



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

August 6, 2009

Ms. Vanessa A. Gonzalez  
Allison, Bass, & Associates, L.L.P.  
402 West 12<sup>th</sup> Street  
Austin, Texas 78701

OR2009-10946

Dear Ms. Gonzalez:

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# 351363.

Bandera County (the "county"), which you represent, received a request for a named officer's termination letter and personnel file.<sup>1</sup> You state you have released some information to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that you have redacted portions of the submitted information. Pursuant to section 552.301 of the Government Code, a governmental body that seeks to withhold requested information must submit to this office a copy of the information, labeled to indicate which exceptions apply to which parts of the copy, unless the governmental body has received a previous determination for the information at issue. *See* Gov't Code § 552.301(a), (e)(1)(D). The previous determination issued in Open Records Decision No. 670 (2001) authorizes a governmental body to withhold the home addresses and telephone numbers, personal cellular phone and pager numbers, social security numbers, and family member information of peace officers, as defined by article 2.12 of the Code of Criminal Procedure, under section 552.117(a)(2) without the necessity of requesting a decision from this office. ORD 670. You do not assert, however, nor does our review of our records indicate, that you have been authorized to withhold the remaining responsive redacted information without seeking a ruling from this office. Gov't Code § 552.301(a); Open Records Decision No. 673 (2000). As such, this type of information must be submitted

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<sup>1</sup>The requestor states she is not requesting the named officer's social security number, addresses, and family information. Therefore, this information is not responsive to the present request for information. We do not address non-responsive information in this ruling and the county need not release non-responsive information in response to the present request.

in a manner that enables this office to determine whether the information comes within the scope of an exception to disclosure. In this instance, we can discern you have redacted an officer's date of birth; thus, being deprived of that information does not inhibit our ability to make a ruling. In the future, however, the county should refrain from redacting any information that it submits to this office in seeking an open records ruling. Failure to do so may result in the presumption that the redacted information is public. *See* Gov't Code § 552.302.

Next, we note that some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides, in pertinent part, as follows:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

*Id.* § 552.022(a)(1). The submitted information includes completed performance evaluations. Therefore, as prescribed by section 552.022, the county must release this information unless it is confidential under other law. You argue the completed evaluations are excepted under sections 552.101 and 552.103 of the Government Code. However, section 552.103 is a discretionary exception under the Act and does not constitute "other law" for purposes of section 552.022. *See 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 section 552.103); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Accordingly, the county may not withhold the completed evaluations under section 552.103 of the Government Code. However, because information subject to section 552.022 may be withheld under section 552.101, we will address your argument under section 552.101 for the completed evaluations. We will also address your argument under section 552.103 for the information that is not subject to section 552.022.

Next, we address your section 552.103 claim for the information that is not subject to section 552.022. 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.

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 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). 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, 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). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. ORD 452 at 4. This office has stated that a pending Equal Employment Opportunity Commission ("EEOC") complaint indicates that litigation is reasonably anticipated. See Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982).

You state, and provide documentation showing, that on April 23, 2009, the officer named in the request filed an EEOC complaint that alleged discrimination by the county's sheriff's department. Based on your representation and our review of the submitted EEOC complaint, we agree that the county reasonably anticipated litigation on the date it received the present request for information. You state the submitted personnel file contains information pertaining to the officer's employment and termination, which are at issue in the discrimination complaint to the EEOC. Based on your representations and our review, we agree that the information at issue relates to litigation anticipated by the county.

We note, however, that some of the documents you seek to withhold under section 552.103 have been provided to or from the potential opposing party to the anticipated litigation. If a potential opposing party has seen or had access to information that is related to anticipated litigation, through discovery or otherwise, then there is no interest in withholding such information from public disclosure under section 552.103. See Open Records Decision Nos. 349 (1982), 320 (1982). Therefore, the county may not withhold this information, which we have marked, under section 552.103 of the Government Code. However, because we have no indication the remaining information at issue has been seen or obtained by the

opposing party, these documents may be withheld under section 552.103.<sup>2</sup> We note the applicability of section 552.103(a) ends once the litigation is no longer reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

Next, you raise section 552.101 of the Government Code for the information in Exhibit I. 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 section encompasses confidentiality provisions such as section 58.007 of the Family Code. Juvenile law enforcement records relating to conduct that occurred on or after September 1, 1997 are confidential under section 58.007. *See* Fam. § Code 58.007. For purposes of section 58.007, "child" means a person who is ten years of age or older and under seventeen years of age. *See id.* § 51.02(2). Section 58.007 provides in relevant part:

(c) Except as provided by Subsection (d), law enforcement records and files concerning a child and information stored, by electronic means or otherwise, concerning the child from which a record or file could be generated may not be disclosed to the public and shall be:

(1) if maintained on paper or microfilm, kept separate from adult files and records;

(2) if maintained electronically in the same computer system as records or files relating to adults, be accessible under controls that are separate and distinct from controls to access electronic data concerning adults; and

(3) maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subchapters B, D, and E.

*Id.* § 58.007(c). We agree the information in Exhibit I pertains to a report of juvenile delinquent conduct that occurred after September 1, 1997. This conduct is within the scope of section 58.007. *See id.* § 51.03(a). Accordingly, the county must withhold the information in Exhibit I under section 552.101 of the Government Code in conjunction with section 58.007 of the Family Code.<sup>3</sup>

Next, you raise the federal Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 42 U.S.C. §§ 1320d-1320d-8, for a portion of the information not excepted under section 552.103 of the Government Code. At the direction of Congress, the Secretary

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<sup>2</sup>As our ruling is dispositive for this information, we need not address your remaining arguments against its disclosure.

<sup>3</sup>As our ruling is dispositive for this information, we need not address your remaining arguments against its disclosure.

of Health and Human Services (“HHS”) promulgated regulations setting privacy standards for medical records, which HHS issued as the Federal Standards for Privacy of Individually Identifiable Health Information. *See* Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 1320d-2 (Supp. IV 1998) (historical & statutory note); Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. Pts. 160, 164 (“Privacy Rule”); *see also* Attorney General Opinion JC-0508 at 2 (2002). These standards govern the releasability of protected health information by a covered entity. *See* 45 C.F.R. pts. 160, 164. Under these standards, a covered entity may not use or disclose protected health information, except as provided by parts 160 and 164 of the Code of Federal Regulations. *See id.* § 164.502(a).

This office has addressed the interplay of the Privacy Rule and the Act. In Open Records Decision No. 681 (2004), we noted that section 164.512 of title 45 of the Code of Federal Regulations provides that a covered entity may use or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law. *See* 45 C.F.R. § 164.512(a)(1). We further noted that the Act “is a mandate in Texas law that compels Texas governmental bodies to disclose information to the public.” *See* ORD 681 at 8; *see also* Gov’t Code §§ 552.002, .003, .021. We therefore held that the disclosures under the Act come within section 164.512(a). Consequently, the Privacy Rule does not make information confidential for the purpose of section 552.101 of the Government Code. *See Abbott v. Tex. Dep’t of Mental Health & Mental Retardation*, 212 S.W.3d 648 (Tex. App.—Austin 2006, no pet.); ORD 681 at 9; *see also* Open Records Decision No. 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). Thus, because the Privacy Rule does not make information that is subject to disclosure under the Act confidential, the county may withhold protected health information from the public only if the information is confidential under other law or an exception in subchapter C of the Act applies.

Section 552.101 also encompasses the Medical Practice Act (“MPA”), subtitle B of title 3 of the Occupations Code. 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 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). Upon review, we find Exhibit N, which we marked, constitutes a medical record that is subject to the MPA and may only be released in accordance with the MPA.<sup>4</sup>

Next, you argue the completed evaluations and the information not excepted under section 552.103 are confidential under section 552.101 of the Government Code. Section 552.101 also encompasses the doctrine of common-law privacy, which protects information that (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). To demonstrate the applicability of common-law privacy, both prongs of this test must be demonstrated. *Id.* at 681-82. 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. We note this office has found that the public has a legitimate interest in the qualifications and work conduct of employees of governmental bodies. See Open Records Decision Nos. 562 at 10 (1990), 542 at 5 (1990); see also Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow). Upon review, we find you have failed to establish how any portion of the remaining information constitutes highly intimate or embarrassing information of no legitimate public concern. Thus, none of the remaining information may be withheld on the basis of common-law privacy.

Lastly, we note portions of the remaining information are subject to section 552.130 of the Government Code.<sup>5</sup> Section 552.130 excepts from disclosure information relating to a motor vehicle operator's license, driver's license, motor vehicle title, or registration issued by a Texas agency. See Gov't Code § 552.130(a)(1), (2). Accordingly, the county must withhold the Texas motor vehicle information we have marked under section 552.130.

In summary, the county must withhold (1) the information in Exhibit I under section 552.101 of the Government Code in conjunction with section 58.007 of the Family Code, and (2) the information we have marked under section 552.130 of the Government Code. Exhibit N constitutes a marked medical record that may only be released in accordance with the MPA. With the exception of the information we have marked for release, the county may withhold the remaining responsive information under section 552.103 of the Government Code.

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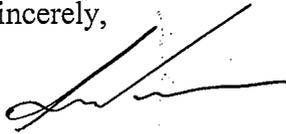
<sup>4</sup>As our ruling is dispositive for this information, we need not address your argument against its disclosure.

<sup>5</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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,



Ana Carolina Vieira  
Assistant Attorney General  
Open Records Division

ACV/eeg

Ref: ID# 351363

Enc. Submitted documents

c: Requestor  
(w/o enclosures)