



September 8, 2000

Ms. Patricia Reedy
Public Information Coordinator
Office of General Counsel
Texas Department of Health
1100 West 49th Street
Austin, Texas 78756-3199

OR2000-2434A

Dear Ms. Reedy:

You ask this office to examine Open Records Letter No. 2000-2434 (2000) because you believe that this office failed to consider properly raised and applicable exceptions to disclosure. Your request was assigned ID# 138732.

The Texas Department of Health ("TDH") received a request for information regarding an investigation of a licensed professional counselor. In the original request for a decision to this office, you claimed that the requested information was excepted from disclosure under sections 552.101, 552.103 and 552.108 of the Government Code. In Open Records Letter No. 2000-2434, this office found that TDH could withhold all of the requested information under section 552.101 in conjunction with section 501.205(a) of the Occupations Code. You inform us that section 501.205 applies to information pertaining to licensed psychologists, not to licensed professional counselors. Where this office determines that an error was made in the decision process under sections 552.301 and 552.306, and that error resulted in an incorrect decision, we will correct the previously issued ruling. The previous decision did not address your other claimed exceptions under sections 552.101, 552.103, and 552.108 of the Government Code. Because this office erred in its application of the confidentiality provision of section 501.205(a), we hereby overrule our decision in Open Records Letter No. 2000-2434, and will now re-examine the submitted information in light of your claimed exceptions.

Initially, we note that the newspaper article you submitted must be released to the requestor because it is public information. Additionally, we find that the submitted information contains documents which appear to have been filed with a court. Documents filed with a court are generally considered public and must be released. Gov't Code § 552.022(a)(17); *Star-Telegram, Inc. v. Walker*, 834 S.W.2d 54, 57 (Tex. 1992).

You claim that the submitted information is excepted from disclosure under section 552.103 of the Government Code. Section 552.103 states in pertinent part:

(a) Information is excepted from the requirements of Section 552.021 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.

To secure the protection of section 552.103(a), a governmental body must demonstrate that the requested information "relates" to a pending or reasonably anticipated judicial or quasi-judicial proceeding. Open Records Decision No. 588 (1991). A governmental body has the burden of providing relevant facts and documents to show the applicability of an exception in a particular situation. The test for establishing that section 552.103(a) applies is a two-prong showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Texas Law Sch. v. Texas 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.).

Section 552.103 requires concrete evidence that litigation may ensue. To demonstrate that litigation is reasonably anticipated, TDH must furnish evidence that litigation is realistically contemplated and is more than mere conjecture. Open Records Decision No. 518 at 5 (1989). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986).

The Texas State Board of Examiners of Professional Counselors (the "board") is authorized, pursuant to chapter 503 of the Occupations Code, to adopt rules related to licensed professional counselors. Occ. Code § 503.201. The board may investigate complaints involving license holders, and impose disciplinary sanctions, including license revocation, for violations of statutes or board rules. Occ. Code §§ 503.254, .401. You indicate that the current investigation file was forwarded from the board to the "TDH's Office of General Counsel for purposes of enforcing the provisions of chapter 503 of the Occupations Code." You state that, in the instant case, the license holder has requested a hearing. Chapter 2001 of the Government Code, the Administrative Procedures Act, governs proceedings to revoke or suspend a license under chapter 503. Occ. Code § 503.406. Contested cases conducted under the Administrative Procedures Act, chapter 2001 of the Government Code, are considered litigation under section 552.103. Open Records Decision No. 588 at 7 (1991). Therefore, we conclude that you have

shown that litigation is reasonably anticipated. We additionally find that the submitted documents relate to the reasonably anticipated litigation for the purposes of section 552.103(a). *Texas Legal Found.*, 958 S.W.2d at 483. Therefore, the requested information may be withheld from disclosure pursuant to section 552.103, subject to the following exceptions.

Generally, once information has been obtained by all parties to the 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 the opposing party is not excepted from disclosure under section 552.103(a), and it must be disclosed. The submitted documents contain information which appears to have been obtained from the license holder who is the opposing party in the anticipated litigation. We have marked the information which must be released to the requestor after redaction of private information as discussed below. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

We note that the submitted information contains a completed investigation. Section 552.022(a)(1) of the Government Code makes a completed investigation made of, for, or by a governmental body public and not excepted from required disclosure under chapter 552 of the Public Information Act unless the investigation is expressly confidential under other law or excepted from disclosure under section 552.108. Gov't Code § 552.022(a)(1). Our office has previously concluded that section 552.103 is a discretionary exception. *See* Open Records Decision No. 551 (1990) (statutory predecessor to section 552.103 serves only to protect a governmental body's position in litigation, and does not itself make information confidential). Further, TDH is not a "law enforcement agency" for purposes of section 552.108. *See* Open Records Decision Nos. 493 at 2 (1988), 287 at 2 (1981) (law enforcement exception applies to records created by an agency, or portion of agency, whose primary function is to investigate crimes and enforce criminal laws). Accordingly, the completed investigation, which we have marked for your convenience, may not be withheld from disclosure pursuant to section 552.103 or 552.108 of the Government Code. However, portions of the investigation must be withheld under section 552.101, as discussed below.

Next, we consider your section 552.101 claim for information that is not excepted under section 552.103 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Chapter 611 of the Health and Safety Code provides for the confidentiality of mental health records created or maintained by a mental health professional. Section 611.002 provides in relevant part as follows:

- (a) Communications 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.

Section 611.001 defines a "professional" as (1) a person authorized to practice medicine, (2) a person licensed or certified by the state to diagnose, evaluate or treat mental or emotional

conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals. *See* Open Records Decision No. 565 (1990). We find that some of the submitted documents are mental health records that are confidential under section 611.002. We have marked the confidential documents. TDH may release the documents only as provided by sections 611.004 and 611.0045.

Section 552.101 also encompasses common law privacy and excepts from disclosure private facts about an individual. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Therefore, information may be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 at 1 (1992). In *Industrial Foundation*, the Texas Supreme Court considered intimate and embarrassing information such as that relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683; *see also* Open Records Decision Nos. 470 (1987) (concluding that fact that a person broke out in hives as a result of severe emotional distress is excepted by common law privacy), 455 (1987) (concluding that kinds of prescription drugs a person is taking are protected by common law privacy), 343 (1982) (concluding that information regarding drug overdoses, acute alcohol intoxication, obstetrical/gynecological illnesses, convulsions/ seizures, or emotional/mental distress is protected by common law privacy). This office has also determined that personal financial information not relating to a financial transaction between an individual and a governmental body is protected under common law privacy. Open Records Decision Nos. 600 (1992), 545 (1990). We have marked the type of information that must be withheld under section 552.101 in conjunction with the common law right to privacy. Additionally, we have marked a representative sample of the types of information that identify the patient. You must withhold the information we have marked and other information that identifies the patient before releasing any of the documents.

You claim that the social security numbers contained in the submitted information are excepted from disclosure by section 552.101 of the Government Code. The social security numbers in the documents may be confidential if they were obtained or are maintained by TDH pursuant to any provision of law, enacted on or after October 1, 1990. 42 U.S.C. § 405(c)(2)(C)(viii); *see* Open Records Decision No. 622 (1994). We are unable to determine whether, in this instance, any of the social security numbers at issue are confidential under this federal statute. You argue that the social security numbers are made confidential in this instance by section 552.101 in conjunction with 42 U.S.C. § 405(c)(2)(C)(viii)(I) because the “*records were obtained/maintained pursuant to Tex. Government Code, Chapter 441, Subchapter L, which was added in 1997.*” (Emphasis added). We acknowledge that chapter 441 of the Government Code contains records management provisions that are applicable to TDH’s records. We do not find, however, that these records management provisions contain any specific language that authorize TDH to obtain or maintain the *social security number information* at issue. *See* Gov’t Code § 441.180 *et seq.* Thus, we do not believe that the records management provisions you cite constitute provisions of law enacted on or after October 1, 1990 that authorize TDH to obtain

or maintain social security number information. We note, however, that section 552.352 of the Public Information Act imposes criminal penalties for the release of confidential information. Thus, prior to releasing any social security number information from the responsive records, you should ensure that no such information was obtained or is maintained by TDH pursuant to any provision of law, enacted on or after October 1, 1990, which authorizes or requires TDH to obtain or maintain that social security number information.

One of the offense reports contained within the completed investigation must be withheld in its entirety under section 552.101 in conjunction with section 261.201 of the Family Code. Section 261.201 reads in part as follows:

(a) The following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

(1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and

(2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

We believe that the information we have marked consists of reports, records, and working papers used or developed in an investigation made under chapter 261 of the Family Code. Because you have not cited any specific rule that you have adopted with regard to the release of this type of information, we assume that no such regulation exists. Given that assumption, the offense report is confidential pursuant to section 261.201 of the Family Code. *See* Open Records Decision No. 440 at 2 (1986) (construing predecessor statute). Accordingly, you must not release the offense report to the requestor.¹

We note that the information we are otherwise directing you to release contains a driver's license number and a license plate number. Section 552.130 of the Government Code excepts

¹We note that if the investigation has been referred to the Department of Protective and Regulatory Services (the "department"), a parent who is a requestor may be entitled to access to the department's records. Section 261.201(g) of the Family Code provides that the department, upon request and subject to its own rules:

shall provide to the parent, managing conservator, or other legal representative of a child who is the subject of reported abuse or neglect information concerning the reported abuse or neglect that would otherwise be confidential under this section if the department has edited the information to protect the confidentiality of the identity of the person who made the report and any other person whose life or safety may be endangered by the disclosure.

information that relates to a motor vehicle operator's or driver's license or permit issued by an agency of this state or a motor vehicle title or registration issued by an agency of this state. We have marked the information which must be withheld from disclosure under section 552.130.

In summary, you must release to the requestor the newspaper article and any records filed with a court. You must also release to the requestor most of the completed investigation, and some of the information we have identified as having been provided by the license holder. You must withhold from disclosure the mental health records in accordance with chapter 611 of the Health and Safety Code, and the information we have identified as protected under the common law right to privacy. You must also withhold in its entirety the offense report we have marked as protected from disclosure under section 261.201 of the Family Code, and the marked driver's and license plate information under section 552.130. You may be required to withhold the social security numbers if they were obtained or are maintained pursuant to a law enacted on or after October 1, 1990. You may withhold the remaining information under section 552.103 of the Government Code.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script that reads "Carla Gay Dickson".

Carla Gay Dickson
Assistant Attorney General
Open Records Division

CGD/ljp

Ref: ID# 138732

Encl. Marked documents

cc: Mr. Andrew L. Drapkin
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(w/o enclosures)