



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

January 5, 2010

Ms. Victoria Huynh  
Assistant City Attorney III  
City of Plano  
P.O. Box 860358  
Plano, Texas 75086-0358

OR2010-00149

Dear Ms. Huynh:

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# 366197.

The City of Plano (the "city") received a request for the requestor's personnel file and all documentation regarding a specified harassment complaint. You state you have provided the requestor with a portion of the requested information. You claim that the submitted information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, we note that a portion of the submitted information is subject to 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). The submitted information includes a completed investigation made by the city. Although you seek to withhold all of the submitted 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 Nos. 665 at 2 n.5 (discretionary exceptions generally), 542 at 4 (1990) (statutory predecessor to Gov't

Code § 552.103 could be waived). As such, section 552.103 is not "other law" that makes information expressly confidential for the purposes of section 552.022. Therefore, the city may not withhold the completed investigation, which we have marked, under section 552.103. As you raise no further exceptions to disclosure for this information, the marked investigation must be released.

We note the remaining information contains a medical record. Section 552.101 of the Government Code exempts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."<sup>1</sup> Gov't Code § 552.101. This exception encompasses information other statutes make confidential, such as the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. *See* Occ. Code § 151.001. Section 159.002 of the MPA provides, in part:

(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.

*Id.* § 159.002(a)-(c). Information subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004; Open Records Decision No. 598 (1991). 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). Medical records must be released upon the patient's signed, written consent, provided that the consent specifies (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. Occ. Code §§ 159.004, .005. We have marked the medical record that is subject to the MPA. We note, however, that the requestor is the subject of the marked medical record. Accordingly, if the requestor provides the proper consent, the marked medical record

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<sup>1</sup>The Office of the Attorney General will raise a mandatory exception like section 552.101 on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

must be released to him. *See id.* § 159.005(a)(2). General exceptions in the Act, like section 552.103, cannot impinge on a statutory right of access to information. *See* Open Records Decision Nos. 613 at 4 (1993), 451 at 3 (1986) (specific statutory right of access provisions overcome general exceptions to disclosure under the Act). If the requestor does not provide the proper consent, the marked medical record must be withheld under section 552.101 in conjunction with the MPA.

We note the submitted information also contains mental health records. Section 552.101 of the Government Code also encompasses section 611.002(a) of the Health and Safety Code, which pertains to mental health records. Section 611.002(a) provides that “[c]ommunications 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.” Health & Safety Code § 611.002(a). Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals. *See* Open Records Decision No. 565 (1990). These sections permit disclosure of mental health records to a patient, a person authorized to act on the patient’s behalf, or a person who has the written consent of the patient. Health & Safety Code §§ 611.004, .0045. We have marked the information that is confidential under section 611.002 of the Health and Safety Code. We note, however, that the requestor is the subject of the marked mental health records. Accordingly, if the city receives the required consent, the marked mental health records must be released to the requestor. *See id.* §§ 611.004, .0045; *see also* ORD 613 at 4, 451 at 3. Otherwise, the marked mental health records must be withheld under section 552.101 in conjunction with section 611.002 of the Health and Safety Code.

We next address your claim under section 552.103 of the Government Code for the remaining information. Section 552.103 provides in relevant 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). The city 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 the governmental body received the request, 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 city must meet both prongs of this test for information to be excepted under section 552.103(a).

You inform us, and provide documentation showing that, prior to the city's receipt of the present request for information, a lawsuit styled *Bobby Cole v. Brenda Mammel*, Case Number 429-01106-2008, was served on city employees through the city secretary and was filed against the city employees in connection with their employment. Thus, we conclude litigation involving the city was pending when the city received the request. You state that the claims raised in the plaintiff's petition pertain to the issues addressed in the remaining information at issue. Therefore, we find this information relates to the pending litigation. Accordingly, the city may withhold the remaining information pursuant to section 552.103 of the Government Code.

We note, however, once information has been obtained by all plaintiffs in the pending litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. *See* Open Records Decision Nos. 349 at 2 (1982), 320 at 1 (1982). Thus, information that has either been obtained from or provided to all the opposing parties in the pending litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends when the litigation has concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 at 2 (1982); Open Records Decision Nos. 350 at 3 (1982), 349 at 2 (1982).

In summary, the completed investigation that is subject to section 552.022(a)(1) of the Government Code must be released. If the city receives the proper consent, the marked medical and mental health records must be released in accordance with the MPA and chapter 611 of the Health and Safety Code. Otherwise, the city must withhold the marked medical and mental health records under section 552.101 of the Government Code in conjunction with the MPA and section 611.002 of the Health and Safety Code. The city may withhold the remaining information pursuant to section 552.103 of the Government Code.<sup>2</sup>

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<sup>2</sup>We note that the information being released contains confidential information to which the requestor has a right of access. *See* Gov't Code § 552.023(a); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual asks governmental body to provide him with information concerning himself). Therefore, if the city receives another request for this same information from a different requestor, then the city should again seek a decision from this office.

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

Sincerely,



Sarah Casterline  
Assistant Attorney General  
Open Records Division

SEC/jb

Ref: ID# 366197

Enc. Submitted documents

c: Requestor  
(w/o enclosures)