



August 11, 2000

Ms. Tina Plummer
Open Records Coordinator
Texas Department of Mental Health and Mental Retardation
P.O. Box 12668
Austin, Texas 78711-2668

OR2000-3058

Dear Ms. Plummer:

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# 137975.

The Texas Department of Mental Health and Mental Retardation (the "department") received a request for a copy of a letter, dated April 26, 2000, that the department submitted to this office in support of its request for Open Records Letter No. 2000-2544 (2000). Ordinarily we consider a governmental body's communications to this office, stating why requested information should be withheld from public disclosure, to be available to the public. *See* Open Records Decision No. 459 (1987). In this instance, you claim that certain portions of your letter are excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered your arguments and the exceptions you claim. We also received and have reviewed the requestor's letter to this office, dated July 14, 2000, and its attachments.

You assert that some segments of the document in question here are confidential under section 552.101 of the Government Code in conjunction with 160.007 of the Occupations 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 explicit 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). Subchapter A of chapter 160 of the Occupations Code governs medical peer review. Section 160.007 provides in relevant part:

(a) Except as otherwise 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). As your letter to this office is neither a proceeding nor a record of a medical peer review committee or a communication to such a committee, it is not within the purview of section 160.007. Further, we are not persuaded that section 160.007 is applicable to the references in your letter to medical peer review proceedings. Therefore, those portions of the letter are not excepted from disclosure under section 552.101 of the Government Code. *See also Memorial Hosp.--The Woodlands v. McCown*, 927 S.W.2d 1 (Tex. 1996) (construing statutory predecessor); Open Records Decision No. 591 at 2-3 (1991).

You also claim that other portions of the letter are confidential under section 552.101 in conjunction with 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). Having considered your arguments, we conclude that none of the information that you seek to withhold is excepted from disclosure under section 552.101 in conjunction with common law privacy. *See* Open Records Decision Nos. 470 at 3-5 (1987), 444 at 3-4 (1986), 423 at 2 (1984), 405 at 2 (1983).

You also claim that another portion of the letter and an attachment to the letter are 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.*¹

You assert that the department reasonably anticipates a lawsuit if certain contents of its letter to this office are disclosed. In Open Records Letter No. 2000-2544 (2000), we determined that the same prospect of a lawsuit represented reasonably anticipated litigation for the purposes of section 552.103. However, as we explained in that ruling, there is no interest under section 552.103 in withholding from public disclosure information that the prospective opposing party to litigation already has seen or to which that party has had access. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, you may not withhold either the letter that the department received from the attorney for the prospective opposing party to the anticipated litigation or your statements to this office about the contents of the attorney's letter. We have identified one item of information in your letter that we conclude is excepted from disclosure under section 552.103. Assuming that the opposing party to the anticipated litigation has not had access to the information that we have marked, you may withhold it from the requestor.

In summary, none of the information that the department seeks to withhold is excepted from disclosure under section 552.101. One item of information may be excepted from disclosure under section 552.103. The rest of the letter must be released to the requestor.

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.

¹Among 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).

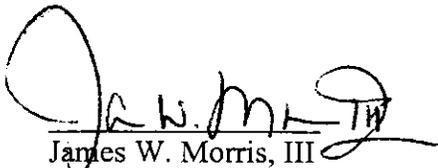
This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge 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 "J.W. Morris, III". The signature is written in a cursive style with a large initial "J" and "M".

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

JWM/ljp

Ref: ID# 137975

Encl. Submitted documents

cc: Ms. Adele Leinbach
North Texas State Hospital
P.O. Box 2231
Vernon, Texas 76384
(w/o enclosures)