



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 9, 2003

Ms. Paige Saenz
Barney Knight & Associates
223 West Anderson Lane, Suite A-105
Austin, Texas 78752

OR2003-6343

Dear Ms. Saenz:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 187349.

The Rockdale Police Department (the "department"), which you represent, received a written request for all documents pertaining to a named police officer employed by the department. You contend that the requested information is excepted from required disclosure pursuant to section 552.103 of the Government Code.

We note at the outset that some of the requested records are specifically made public under section 552.022 of the Government Code. Section 552.022(a) provides in pertinent part as follows:

(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[.]

Gov't Code § 552.022(a)(1) (emphasis added). Because some of the submitted records consist of completed performance evaluations of the officer, those records are expressly

made public under section 552.022. Therefore, the department may withhold those records only if they are made confidential under other law or are excepted from public disclosure pursuant to section 552.108.¹ Although you argue that the requested records are excepted under section 552.103 of the Government Code, this provision is a discretionary exception and therefore is not "other law" for purposes of section 552.022. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.); *see, e.g.*, Open Records Decision Nos. 665 at 2 n.5 (2000) (governmental body may waive section 552.103). Consequently, the department may not withhold the performance evaluations pursuant to section 552.103. Because you have not raised an applicable exception to required public disclosure, the evaluations must be released to the requestor.

We next note that one of the documents you submitted to this office is made confidential under the Medical Practice Act, chapter 159 of the Occupations Code (the "MPA"). Section 159.002 of the MPA provides in pertinent 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, 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.

Occ. Code § 159.002(b), (c). 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). The record that we have identified contains information that appears to have been directly obtained from medical records and communications and such information may be disclosed only in accordance with the MPA. *See* Occ. Code §§ 159.002, .004; Open Records Decision Nos. 598 (1991), 546 (1990) (because hospital treatment is routinely conducted under supervision of physicians, documents relating to diagnosis and treatment during hospital stay would constitute protected MPA records). The medical record we marked 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).

¹We note that you do not contend that the requested records are excepted from public disclosure pursuant to section 552.108.

We now address the applicability of section 552.103 to the remaining submitted records. Section 552.103 of the Government Code is known as the "litigation" exception. A governmental body has the burden of providing relevant facts and documents to show that section 552.103 is applicable in a particular situation. Under section 552.103(a) and (c), the test for meeting this burden is a showing that (1) litigation involving the governmental body is pending or reasonably anticipated on the date the governmental body received the records request, and (2) the information at issue is related to that litigation. *See also 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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103.

In this instance, you inform us that the requested records relate to litigation in which the City of Rogers is named as defendant. However, you have not explained, nor is it apparent from the submitted documents, that the department or the City of Rockdale is a party to that litigation or that the police officer is party to the litigation as a consequence of his employment relationship with the City of Rockdale and the department. We therefore conclude that you have not met your burden of establishing the applicability of section 552.103 to the records at issue. *See* Open Records Decision Nos. 392 (1983), 132 (1976) (litigation exception applies only where litigation involves or is expected to involve governmental body claiming exception). Consequently, the department may not withhold any of the requested information pursuant to section 552.103.

We note, however, that certain portions of the submitted information are made confidential by law and thus must be withheld from the public pursuant to section 552.101 of the Government Code. Section 552.101 of the Government Code protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Among the submitted documents are the police officer's W-4 and I-9 forms. Title 26 section 6103(a) of the United States Code renders tax return information confidential. This term has been interpreted by federal courts to include any information gathered by the Internal Revenue Service regarding a taxpayer's liability under title 26 of the United States Code. *Mallas v. Kolak*, 721 F. Supp 748 (M.D.N.C. 1989). Because the W-4 Forms constitute tax return information, the department must withhold this information under section 552.101 in conjunction with federal law. The submitted Form I-9 is governed by title 8, section 1324a of the United States Code, which provides that the form "may not be used for purposes other than for enforcement of this chapter" and for enforcement of other federal statutes governing crime and criminal investigations. 8 U.S.C. § 1324a(b)(5). Release of these documents under the Public Information Act in this instance would be "for purposes other than for enforcement" of the referenced federal statute. Accordingly, we conclude that the Form I-9 is confidential for purposes of section 552.101 of the Government Code and may be released only in compliance with the federal laws and regulations governing the employment verification system.

The submitted records also contain information the department is required to withhold pursuant to section 552.117(a)(2) of the Government Code, which exempts from required public disclosure the police officer's home address, home telephone number, social security number, and family information. Unlike civilian public employees, a peace officer need not affirmatively claim confidentiality for this information. Open Records Decision No. 488 (1988); *see also* Open Records Decision No. 506 (1988). We have marked the information the department must withhold pursuant to section 552.117(a)(2).

Finally, we note that the submitted information contains information related to the officer's driver's license. Section 552.130(a)(1) of the Government Code requires the department to withhold "information [that] relates to . . . a motor vehicle operator's or driver's license or permit issued by an agency of this state." Accordingly, the department must withhold the information that we have marked pursuant to section 552.130(a)(1) of the Government Code.

In summary, the department must withhold the information we have marked as coming under the protection of the MPA and sections 552.101, 552.117(a)(2), and 552.130(a)(1) of the Government Code. The remaining submitted 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,

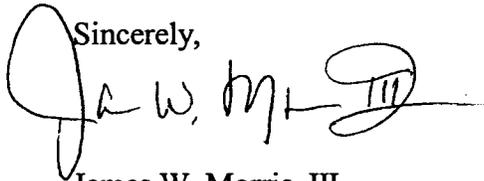
at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

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 Dep't of Pub. 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,

A handwritten signature in black ink, appearing to read "James W. Morris, III". The signature is fluid and cursive, with a large initial "J" and "M".

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

JWM/RWP/seg

Ref: ID# 187349

Enc: Submitted documents

c: Mr. David Fernandez, Jr.
Attorney at Law
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(w/o enclosures)