



November 21, 2002

Ms. Thao La
Assistant District Attorney
Dallas County
411 Elm Street, 5th Floor
Dallas, Texas 75202

OR2002-6689

Dear Ms. La:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 172586.

The Dallas County Auditor's Office (the "county") received a request for information related to a particular audit undertaken by the county between 2001 and 2002. You claim that the requested information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the representative sample of submitted information.¹

We begin by noting that the some of submitted information is made expressly public 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:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

¹We assume that the "representative sample" of responsive documents submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

The submitted information includes a completed report that is expressly public under section 552.022(a)(1). Therefore, you may only withhold this information if it is excepted under section 552.108 or is confidential under other law. You do not argue that the submitted information is excepted under section 552.108. Although you argue that the submitted information is excepted under section 552.103 of the Government Code, section 552.103 is a discretionary exception and therefore is not "other law" for purposes of section 552.022.² Accordingly, the submitted report, which we have marked, must be released to the requestor.

We turn now to your section 552.103 arguments for the remainder of the submitted information. Section 552.103(a) provides 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.

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 Tex. 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.); Open Records Decision No. 588 (1991). Further, litigation must be pending or reasonably anticipated on the date the requestor applies to the public information officer for access. Gov't Code § 552.103(c).

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit,

²Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.*, Open Records Decision Nos. 665 at 2 n.5 (2000) (governmental body may waive litigation exception, section 552.103), 522 at 4 (1989) (discretionary exceptions in general). Discretionary exceptions therefore do not constitute "other law" that makes information confidential.

litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Nor does the mere fact that an individual hires an attorney and alleges damages serve to establish that litigation is reasonably anticipated. Open Records Decision No. 361 at 2 (1983). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986).

In this case, you state that the contested issues raised in the audit “will more likely than not be resolved through litigation because litigation seems to be the only course of action” for the potential opposing party to seek a remedy. You also state that a representative of the potential opposing party “has stated in a previous meeting with the County staffs that the [potential opposing party] will file claims against the County to resolve the matter.” Finally, you state that the requested audit information “is the cause of potential litigation and will be used as evidence in such litigation.” However, after considering the totality of the circumstances, we find that the county has not shown that concrete steps toward litigation have been taken. Thus, we do not believe that you have established that litigation against the county was reasonably anticipated at the time the county received the records request. *See* ORD 361. Accordingly, you may not withhold any of the submitted information based on section 552.103.

We note that one of the requested records is subject to the Medical Practices Act (the “MPA”), subtitle B of Title 3 of the Occupations Code. The MPA governs access to medical records and provides in relevant part:

(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 . . . may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

The MPA requires that any subsequent release of medical records be consistent with the purposes for which a governmental body obtained the records. Occupations Code § 159.002(c); .005(e). Open Records Decision No. 565 at 7 (1990). Thus, the MPA governs access to medical records. Open Records Decision No. 598 (1991). The MPA provides for access to medical records in certain circumstances. *See id.* §§ 159.003, .004, .005. Thus, the county must release the medical records in accordance with the MPA. *See* Open Records Decision No. 598 (1991). We have marked the record that is subject to the MPA.

We next note that some of the submitted information, records relating to chiropractors, is subject to chapter 201 of the Occupations Code, which governs the practice of chiropractic. Section 201.402 of the Occupations Code provides in part:

(a) Communications between a chiropractor and a patient relating to or in connection with any professional services provided by a chiropractor to the patient are confidential and privileged and may not be disclosed except as provided by this subchapter.

(b) Records of the identity, diagnosis, evaluation, or treatment of a patient by a chiropractor that are created or maintained by a chiropractor are confidential and privileged and may not be disclosed except as provided by this subchapter.

(c) A person who receives information from the confidential communications or records, excluding a person listed in Section 201.404(a) 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.

Occ. Code § 201.402(a)-(c). Chapter 201 includes exceptions to confidentiality and consent provisions, but we have no information to allow us to conclude that these provisions are applicable in this instance. *See id.* §§ 201.403, .404, .405. We have marked the records relating to chiropractors that are subject to chapter 201 of the Occupations Code. The county may release these records only if chapter 201 of the Occupations Code permits the county to do so.

We next note that the submitted information includes mental health records that are subject to chapter 611 of the Health and Safety Code. Section 611.002 provides:

(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.

(b) Confidential communications or records may not be disclosed except as provided by Section 611.004 or 611.0045.

(c) This section applies regardless of when the patient received services from a professional.

Section 611.004 and 611.0045 provide for access to mental health records only by certain individuals. 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. We believe that in this case, a hypnotherapist is a professional as defined by chapter 611. *See Occ. Code § 501.003(c)(3)(A)*(practice of psychology includes hypnotherapy). We have marked the information that is confidential

under section 611.002 of the Health and Safety Code and may not be released except in accordance with sections 611.004 and 611.0045 of the Health and Safety Code.

In summary, the county must release records governed by the MPA only in accordance with that act. The county must release to the requestor the submitted chiropractor treatment records only if chapter 201 of the Occupations Code permits the county to do so. Finally, the county must release the information we have marked only in accordance with chapter 611 of the Health and Safety Code. The remaining information 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.

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 Hadassah Schloss at the Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



V.G. Schimmel
Assistant Attorney General
Open Records Division

VGS/sdk

Ref: ID# 172586

Enc: Submitted documents

c: Mr. Frank Trejo
Dallas Morning News
P.O. Box 655237
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(w/o enclosures)