



October 22, 2001

Ms. Laura Garza Jimenez
County Attorney
County of Nueces
901 Leopard, Room 207
Corpus Christi, Texas 78401-3680

OR2001-4792

Dear Ms. Jimenez:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 153702.

The County of Nueces (the "county") received a request for a named employee's personnel file. You state that you have released some of the requested information. You claim, however, that some of the requested information is excepted from disclosure under sections 552.101, 552.103, and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

You argue that the payroll information and performance evaluation submitted in Exhibit 1 is excepted from disclosure under section 552.103 of the Government Code. Initially, we note that section 552.022 of the Government Code makes certain information expressly public, unless it is confidential under other law. One category of expressly public information under section 552.022 is "the name, sex, ethnicity, salary, title, and dates of employment of each employee and officer of a governmental body[.]" Gov't Code § 552.022(a)(2). Some of the information in Exhibit 1 consists of a county employee's salary information. This salary information, which we have marked, must be released to the requestor unless it is confidential under other law. Section 552.022 also makes "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body" public information unless expressly made confidential under other law or "except as provided by [s]ection 552.108[.]" Gov't Code § 552.022(a)(1). Exhibit 1 also contains a completed evaluation, which we have marked. Section 552.103 is a discretionary exception under the Public Information Act and is, therefore, not "other law" that makes the salary information and completed evaluation confidential. *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). Therefore, the county may not withhold the information we have marked in Exhibit 1 under section 552.103 of the Government Code.

We now address your claim under section 552.103 with respect to the remaining information in Exhibit 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.

The county has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas 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 county must meet both prongs of this test for information to be excepted under 552.103(a).

You inform us that the county is a defendant in a case currently pending in district court. You further inform us that the named employee whose personnel file is the subject of this request is also a defendant in this case. You have submitted a copy of the first amended petition in this case for our review. Based on your representations and our review of the submitted petition, we conclude that the county has demonstrated that litigation was pending at the time the request was received. We also find that the county has demonstrated that the information you seek to withhold under this exception is related to the pending litigation for purposes of section 552.103(a). Therefore, with the exception of the information that is subject to section 552.022, the county may withhold the information you seek to withhold from Exhibit 1 under section 552.103.

Generally, however, 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 in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. 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 agree that some of the records in Exhibit 2 are medical records. Access to medical records is governed by the Medical Practice Act ("MPA"), chapter 159 of the Occupations Code rather than by chapter 552 of the Government Code. Open Records Decision No. 598 (1991). Section 159.002 of the MPA provides:

- (a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.
- (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.

Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See* Occ. Code §§ 159.002, .004; Open Records Decision No. 598 (1991). This office has concluded that 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). We have further found that when a file is created as the result of a hospital stay, all the documents in the file relating to diagnosis and treatment constitute physician-patient communications or "[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician." Open Records Decision No. 546 (1990).

The medical records must be released upon the patient's signed, written consent, provided that 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. Occ. Code §§ 159.004, .005. Section 159.002(c) also requires that 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). You indicate that the county has not received any such written consent from the named employee. We have marked the documents in Exhibit 2 that consist of medical records and are therefore subject to the MPA. This information may be released only in accordance with the MPA. *See* Open Records Decision No. 598 (1991).

Exhibit 2 also contains a declaration of medical condition, which is made confidential by section 1701.306 of the Occupations Code.¹ Section 1701.306 provides, in relevant part, as follows:

(a) The commission may not issue a license to a person as an officer or county jailer unless the person is examined by:

(1) a licensed psychologist or by a psychiatrist who declares in writing that the person is in satisfactory psychological and emotional health to serve as the type of officer for which a license is sought; and

(2) a licensed physician who declares in writing that the person does not show any trace of drug dependency or illegal drug use after a physical examination, blood test, or other medical test.

(b) An agency hiring a person for whom a license as an officer or county jailer is sought shall select the examining physician and the examining psychologist or psychiatrist. The agency shall prepare a report of each declaration required by Subsection (a) and shall maintain a copy of the report on file in a format readily accessible to the commission. *A declaration is not public information.*

Occ. Code § 1701.306. We have marked the information that is confidential under section 1701.306 of the Occupations Code and must therefore be withheld.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses information that is confidential under the common law right to privacy. Information is protected by the common law right to privacy if (1) the information contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person, and (2) the information is not of a legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). 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 (1978) (concluding that fact that 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), 422 (1984) (concluding that details of self inflicted injuries are presumed protected by common law privacy), 343 (1982) (concluding that information regarding drug overdoses,

¹The Seventy-sixth legislature enacted section 1701.306 of the Occupations Code and repealed section 415.057 of the Government Code without substantive change.

acute alcohol intoxication, obstetrical/gynecological illnesses, convulsions/seizures, or emotional/mental distress is protected by common law privacy). From our review of the submitted information, we find that it contains information that must be withheld pursuant to section 552.101 of the Government Code. We have marked the information that the county must withhold pursuant to section 552.101 in conjunction with common law privacy.

Section 552.117 of the Government Code excepts from disclosure the home addresses, telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential in accordance with section 552.024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). The county must withhold this type of information pursuant to section 552.117 only to the extent that the respective employee elected to keep this information confidential prior to the district's receipt of the current records request. You have submitted a copy of the form on which the named employee elected to keep her home address and telephone number confidential. Accordingly, we agree that the county must withhold the named employee's home address and telephone number under section 552.117. We note, however, that the employee did not elect to keep her social security number confidential. Thus, the county may not withhold the named employee's social security number under section 552.117. Further, we have marked a business telephone number that you have highlighted, which may not be withheld under section 552.117.

The social security numbers in the submitted documents may nevertheless be confidential under federal law. A social security number may be withheld in some circumstances under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security number and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that any of the social security numbers in the responsive records are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 of the Act on the basis of that federal provision. We caution, however, that section 552.352 of the Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, the county should ensure that no such information was obtained or is maintained by the county pursuant to any provision of law enacted on or after October 1, 1990.

To summarize: (1) with the exception of the information that is subject to section 552.022, the county may withhold the information you seek to withhold from Exhibit 1 under section 552.103; (2) we have marked the medical records that may only be released in accordance with the MPA; (3) we have marked the information that is confidential section 1701.306 of the Occupations Code and must be withheld; (4) we have marked the information that the county must withhold under section 552.101 and common law privacy;

(5) the county must withhold the named employee's home address and telephone numbers under section 552.117; and (6) prior to releasing any social security number information, the county should ensure that no such information was obtained or is maintained by the county pursuant to any provision of law enacted on or after October 1, 1990. The remaining submitted information 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 Dept. 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 Hadassah Schloss at 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,



Karen A. Eckerle
Assistant Attorney General
Open Records Division

KAE/sdk

Ref: ID# 153702

Enc: Submitted documents

c: Mr. Guy Lawrence
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