosure is permitted by other state law.” *Id.* § 576.005. We find that the rest of the submitted information falls within the scope of section 576.005. We are not aware of any other state law that would permit disclosure of the remaining information in this instance. We therefore conclude that EPMHMR must withhold the rest of the submitted information under section 552.101 of the Government Code in conjunction with section 576.005 of the Health and Safety Code. *See* Open Records Decision No. 163 (1977) (construing statutory predecessor).

In summary: (1) EPMHMR must withhold the marked evaluation of the requestor under section 552.101 of the Government Code in conjunction with section 611.002 of the Health and Safety Code unless he is authorized to obtain that information under sections 611.004 and 611.0045 of the Health and Safety Code; and (2) the rest of the submitted information must be withheld under section 552.101 in conjunction with section 576.005 of the Health and Safety Code.

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, 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,



Amanda Crawford  
Assistant Attorney General  
Open Records Division

AC/cc

Ref: ID# 349992

Enc: Submitted documents

c: Requestor  
(w/o enclosures)