



July 7, 2000

Ms. Nora S. Bender
Acting Open Records Coordinator
Texas Department of Mental Health and Mental Retardation
P.O. Box 12668
Austin, Texas 78711-2668

OR20002544

Dear Ms. Bender:

You ask whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code. Your request was assigned ID #136351.

The North Texas State Hospital of the Texas Department of Mental Health and Mental Retardation (the "department") received a request for all documentation and information relating to corrective action or peer review involving three identified physicians. You inform us that the department has provided to the requestor certain responsive documents that it determined were appropriate for release. You have submitted to this office other responsive information that you claim is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.117 of the Government Code. We have considered the exceptions you claim and have reviewed the information you submitted.

Initially we note that some of the submitted documents contain information that is subject to required public disclosure under section 552.022 of the Government Code. Section 552.022 provides in relevant part:

(a) 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 under this chapter unless they are expressly confidential under other law:

...

(10) a substantive rule of general applicability adopted or issued by an agency as authorized by law, and a statement of general policy or interpretation of general applicability formulated and adopted by an agency;

...

(13) a policy statement or interpretation that has been adopted or issued by an agency;

(14) administrative staff manuals and instructions to staff that affect a member of the public[.]

Gov't Code § 552.022(a)(10), (13), (14). We have marked documents that are subject to required public disclosure under section 552.022(a) unless they are expressly confidential under other law. As you have not demonstrated that those documents are confidential under other law, they must be released.

You claim that the submitted documents include information that is confidential under section 552.101 of the Government Code. Section 552.101 excepts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Statutory confidentiality under section 552.101 requires express language stating that certain information is confidential or that it shall not be released to the public. *See* Open Records Decision No. 658 at 4 (1998). You claim that portions of the submitted information are confidential under section 552.101 in conjunction with provisions of chapter 160 of the Occupations Code. Subchapter A of chapter 160 governs medical peer review. Section 160.007 provides in relevant part:

(a) Except as other provided by this subtitle, each proceeding or record of a medical peer review committee is confidential, and any communication made to a medical peer review committee is privileged.

Occ. Code § 160.007(a). You state that many of the requested documents contain peer review information that is deemed to be confidential under chapter 160 of the Occupations Code. You have not advised us, and we are not otherwise informed, that any of the exceptions to confidentiality under section 160.007 of the Occupations Code is applicable here. Based on your representations and our review of the submitted information, we conclude that some portions of the information in question represent proceedings or records of a medical peer review committee that are confidential under section 552.101 of the Government Code in conjunction with section 160.007 of the Occupations Code. *See also Memorial Hosp. -- The Woodlands v. McCown*, 927 S.W.2d 1 (Tex. 1996) (concluding that statutory predecessor protected information that was obtained and utilized by hospital credentialing committees); Open Records Decision No. 591 at 2-3 (1991). We have marked the documents that the department must withhold under section 552.101 in conjunction with section 160.007 of the Occupations Code. With regard to other documents that you contend are confidential peer review information, the department has not demonstrated, and we are unable to conclude, that those documents constitute records or proceedings of or communications to a medical peer review committee for the purposes of section 160.007 of

the Occupations Code. *See Memorial Hospital – The Woodlands v. McCown*, 927 S.W.2d at 8-12. Therefore, the department may not withhold those documents under section 552.101 of the Government Code in conjunction with section 160.007.

Section 552.101 also protects information that is encompassed by the common law right of privacy. Information must be withheld under section 552.101 in conjunction with common law privacy if the information is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, *and* (2) of no legitimate public interest. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The types of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* include information 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. *Id.* at 683; *see also* Open Records Decision No. 659 at 5 (1999). We have marked the information that the department must withhold under section 552.101 in conjunction with common law privacy.

You also claim that the submitted records contain information that is excepted from disclosure under section 552.103 of the Government Code, the “litigation exception.” As amended by the Seventy-sixth Legislature, 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). Thus, to sustain a claim under section 552.103, a governmental body must establish: (1) that litigation was either pending or reasonably anticipated on the date that it received the written request for information, and (2) that the information in question is related to that litigation. *See also University of Tex. Law Sch. V. Texas Legal Found.*, 958 S.W.2d 479, 481-83 (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 (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 that 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.* Among other examples, this office has concluded that litigation was reasonably anticipated where the opposing party took the following objective steps toward litigation: (1) filed a complaint with the Equal Employment Opportunity Commission (“EEOC”), *see* Open Records Decision No. 336 (1982); (2) 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 (3) threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981). You inform us that an attorney for one of the doctors who were the subject of the peer review proceedings has threatened to sue the department regarding certain aspects of the submitted information and that the department reasonably anticipates that suit may be filed regarding these matters. Based on your representations and our review of the information in question, we find that a portion of the submitted information is related to litigation that reasonably was anticipated by the department on the date that it received the information request. Accordingly, we conclude that a portion of the submitted information is excepted from disclosure under section 552.103. We have marked that information.

In reaching our conclusion, we assume that the opposing party to the anticipated litigation has not had access to any of the information in question. To the extent that the opposing party has seen or had access to any of that information, there is no interest under section 552.103 in withholding it from public disclosure. *See* Open Records Decision Nos. 349 (1982), 320 (1982). In addition, 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). However, any requested information that is confidential by law must not be released even at the conclusion of the litigation. *See* Gov’t. Code §§ 552.007(a), 552.101, 552.352.

You also raise section 552.107 of the Government Code. Section 552.107 provides in relevant part that information is excepted from required public disclosure if

it is information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Civil Evidence, the Texas Rules of Criminal Evidence, or the Texas Disciplinary Rules of Professional Conduct[.]

Gov’t Code § 552.107(1). Although the scope of section 552.107(1) would appear to be co-extensive with that of rule 1.05 of the Texas Disciplinary Rules of Professional Conduct, which prohibits an attorney from divulging “confidential information,” this office has concluded that such an interpretation of rule 1.05 would be in potential conflict with the purposes of the Act. *See* Open Records Decision No. 574 at 4-5 (1990) (construing statutory predecessor to section 552.107(1)). Accordingly, this office has determined that section

552.107(1) protects only what rule 1.05 describes as “privileged” information, *i.e.*, information that represents confidential communications between attorney and client. *Id.* at 5. “Unprivileged” information, as defined by rule 1.05, is not excepted from disclosure under section 552.107(1). *Id.* Thus, section 552.107(1) excepts from disclosure only factual information or requests for legal advice communicated by the client to the attorney and legal advice or opinion rendered by the attorney to the client or to an associated attorney in the course of rendering legal services to the client. *Id.* at 7-8. We agree that several of the submitted documents contain privileged attorney-client communications that are protected by section 552.107(1) of the Government Code. We have marked the information that the department may withhold under section 552.107(1).

Finally, we address your claim under section 552.117 of the Government Code. Section 552.117 excepts from disclosure the home address, home telephone number, or social security number of an employee of a governmental body, or information that reveals whether the employee has family members, if the employee has elected to not allow public access to this information in accordance with section 552.024 of the Act. *See* Gov’t Code §§ 552.024(a), 552.117(1); *see also* Open Records Decision Nos. 622 (1994), 530 (1989), 455 (1987). We have marked the kind of information that is subject to sections 552.117 and 552.024.

In summary, some of the submitted information is subject to required public disclosure under section 552.022(a) of the Government Code. Other portions of the submitted information are excepted from disclosure under sections 552.101, 552.103, and 552.107 of the Government Code. The submitted documents also contain information that may be excepted from disclosure under sections 552.024(a) and 552.117(1). The rest of the submitted information is not excepted from disclosure and must be released.

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).

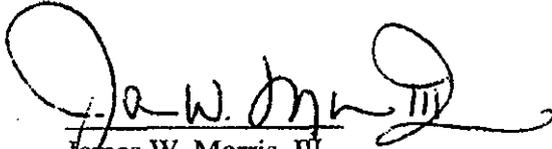
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the

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).

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 black ink, appearing to read 'James W. Morris, III', with a large, stylized flourish extending to the right.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/ljp

Ref: ID# 136351

Encl.: Documents (Returned under separate cover)