



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 16, 2012

Mr. Robert J. Davis
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OR2012-05422

Dear Mr. Davis:

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# 450698 (Collin File No. 1600-64533).

The Collin County Sheriff's Office (the "sheriff's office"), which you represent, received a request for the requestor's client's personnel file, employee handbooks, benefit information, arbitration agreements, and information pertaining to employer/employee communications and workers' compensation claims. You state the sheriff's office has released some of the requested information. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.117, 552.1175, and 552.119 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note some of the submitted information consists of completed employee evaluations made by or for the sheriff's office, which are subject to section 552.022(a)(1) of the Government Code. Section 552.022(a)(1) provides for the required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108." Gov't Code § 552.022(a)(1). Pursuant to section 552.022(a)(1), a completed report is expressly public unless it is either excepted under 552.108 of the Government Code or is made confidential under the Act or other law. Although you raise section 552.103 of the Government Code, section 552.103 is a discretionary exception to disclosure and does not make information confidential under the Act. 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

section 552.103); Open Records Decision Nos. 665 at 2 n.5 (discretionary exceptions generally), 663 (1999) (governmental body may waive section 552.103). As such, section 552.103 does not make information confidential for the purposes of section 552.022. Therefore, the sheriff's office may not withhold the completed employee evaluations, which we have marked, under section 552.103 of the Government Code. We understand you to claim sections 552.101 and 552.117 of the Government Code apply to the marked evaluations. Because these sections can make information confidential, we will address the applicability of these exceptions to the marked evaluations, as well as the remaining information. We will also address your claim under section 553.103 for the information that is not subject to section 552.022(a)(1).

We note the submitted information contains the requestor's client's fingerprints. Access to fingerprint information is governed by sections 560.001, 560.002, and 560.003 of the Government Code.¹ Section 560.001 provides in part "[i]n this chapter . . . '[b]iometric identifier' means a retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry." Gov't Code § 560.001(1). Section 560.003 provides that "[a] biometric identifier in the possession of a governmental body is exempt from disclosure under [the Act]." *Id.* § 560.003. Section 560.002 provides, however, "[a] governmental body that possesses a biometric identifier of an individual . . . may not sell, lease, or otherwise disclose the biometric identifier to another person unless . . . the individual consents to the disclosure[.]" *Id.* § 560.002(1)(A). Thus, section 560.002(1)(A) of the Government Code gives an individual or her authorized representative a right of access to her own fingerprints. In this instance, the requestor is the authorized representative of the individual whose fingerprints are at issue. Thus, the requestor has a right of access to his client's fingerprints, which we have marked, under section 560.002(1)(A). Although you assert this information is excepted from disclosure under section 552.103 of the Government Code, statutes governing the release of specific information prevail over the general exceptions to disclosure found in the Act. *See* Open Records Decision Nos. 613 at 4 (1993) (exceptions to Act cannot impinge on statutory right of access to information), 451 (1986) (specific statutory right of access provisions overcome general exceptions to disclosure under the Act). Therefore, the sheriff's office must release the marked fingerprints to this requestor under section 560.002 of the Government Code.

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 the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. Section 159.002 of the MPA provides in part the following:

¹The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

(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.* §§ 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 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. *Id.* §§ 159.004, 005. Section 159.002(c) also requires any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Medical records may be released only as provided under the MPA. ORD 598.

We have marked the portions of the remaining information that constitute the requestor's client's medical records. Although you assert this information is excepted from disclosure under section 552.103 of the Government Code, as previously noted, statutes governing the release of specific information prevail over the general exceptions to disclosure found in the Act. *See* ORDs 613 at 4, 451. Accordingly, the medical records we have marked must be withheld under section 552.101 of the Government Code in conjunction with the MPA, unless the sheriff's office receives written consent for release of those records that complies with sections 159.004 and 159.005 of the MPA. However, we find none of the remaining information consists of medical records for purposes of the MPA, and it may not be withheld under section 552.101 on that basis.

We will now address your argument under section 552.103 of the Government Code for the remaining information that is not subject to section 552.022(a)(1). 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). The governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing (1) litigation is pending or reasonably anticipated on the date that the department 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). The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

To establish litigation is reasonably anticipated, a governmental body must provide this office with “concrete evidence showing 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. *See id.* Concrete evidence to support a claim litigation is reasonably anticipated may include, for example, the governmental body’s receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.² *See* Open Records Decision No. 555 (1990); *see also* Open Records Decision No. 518 at 5 (1989) (litigation must be “realistically contemplated”). On the other hand, this office has determined if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Further, the fact a potential opposing party has hired an attorney who makes a request for information does not establish litigation is reasonably anticipated. *See* Open Records Decision No. 361 (1983).

You state the requestor represents a former employee of the sheriff’s office. You explain the requestor’s client was terminated after her leave under the Family and Medical Leave Act expired. You state the circumstances leading up to her termination involved an on-the-job injury and “her workers’ compensation process was somewhat protracted and eventually contentious.” You explain, in the letter containing the instant request for information, the

²In addition, this office has concluded litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); 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 threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

requestor states the former employee has retained him for representation in a claim for work-related injuries and he is seeking a “just and equitable resolution” for his client’s claim. You also state the remaining information not subject to section 552.022(a)(1) pertains to the substance of the anticipated litigation. Based on your representations, our review of the submitted documents, and the totality of the circumstances, we find you have established litigation was reasonably anticipated on the date the sheriff’s office received the request for information. Accordingly, we find the remaining information that is not subject to section 552.022(a)(1) is generally subject to section 552.103 of the Government Code.

However, we note the opposing party in the anticipated litigation has seen or had access to some of the information at issue. 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, if the opposing party has seen or had access to information relating to 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 information we have marked is not protected by section 552.103 and may not be withheld on that basis. We also note the applicability of section 552.103 ends once the related litigation concludes. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982). Accordingly, with the exception of the information we have marked and the information subject to section 552.022(a)(1), the sheriff’s office may withhold the remaining information under section 552.103 of the Government Code.³

You claim some of the remaining information is excepted section 552.101 in conjunction with the Americans with Disabilities Act of 1990 (the “ADA”). *See* 42 U.S.C. §§ 12101 *et seq.* Title I of the ADA requires information about the medical conditions and medical histories of applicants or employees be (1) collected and maintained on separate forms, (2) kept in separate medical files, and (3) treated as a confidential medical record. Information obtained in the course of a “fitness for duty examination,” conducted to determine whether an employee is still able to perform the essential functions of his or her job, is to be treated as a confidential medical record as well. *See* 29 C.F.R. § 1630.14(c); *see also* Open Records Decision No. 641 (1996). The federal Equal Employment Opportunity Commission (the “EEOC”) has determined medical information for purposes of the ADA includes “specific information about an individual’s disability and related functional limitations, as well as general statements that an individual has a disability or that an ADA reasonable accommodation has been provided for a particular individual.” *See* Letter from Ellen J. Vargyas, Legal Counsel, EEOC, to Barry Kearney, Associate General Counsel, National Labor Relations Board, 3 (Oct. 1, 1997). Although you contend some of the information at issue is confidential under the ADA, we find you have not demonstrated any of the information falls within the scope of the federal law. *See Ballard v. Healthsouth Corp.*, 147 F. Supp. 2d 529, 534 (N.D. Tex. 2001) (information not confidential under ADA

³As our ruling on this information is dispositive, we do not address your remaining arguments against its disclosure.

when not obtained by an employer as a result of job-related medical examination); *Wiggins v. DaVita Tidewater, LLC*, 451 F. Supp.2d 789, 801-02 (E.D. Va. 2006) (information not confidential as medical information under ADA if not obtained as part of employee health program or from medical examinations conducted at employer's direction). We therefore conclude the sheriff's office may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with the ADA.

Section 552.117(a)(2) of the Government Code exempts from public disclosure the home addresses, home telephone numbers, emergency contact information, and social security number of a peace officer, as well as information that reveals whether the peace officer has family members, regardless of whether the peace officer complies with section 552.024 or section 552.1175 of the Government Code.⁴ *See* Gov't Code § 552.117(a)(2). We note section 552.117 protects personal privacy. As previously noted, the requestor is the attorney for the officer to whom the request for information pertains. Thus, the requestor is the authorized representative of his client and has a right of access to his client's private information under section 552.023 of the Government Code. *See id.* § 552.023(a); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual or authorized representative asks governmental body to provide information concerning that individual). Upon review, we find none of the remaining information pertains to currently licensed peace officers other than the requestor's client. Accordingly, none of the remaining information may be withheld under section 552.117(a)(2).

A portion of the information the opposing party has seen or had access to may be subject to section 552.1175 of the Government Code. Section 552.1175 states in relevant part as follows:

(b) [T]he home telephone number . . . of an individual to whom this section applies . . . is confidential and may not be disclosed to the public under this chapter if the individual to whom the information relates:

- (1) chooses to restrict public access to the information; and
- (2) notifies the governmental body of the individual's choice on a form provided by the governmental body, accompanied by evidence of the individual's status.

Gov't Code § 552.1175(b). Section 552.1175 applies, in part, to current or former employees of the Texas Department of Criminal Justice (the "TDCJ"). *See id.* § 552.1175(a)(3). Upon review, we find the sheriff's office must withhold the information we have marked under section 552.1175 if the individual to whom this information relates is a current or former employee of the TDCJ and he elects to restrict access to his information in accordance with section 552.1175(b). If this individual is not a current or former employee of the TDCJ, or

⁴"Peace officer" is defined by Article 2.12 of the Texas Code of Criminal Procedure.

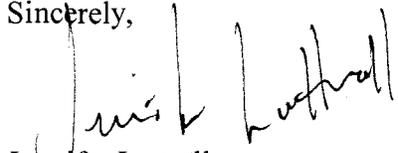
if no election is made, the sheriff's office may not withhold the individual's information under section 552.1175.

In summary, the sheriff's office must release the marked fingerprints under section 560.002 of the Government Code. The medical records we have marked must be withheld under section 552.101 of the Government Code in conjunction with the MPA, unless the sheriff's office receives written consent for release of those records that complies with sections 159.004 and 159.005 of the MPA. With the exception of the information we have marked and the information subject to section 552.022(a)(1), the sheriff's office may withhold the remaining information under section 552.103 of the Government Code. The sheriff's office must withhold the information we have marked under section 552.1175 of the Government Code if the individual to whom this information relates is a current or former employee of the TDCJ and he elects to restrict access to his information in accordance with section 552.1175(b) of the Government Code. The sheriff's office must release the remaining marked information the opposing party to the anticipated litigation has seen or had access to and the marked information subject to section 552.022(a)(1) of the Government Code.⁵

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,



Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/som

⁵Because the requestor has a right of access to certain information that otherwise would be excepted from release under the Act, the sheriff's office must again seek a decision from this office if it receives a request for this information from a different requestor.

Ref: ID#450698

Enc. Submitted documents

c: Requestor
(w/o enclosures)