



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 6, 2004

Ms. Beverly West Stephens, Esq.
Gale, Wilson & Sanchez
115 East Travis, Suite 618
San Antonio, Texas 78205

OR2004-0920

Dear Ms. Stephens:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 195901.

The Housing Authority of Bexar County (the "authority"), which you represent, received a request for the "Mortgage Assistance Services of Bexar County, specifically assistance to [a specified person]." You characterize the request as one seeking the person's "Mortgage Assistance file." You claim that the requested information is excepted from disclosure pursuant to sections 552.101 and 552.103 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information. We have also considered comments submitted by an interested third party. *See* Gov't Code § 552.304 (providing that person may submit comments stating why information should or should not be released).

Initially, we note that the submitted information includes a medical record, access to which is governed by the Medical Practice Act ("MPA"), chapter 159 of the Occupations Code. Section 159.002 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). 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). Further, information that is subject to the MPA also includes information that was obtained from medical records. *See id.* § 159.002(a), (b), (c); *see also* Open Records Decision No. 598 (1991). Medical records must be released upon the governmental body's receipt of 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. *See* 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. *See* Open Records Decision No. 565 at 7 (1990). We have marked the medical record that is subject to the MPA. Absent the applicability of an MPA access provision, the authority must withhold this marked record pursuant to the MPA.

Next, we note that portions of the submitted information are subject to section 552.022 of the Government Code. Section 552.022 provides that:

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;

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(1), (3). The submitted information includes information that is encompassed by subsections 552.022(a)(1) and (a)(3) of the Government Code. The authority must release the information that is subject to subsection 552.022(a)(1), unless it is excepted from disclosure under section 552.108 or expressly confidential under other law.¹ Further, the authority must release the information that is subject to subsection 552.022(a)(3), unless it is expressly confidential under other law. Although the authority claims that the information that is subject to subsections 552.022(a)(1) and (a)(3) is excepted from

¹ We note that the authority does not claim that any portion of the submitted information is excepted from disclosure under section 552.108 of the Government Code.

disclosure under section 552.103 of the Government Code, we note that section 552.103 is a discretionary exception to disclosure under the Public Information Act (the "Act") that does not constitute "other law" for the purposes of section 552.022.² Accordingly, we conclude that the authority may not withhold any portion of the information that is subject to subsections 552.022(a)(1) and (a)(3) under section 552.103 of the Government Code. However, since the authority also claims that this particular information is excepted from disclosure under section 552.101 of the Government Code, we will address this claim with regard to this particular information, as well as the remaining submitted information.

You claim that the remaining submitted information is excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with the common-law right to privacy.³ Information is protected from disclosure under the common-law right to privacy if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included 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. *See id.* at 683. Prior decisions of this office have found that financial information relating only to an individual ordinarily satisfies the first requirement of the test for common-law privacy, but that there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. *See, e.g.*, Open Records Decision No. 600 (1992) (information revealing that employee participates in group insurance plan funded partly or wholly by governmental body not excepted from disclosure). In addition, this office has found that some kinds of medical information or information indicating disabilities or specific illnesses are excepted from disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps).

² Discretionary 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. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation and does not itself make information confidential), 522 at 4 (1989) (discretionary exceptions in general), 473 (1987) (governmental body may waive statutory predecessor to section 552.111); *see also Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103). Discretionary exceptions, therefore, do not constitute "other law" that makes information confidential.

³ Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. *See* Gov't Code § 552.101. Section 552.101 encompasses information that is protected from disclosure by the common-law right to privacy.

In Open Records Decision No. 318 (1982), this office concluded that the names and present addresses of former residents of a public housing development were not protected from disclosure under the common-law right to privacy. *See* Open Records Decision No. 318 (1982). This office has also found that information contained in a housing grant application regarding an applicant's family composition, employment, age, and ethnic origin is not information that is ordinarily protected from disclosure under the common-law right to privacy. *See* Open Records Decision No. 373 (1983). Likewise, the amounts paid by a housing authority on behalf of eligible tenants are not protected from disclosure under privacy interests. *See* Open Records Decision No. 268 (1981); *see also* Open Records Decision Nos. 600 at 9-10 (1992), 545 (1990), 489 (1987), 480 (1987). On the other hand, this office has also found that personal financial information regarding public housing tenants is excepted from disclosure pursuant to section 552.101 of the Government Code.

In Open Records Decision No. 373 (1983), this office addressed the availability of personal financial information submitted to a city by an applicant for a housing rehabilitation grant. In that decision, this office concluded:

all financial information relating to an individual -- including sources of income, salary, mortgage payments, assets, medical and utility bills, social security and veterans benefits, retirement and state assistance benefits, and credit history -- ordinarily satisfies the first requirement of common law privacy, in that it constitutes highly intimate or embarrassing facts about the individual, such that its public disclosure would be highly objectionable to a person of ordinary sensibilities.

Open Records Decision No. 373 at 3. Whether the public has a legitimate interest in an individual's sources of income must be determined on a case-by-case basis. *See id.* at 4; *see also* Open Records Decision Nos. 600 (1992); 545 (1990). Based on your arguments and our review of the remaining submitted information, we find that portions of this information constitute personal financial information that is protected from disclosure under the common-law right to privacy. Accordingly, we conclude that the authority must withhold the information that we have marked pursuant to section 552.101 of the Government Code in conjunction with the common-law right to privacy.

We note that a portion of the remaining submitted information constitutes tax return information that is excepted from disclosure pursuant to section 552.101 in conjunction with section 6103(a) of title 26 of the United States Code. Section 6103(a) provides that tax return information is confidential. *See* 26 U.S.C. § 6103(a)(2), (b)(2)(A), (p)(8); *see also* Open Records Decision No. 600 (1992); Attorney General Op. MW-372 (1981). Accordingly, we conclude that the authority must withhold the information that we have marked pursuant to section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code.

You also claim that the remaining submitted information is excepted from disclosure pursuant to section 552.101 in conjunction with the federal Public Health and Welfare Act (the "PHWA"), 42 U.S.C. § 3544. Section 552.101 also encompasses information that is protected from disclosure by other statutes. We note that the PHWA provides for the confidentiality of certain records held by, among others, "representatives of public housing agencies." Specifically, the PHWA provides that the following categories of information may be used only for the purpose of verifying an applicant's or participant's eligibility for or level of benefits: 1) unemployment compensation income, 2) additional sources of earned income, and 3) federal income tax return information. *See* 42 U.S.C. § 3544(c)(2)(A). Because we find that these categories of information are excepted from disclosure pursuant to section 552.101 in conjunction with the common-law right to privacy or section 6103(a) of title 26 of the United States Code, we need not further address the applicability of the PHWA, except to note that no portion of the remaining submitted information is made confidential under the PHWA.

In addition, we note that social security numbers that are contained within the remaining submitted information may be excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with federal law. The 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), make confidential social security numbers and related records that are obtained or 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* Open Records Decision No. 622 (1994). The authority has cited no law, nor are we aware of any law, enacted on or after October 1, 1990, that authorizes it to obtain or maintain social security numbers. Therefore, we have no basis for concluding that these social security numbers are confidential under section 405(c)(2)(C)(viii)(I) of title 42 of the United States Code. We caution the authority, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Prior to releasing these social security numbers, the authority should ensure that they were not obtained and are not maintained by the authority pursuant to any provision of law enacted on or after October 1, 1990.

We also note that a portion of the remaining submitted information is excepted from disclosure pursuant to section 552.101 in conjunction with section 1304(b) of title 8 of the United States Code. Section 1304(b) addresses the confidentiality of the registration of aliens under section 1301 of the United States Code and provides:

All registration and fingerprint records made under the provisions of this subchapter shall be confidential, and shall be made available only

(1) pursuant to section 1357(f)(2) of this title, and

(2) to such persons or agencies as may be designated by the Attorney General.

We have marked the information that is confidential under section 1304(b) of title 8 of the United States Code and that must, therefore, be withheld from disclosure pursuant to section 552.101 of the Government Code.

Further, you claim that the remaining submitted information is excepted from disclosure pursuant to section 552.103 of the Government Code. Section 552.103 provides in pertinent 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). The authority maintains the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information that it seeks to withhold from disclosure. In order to meet this burden, the authority must demonstrate: (1) that litigation was pending or reasonably anticipated on the date of its receipt of the request and (2) that the information at issue is related to that litigation. *See 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.); *see also* Open Records Decision No. 551 at 4 (1990). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See id.*

In demonstrating that litigation is reasonably anticipated, the authority must furnish concrete evidence that litigation is realistically contemplated and is more than mere conjecture. *See* Open Records Decision No. 518 at 5 (1989). 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.⁴ *See* Open Records Decision No. 555 (1990); *see also* Open

⁴ In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who

Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). Conversely, 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, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. *See* Open Records Decision No. 361 (1983). Whether litigation is reasonably anticipated must be determined on case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986).

After carefully reviewing your arguments and the remaining submitted information, we find that the authority has failed to adequately demonstrate that it reasonably anticipated litigation with regard to this matter on the date that it received this request for information. Accordingly, we conclude that the authority may not withhold any portion of the remaining submitted information under section 552.103 of the Government Code.

We also note that a portion of the remaining submitted information is subject to section 552.130 of the Government Code. Section 552.130 excepts from disclosure information that relates to a motor vehicle operator's or driver's license or permit issued by an agency of this state or a motor vehicle title or registration issued by an agency of this state. *See* Gov't Code § 552.130. Accordingly, we conclude that the authority must withhold the driver's license number that we have marked pursuant to section 552.130 of the Government Code, but only if it is a Texas driver's license number. Otherwise, the authority must release this marked driver's license number to the requestor.

Further, we note that portions of the remaining submitted information are excepted from disclosure pursuant to section 552.136 of the Government Code. Section 552.136 provides:

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

- (1) obtain money, goods, services, or another thing of value; or
- (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

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 threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Gov't Code § 552.136. Accordingly, we conclude that the authority must withhold the bank account numbers that we have marked pursuant to section 552.136 of the Government Code.

Finally, we note that portions of the remaining submitted information are copyrighted. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. *See* Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *See id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making such copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

In summary, absent the applicability of an MPA access provision, the authority must withhold the medical record that we have marked pursuant to the MPA. The authority must withhold the information that we have marked pursuant to section 552.101 of the Government Code in conjunction with the common-law right to privacy. Social security numbers may be confidential under federal law. The authority must withhold the information that we have marked pursuant to section 552.101 in conjunction with section 1304(b) of title 8 of the United States Code and section 6103(a) of title 26 of the United States Code. The authority must withhold the driver's license number that we have marked pursuant to section 552.130 of the Government Code, but only if it is a Texas driver's license number. The authority must withhold the bank account numbers that we have marked pursuant to section 552.136 of the Government Code. The authority must release the remaining submitted information to the requestor. However, the authority must do so in compliance with the applicable copyright law for any copyrighted information.

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).

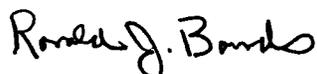
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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,



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/lmt

Ref: ID# 195901

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