



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

May 2, 2012

Ms. Leni Kirkman  
Vice President, Strategic Communications & Patient Relations  
University Health System  
4502 Medical Drive  
San Antonio, Texas 78229

OR2012-06349

Dear Ms. Kirkman:

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# 452326.

The University Health System ("UHS") received a request for information pertaining to contractor controlled insurance program (CCIP) insurance certificates for entities working on a specified project, e-mails between a named individual and a specified entity during a specified time period, and contracts with three specified entities. You claim the submitted information is excepted from disclosure under section 552.103 of the Government Code. We have considered the claimed exception and reviewed the submitted information.

Initially, we note portions of the submitted information are subject to section 552.022 of the Government Code. Section 552.022(a) provides in relevant part:

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 unless made confidential under this chapter or 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;

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body; [and]

...

(5) all working papers, research material, and information used to estimate the need for or expenditure of public funds or taxes by a governmental body, on completion of the estimate[.]

Gov't Code § 552.022(a)(1), (3), (5). In this instance, the submitted information contains completed reports, investigations, and evaluations subject to section 552.022(a)(1); contracts subject to section 552.022(a)(3); and budget estimates subject to section 552.022(a)(5). The information subject to subsection 552.022(a)(1) must be released unless it is excepted by section 552.108 of the Government Code or made confidential by the Act or other law, and the information subject to subsections 552.022(a)(3) and (a)(5) must be released unless it is made confidential by the Act or other law. *Id.* Although you raise section 552.103 of the Government Code for this information, this is a discretionary exception that may be waived 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 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 473 (1987) (section 552.103 may be waived). As such, section 552.103 does not make information confidential for the purposes of section 552.022(a), and UHS may not withhold the information subject to section 552.022(a) on that basis. However, we note portions of the information subject to section 552.022(a) are subject to sections 552.101, 552.130 and 552.136 of the Government Code.<sup>1</sup> As these sections make information confidential under the Act, we will address their applicability.

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 the common-law right to privacy, which protects information if it (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 met. *Id.* at 681-82. Common-law privacy protects the types of information held to be intimate or

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

embarrassing in *Industrial Foundation*. See *id.* at 683 (information relating to sexual assault, pregnancy, mental or physical abuse in workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). Additionally, this office has found some kinds of medical information or information indicating disabilities or specific illnesses are generally highly intimate or embarrassing. See Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Upon review, we find the information we have noted is highly intimate or embarrassing and of no legitimate public interest. Therefore, UHS must withhold the noted information under section 552.101 in conjunction with common-law privacy.

Section 552.130 of the Government Code excepts from disclosure information that relates to a motor vehicle operator's or driver's license, title, or registration issued by an agency of this state or another state or country. Gov't Code § 552.130(a)(1)-(2). Therefore, UHS must withhold the information we have noted under section 552.130.

Section 552.136 of the Government Code provides in part that "[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." *Id.* § 552.136(b); see *id.* § 552.136(a) (defining "access device"). This office has determined an insurance policy number is an access device for purposes of section 552.136. Therefore, UHS must withhold the insurance policy numbers we have noted on that basis.

We note some of the remaining information subject to section 552.022(a) may be protected by copyright law. A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. See Open Records Decision No. 180 at 3 (1977); see also Open Records Decision No. 109 (1975). A custodian of public records also must comply with copyright law, however, and is not required to furnish copies of records that are copyrighted. See ORD 180 at 3. A member of the public who wishes to make copies of copyrighted materials must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. As you raise no additional exceptions to disclosure, UHS must release the remaining information we have indicated under subsections 552.022(a)(1), (3), and (5), but any information that is protected by copyright may only be released in accordance with copyright law.

Next, we address UHS's argument against disclosure of the remaining information, which is not subject to section 552.022 of the Government Code. 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 section 552.103 bears the burden of providing relevant facts and documents sufficient to demonstrate the applicability of this exception to the information at issue. The governmental body must demonstrate that (1) litigation was pending or reasonably anticipated on the date of the governmental body's receipt of the request for information, and (2) the requested information 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.). 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).*

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See Open Records Decision No. 452 at 4 (1986).* To establish 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." *Id.* This office has concluded a governmental body's receipt of a claim it represents to be in compliance with the notice requirements of the Texas Tort Claims Act (the "TTCA"), chapter 101 of the Civil Practice and Remedies Code, is sufficient to establish litigation is reasonably anticipated. If this representation is not made, then receipt of the claim letter is a factor we will consider in determining, from the totality of the circumstances presented, whether the governmental body has established litigation is reasonably anticipated. *See Open Records Decision No. 638 at 4 (1996).*

You explain the information at issue is related to the construction and collapse of a UHS parking garage. You inform us UHS subsequently received a demand letter from an attorney who, along with the requestor, represents two construction workers who were injured in the incident. You state UHS received the demand letter prior to its receipt of the present request for information. You have provided a copy of the demand letter, which places UHS on notice of a claim pursuant to the TTCA. You also have provided a copy of the original petition in a lawsuit the requestor's clients have filed against one of the contractors involved in the project. We note the lawsuit was filed prior to UHS's receipt of the present request. Based on the notice of claim, the pending lawsuit, and the potential inclusion of UHS in the lawsuit, you contend litigation was reasonably anticipated when UHS received the present

request. You also contend the remaining information is related to the anticipated litigation. Based on your representations and documentation and our review, we find the remaining information is related to litigation UHS reasonably anticipated when it received the present request. We therefore conclude UHS may withhold the remaining information under section 552.103 of the Government Code.

We note 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. Therefore, once the information at issue has been obtained by all parties to the anticipated litigation through discovery or otherwise, a section 552.103(a) interest no longer exists as to that information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). We also note the applicability of section 552.103(a) ends once the litigation has concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, UHS must withhold the information we have noted under section 552.101 of the Government Code in conjunction with common-law privacy and under sections 552.130 and 552.136 of the Government Code. UHS must release the information we have marked or noted under subsections 552.022(a)(1), (3), and (5), but any information that is protected by copyright may only be released in accordance with copyright law. UHS may withhold the remaining information under section 552.103 of the Government Code.

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,



Misty Haberer Barham  
Assistant Attorney General  
Open Records Division

MHB/som

Ref: ID# 452326

Enc. Submitted documents

c: Requestor  
(w/o enclosures)