



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

March 4, 2011

Ms. Bonnie Hungerford  
ScottHulse PC  
P.O. Box 99123  
El Paso, Texas 79999-9123

OR2011-03136

Dear Ms. Hungerford:

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# 410666.

The Ysleta Independent School District (the "district"), which you represent, received a request for the requestor's client's personnel file, as well as any information relating to the decision to terminate the requestor's client. 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 submitted information. We have also received and considered comments submitted by the requestor. *See Gov't Code § 552.304* (providing that interested party may submit written comments regarding why information should or should not be released).

Initially, we note the submitted information includes the requestor's client's W-4 form. 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 section encompasses information protected by other statutes, such as section 6103(a) of title 26 of the United States Code. Section 6103(a) renders tax return information confidential. Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision No. 600 (1992) (W-4 forms). Section 6103(b) defines the term "return information" as "a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments . . . or any other data, received

by, recorded by, prepared by, furnished to, or collected by the Secretary [of the Internal Revenue Service] with respect to a return or with respect to the determination of the existence, or possible existence, of liability . . . for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense[.]” 26 U.S.C. § 6103(b)(2)(A). Federal courts have construed the term “return information” expansively to include any information gathered by the Internal Revenue Service regarding a taxpayer’s liability under title 26 of the United States Code. *See Mallas v. Kolak*, 721 F. Supp. 748, 754 (M.D.N.C. 1989), *dismissed in part, aff’d in part, vacated in part, and remanded*, 993 F.2d 1111 (4th Cir. 1993).

Subsections (c) and (e) of section 6103 are exceptions to the confidentiality provisions of section 6103(a) and provide for disclosure of tax information to the taxpayer or the taxpayer’s designee. *See* 26 U.S.C. § 6103(c), (e)(1)(A)(i) (tax return information may be disclosed to taxpayer), (e)(7) (information may be disclosed to any person authorized by subsection(e) to obtain such information if Secretary of Treasury determines such disclosure would not seriously impair tax administration); *see also Lake v. Rubin*, 162 F.3d 113 (D.C. Cir. 1998) (section 6103 represents exclusive statutory route for taxpayer to gain access to own return information and overrides individual’s right of access under the federal Freedom of Information Act). Section 6103(c) provides, unless the Secretary of Treasury determines that disclosure would seriously impair tax administration, tax record information may be released to any person or persons as the taxpayer may designate in a consent to such disclosure. *See* 26 U.S.C. § 6103(c). Therefore, pursuant to section 6103(c) of title 26 of the United States Code, the district must release the requestor’s client’s W-4 form, which we have marked, to the requestor if the requestor is the client’s designee and the Secretary of Treasury determines such disclosure would not seriously impair federal tax administration. Otherwise, the W-4 form we have marked is confidential under section 6103 of title 26 of the United States Code and must be withheld under section 552.101 of the Government Code.

We also note the submitted information includes a medical record pertaining to the requestor’s client. Section 552.101 also encompasses the Medical Practice Act (the “MPA”), subtitle B of title 3 of the Occupations Code, which 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.

Occ. Code § 159.002(b)-(c). Information subject to the MPA includes both medical records and information obtained from those medical records. *See id.* This office has determined 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). Upon review, we find the information we marked constitutes a confidential medical record under the MPA. Pursuant to the MPA, 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. 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). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991).

Although you claim all of the submitted information is excepted under section 552.103 of the Government Code, the MPA's specific right of access provision prevails over the Act's general exceptions to disclosure. *See* Open Records Decision 451 at 4 (1986) (specific statutory right of access provision overcomes general exception to disclosure under statutory predecessor to Act). In this instance, we note the requestor is the patient's attorney and may have a right of access to his client's medical record. *See* Occ. Code §§ 159.004, .005. Accordingly, if the requestor provides proper consent in accordance with the MPA for the medical record we have marked, it must be released. If the requestor does not provide proper consent, then the marked medical record must be withheld under section 552.101 of the Government Code in conjunction with the MPA.

We next address the requestor's argument that he has a right of access to the requested information under section 552.102 of the Government Code. In support of this assertion, the requestor relies on a sentence in section 552.102(a), which states in part that "all information in the personnel file of an employee of a government body is to be made available to that employee[.]" Gov't Code § 552.102(a). The purpose of section 552.102 is to except from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." *Id.* The language in section 552.102(a) on which the requestor relies is intended to allow a person or person's authorized representative a right of access to information relating to the person that is protected from public disclosure for the purpose of protecting that person's privacy interests. *See* Gov't Code § 552.102(a).

Because the requestor has a special right of access to information implicating his client's privacy interests, the district would not be able to withhold such information on the basis of section 552.102. In this instance, however, the district claims that the remaining information is excepted from disclosure under section 552.103 of the Government Code. The purpose of section 552.103 is not to protect the privacy interests of any individual, but rather to protect a governmental body's interests in situations involving litigation. *See id.* § 552.103. Access provisions that apply to information subject to laws intended to protect a person's

privacy interests (including the language in section 552.102(a) on which the requestor relies) are not relevant in determining whether information is excepted from required public disclosure under section 552.103. As such, we will address the district's argument regarding this exception for the remaining information.

Section 552.103 of the Government Code 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 is pending or reasonably anticipated on the date the governmental body receives 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, 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 governmental body must meet both prongs of this test for information to be excepted from disclosure under section 552.103(a). *See* ORD 551 at 4.

In order to demonstrate that litigation is reasonably anticipated, the governmental body must provide this office "concrete evidence showing that the claim that litigation might ensue is more than a mere conjecture." Open Records Decision No. 452 at 4 (1986). This office has concluded that litigation was reasonably anticipated when the potential opposing party filed a complaint with the Equal Employment Opportunity Commission (the "EEOC"). *See* Open Records Decision No. 336 (1982).

You state, and provide supporting documentation demonstrating, the requestor's client has filed six complaints against the district with the EEOC. Each complaint was filed before the date the district received the present request for information. Based on your representations

and our review, we agree that the district reasonably anticipated litigation on the date it received the present request for information. We also agree the remaining information is related to the anticipated litigation for the purposes of section 552.103.

However, 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. Once information has been obtained by all parties to the pending or anticipated litigation, through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to both the potential plaintiff and defendant in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it may not be withheld on that basis. In this instance, some of the remaining information reflects it was provided to and signed by the requestor's client or provided to the district by the requestor's client. As such, we determine that, with the exception of the information we have marked for release, the district may withhold the remaining information under section 552.103 of the Government Code. We note that the applicability of section 552.103(a) ends when the litigation is concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 (1982) at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2.

In summary: (1) the district must release the marked W-4 form pursuant to section 552.101 of the Government Code in conjunction with section 6103 of title 26 of the United States Code; (2) the district may only release the marked medical record in accordance with the MPA; and (3) with the exception of the information we have marked for release, the district may withhold the remaining information under section 552.103 of the Government Code. The district must release the remaining information.<sup>1</sup>

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.

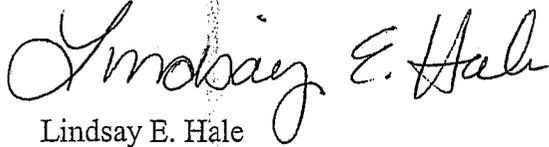
This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), or call the Office of the Attorney General's Open Government Hotline, toll free, at

---

<sup>1</sup>We note the requestor has a right of access to some of the information being released. *See* Gov't Code § 552.023(a) (person or person's authorized representative has special right of access, beyond right of general public, to information held by governmental body that relates to person and is protected from public disclosure by laws intended to protect person's privacy interests); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual asks governmental body to provide him with information concerning himself). Because such information is confidential with respect to the general public, if the district receives another request for this information from an individual other than this requestor or his client, the district must again seek a ruling from this office.

(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 cursive script that reads "Lindsay E. Hale".

Lindsay E. Hale  
Assistant Attorney General  
Open Records Division

LEH/em

Ref: ID# 410666

Enc. Submitted documents

c: Requestor  
(w/o enclosures)