



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 2, 2009

Ms. Cheryl K. Byles
Assistant City Attorney
City of Fort Worth
1000 Throckmorton Street Third Floor
Fort Worth, Texas 76102.

OR2009-13921

Dear Ms. Byles:

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# 357000 (PIR No. 3811-09).

The City of Fort Worth (the "city") received a request for information relating to the requestor, including correspondence involving three named individuals and the city's legal department. You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.111, 552.136, and 552.137 of the Government Code.¹ We have considered the exceptions you claim and reviewed the information you submitted.² We also have considered the comments we received from the requestor.³

We first note that you have labeled some of the submitted information as having been previously released. The Act does not permit selective disclosure of information to the

¹Although you assert the attorney work-product privilege under section 552.107, we note that the appropriate exception under which to claim that privilege is section 552.111. *See* Open Records Decision No. 677 (2002).

²We note that the city received the instant request for information on May 27, 2009, but did not request this decision until July 27. You explain, and have submitted documentation demonstrating, that the city required the requestor to make a deposit for payment of anticipated costs under section 552.263 of the Government Code and received the cost deposit on July 13. Based on your representations and documents, we conclude that the date of the city's receipt of this request was July 13 and that the city complied with section 552.301 of the Government Code in requesting this decision. *See* Gov't Code § 552.263(e) (if governmental body requires deposit or bond for anticipated costs pursuant to Gov't Code § 552.263, request for information is considered to have been received on date that governmental body receives deposit or bond); *see also id.* § 552.301(a)-(b), (e).

³*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).

public. *See* Gov't Code §§ 552.007(b), .021; Open Records Decision No. 463 at 1-2 (1987). Thus, information that has been voluntarily released to a member of the public may not subsequently be withheld from another member of the public, unless public disclosure of the information is expressly prohibited by law or the information is confidential under law. *See* Gov't Code § 552.007(a); Open Records Decision Nos. 518 at 3 (1989), 490 at 2 (1988); *but see* Open Records Decision Nos. 579 (1990) (exchange of information among litigants in "informal" discovery is not "voluntary" release of information for purposes of statutory predecessor to Gov't Code § 552.007), 454 at 2 (1986) (governmental body that disclosed information because it reasonably concluded that it had constitutional obligation to do so could still invoke statutory predecessor to Gov't Code § 552.108). You seek to withhold the information that was previously released under section 552.103 of the Government Code, which is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *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 Gov't Code § 552.103); Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.103 neither prohibits public disclosure of information nor makes information confidential under law. Therefore, the submitted information that was previously released may not be withheld under section 552.103 and must be made available to the requestor.

We also note that the submitted information includes the requestor's medical records. Section 552.101 of the Government Code 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. Medical records are confidential under the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. Section 159.002 of the MPA provides in 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.

Occ. Code § 159.002(b)-(c). This office has determined that in governing access to a specific subset of information, the MPA prevails over the more general provisions of the Act. *See* Open Records Decision No. 598 (1991). Medical records must be released on the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) the reasons or purposes for the release, and (3) the person to whom the information is to be released. *See* 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).

The medical records we have marked must be withheld under section 159.002 of the MPA unless the city receives the required written consent for release under sections 159.004 and 159.005.

Next, we address your claim under section 552.103 of the Government Code for the remaining information. 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.

....

(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 that it seeks to withhold. To meet this burden, the governmental body must demonstrate that (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) 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 [1st 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).*

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." *Open Records Decision No. 452 at 4 (1986).* Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *Id.* You inform us, and have provided documentation reflecting, that the requestor filed a claim of discrimination with the federal Equal Employment Opportunity Commission ("EEOC") prior to the date of the city's receipt of the instant request for information. We understand the city to contend that the submitted information is related to the requestor's discrimination claim. 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).* Therefore, based on your representations and documentation, we find that the city reasonably anticipated litigation on the date of its receipt of this request. We also find that the submitted information is related

to the anticipated litigation. We therefore conclude that section 552.103 of the Government Code is generally applicable to the submitted information.

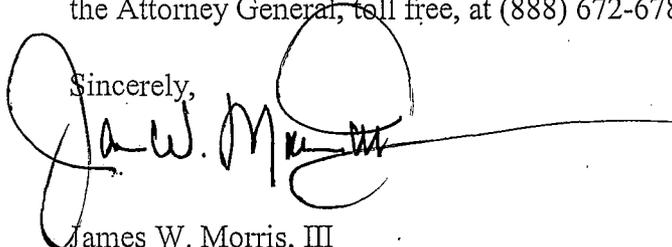
We note that the purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. *See* ORD 551 at 4-5. Thus, when the opposing party has seen or had access to information relating to anticipated litigation, through discovery or otherwise, there is no interest in withholding that information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). In this instance, the requestor has already seen or had access to much of the remaining information. However, the requestor, who is a former city employee, only had access to this information in the usual scope of her employment. Such information is not considered to have been obtained by the opposing party to anticipated litigation and thus may be withheld under section 552.103. Therefore, the city may withhold the rest of the submitted information under section 552.103. We note that the applicability of this exception ends once the related litigation concludes or is no longer reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary: (1) the information that was previously released must be made available to the requestor; (2) the marked medical records must be withheld under section 159.002 of the MPA unless the city receives the required written consent for release under sections 159.004 and 159.005; and (3) the city may withhold the rest of the submitted information under section 552.103 of the Government Code. As we are able to make these determinations, we do not address the other exceptions you claim.

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, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, appearing to read "James W. Morris, III", with a long horizontal line extending to the right.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/cc

Ref: ID# 357000

Enc: Submitted documents

c: Requestor
(w/o enclosures)