



ATTORNEY GENERAL OF TEXAS

December 21, 2007

GREG ABBOTT

Ms. Paula J. Alexander
General Counsel
Metropolitan Transit Authority of Harris County
1900 Main Third Floor
Houston, Texas 77002

OR2007-16967

Dear Ms. Alexander:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 297965.

The Metropolitan Transit Authority of Harris County (the "authority") received a request for information relating to an incident involving a named individual. 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 have reviewed the information you submitted.

We first note that some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a)(1) provides for required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body[,]" unless the information is expressly confidential under other law or excepted from disclosure under section 552.108 of the Government Code. Gov't Code § 552.022(a)(1). Section 552.022(a)(3) provides for required disclosure of "information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[,]" unless the information is expressly confidential under other law. *Id.* § 552.022(a)(3). Section 552.022(a)(17) provides for required disclosure of "information that is also contained in a public court record[,]" unless the information is expressly confidential under other law. *Id.* § 552.022(a)(17).

In this instance, the submitted information includes completed reports and a completed investigation that are subject to section 552.022(a)(1); information in vouchers relating to the expenditure of public funds that is subject to section 552.022(a)(3); and information in court records that is subject to section 552.022(a)(17). The authority must release that

information, which we have marked, unless it is expressly confidential under other law or unless the information encompassed by section 552.022(a)(1) is excepted from disclosure under section 552.108. You do not raise section 552.108. Although you seek to withhold the submitted information under section 552.103 of the Government Code, that section is a discretionary exception that protects a governmental body's interests and may be waived. *See id.* § 552.007; *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 Gov't Code § 552.103); Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.103 is not other law that makes information expressly confidential for the purposes of section 552.022(a)(1), section 552.022(a)(3), or section 552.022(a)(17). Therefore, the authority may not withhold any of the marked information that is subject to section 552.022 under section 552.103.

We next note that the public availability of some of the submitted information is governed by statutes outside the Act. The public availability of medical records is governed by the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. Section 159.002 of the MPA provides in 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(a)-(c). This office has determined that in governing access to a specific subset of information, the MPA prevails over the more general provisions of the Act. *See* Open Records Decision No. 598 (1991). We also have concluded that when a file is created as the result of a hospital stay, all of the documents in the file that relate to diagnosis and treatment constitute either physician-patient communications or records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician. *See* Open Records Decision No. 546 (1990). Medical records must be released on the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) the reasons or purposes for the release, and (3) the person to whom the information is to be released. *See* Occ. Code §§ 159.004, .005. Any subsequent release of medical records must be consistent with the purposes for which the governmental body obtained the records. *See id.* § 159.002(c); Open Records Decision No. 565 at 7 (1990). We have marked medical records involving the requestor's client that must be withheld under the MPA, unless the authority receives consent for release that complies with sections 159.004 and 159.005 of the MPA.

Information relating to the provision of emergency medical services (“EMS”) is governed by chapter 773 of the Health and Safety Code. Section 773.091 of the Health and Safety Code provides in part:

(b) Records of the identity, evaluation or treatment of a patient by emergency medical services personnel or by a physician providing medical supervision that are created by the emergency medical services personnel or physician or maintained by an emergency medical services provider are confidential and privileged and may not be disclosed except as provided by this chapter.

(c) Any person who receives information from confidential communications or records as described by this chapter, other than a person listed in Section 773.092 who is acting on the survivor’s behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was obtained.

Health & Safety Code § 773.091(b)-(c). Section 773.091 further provides, however, that “[t]he privilege of confidentiality under this section does not extend to information regarding the presence, nature of injury or illness, age, sex, occupation, and city of residence of a patient who is receiving emergency medical services.” *Id.* § 773.091(g). We have marked EMS information involving the requestor’s client that the authority must withhold under section 773.091 of the Health and Safety Code, except as specified by section 773.091(g), unless the authority receives consent for release that complies with sections 773.092 and 773.093 of the Health and Safety Code.

The submitted documents also include accident report forms that were completed pursuant to chapter 550 of the Transportation Code. *See* Transp. Code § 550.064 (officer’s accident report). Section 550.065(b) of the Transportation Code states that except as provided by subsection (c), accident reports are privileged and confidential. *See id.* § 550.065(b). Section 550.065(c)(4) provides for the release of an accident report to a person who provides two of the following three items of information: (1) the date of the accident; (2) the name of any person involved in the accident; and (3) the specific location of the accident. *See id.* § 550.065(c)(4). Under this provision, the Texas Department of Transportation or another governmental entity is required to release a copy of an accident report to a person who provides the agency with two or more of the items of information specified by the statute. *Id.* In this instance, the requestor has provided the authority with two of the three specified items of information. Therefore, the accident reports that we have marked must be released in their entirety pursuant to section 550.065(c)(4) of the Transportation Code.

With respect to the remaining information, we address your claim under section 552.103. This exception provides in 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). A governmental body that claims an exception to disclosure under section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate that (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) the information at issue is related to the pending or anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. 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.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See Open Records Decision No. 551 at 4 (1990).*

You state that the remaining information is related to a pending lawsuit in which the authority is the defendant. You have provided documentation reflecting that the lawsuit was pending when the authority received this request for information. Based on your representations and our review of your documentation, we conclude that section 552.103 is generally applicable in this instance.

We note, however, that the opposing party in the lawsuit already has seen or had access to much of the remaining information. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to the litigation through discovery procedures. *See ORD 551 at 4-5.* Thus, if the opposing party has seen or had access to information relating to litigation, through discovery or otherwise, then there is no interest in withholding such information from public disclosure under section 552.103. *See Open Records Decision Nos. 349 (1982), 320 (1982).* Therefore, to the extent that the opposing party in the pending lawsuit has seen or had access to the remaining information, the authority may not withhold any such information under section 552.103. With the exception of that information, the authority may withhold the remaining information at this time under section 552.103. We note that the applicability of

section 552.103 ends when the related litigation concludes. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

We note that sections 552.101, 552.130, and 552.136 of the Government Code are applicable to some of the information that the authority may not withhold under section 552.103.¹ Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This exception encompasses common-law privacy, which protects information that is highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and of no legitimate public interest. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Common-law privacy under section 552.101 encompasses the specific types of information that are held to be intimate or embarrassing in *Industrial Foundation*. *See id.* at 683 (information relating to sexual assault, pregnancy, mental or physical abuse in workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). This office has determined that other types of information also are private under section 552.101. *See generally* Open Records Decision No. 659 at 4-5 (1999) (summarizing information attorney general has held to be private). Common-law privacy also encompasses certain types of personal financial information. Financial information that relates only to an individual ordinarily satisfies the first element of the common-law privacy test, but the public has a legitimate interest in the essential facts about a financial transaction between an individual and a governmental body. *See, e.g.*, Open Records Decision Nos. 545 at 4 (1990) (attorney general has found kinds of financial information not excepted from public disclosure by common-law privacy to generally be those regarding receipt of governmental funds or debts owed to governmental entities), 523 at 4 (1989) (noting distinction under common-law privacy between confidential background financial information furnished to public body about individual and basic facts regarding particular financial transaction between individual and public body). We have marked information that the authority must withhold under section 552.101 in conjunction with common-law privacy.

Section 552.130 of the Government Code excepts from disclosure information relating to a motor vehicle operator’s or driver’s license or permit or a motor vehicle title or registration issued by an agency of this state. *See* Gov’t Code § 552.130(a)(1)-(2). We have marked Texas driver’s license and motor vehicle information that the authority must withhold under section 552.130.

Section 552.136 of the Government Code states that “[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected,

¹Unlike other exceptions to disclosure under the Act, this office will raise sections 552.101, 552.130, and 552.136 on behalf of a governmental body, as these exceptions are mandatory and may not be waived. *See* Gov’t Code §§ 552.007, .352; Open Records Decision Nos. 674 at 3 n.4 (2001) (mandatory exceptions generally), 325 (1982) (statutory predecessor to Gov’t Code § 552.101)..

assembled, or maintained by or for a governmental body is confidential.” *Id.* § 552.136(b); *see id.* § 552.136(a) (defining “access device”). We have marked an insurance policy number that the authority must withhold under section 552.136.

In summary: (1) the marked medical records must be withheld under the MPA unless the authority receives written consent for release that complies with sections 159.004 and 159.005 of the MPA; (2) the marked EMS information must be withheld under section 773.091 of the Health and Safety Code, except as specified by section 773.091(g), unless the authority receives consent for release that complies with sections 773.092 and 773.093 of the Health and Safety Code; (3) the marked accident reports must be released pursuant to section 550.065(c)(4) of the Transportation Code; (4) except for the marked information that is subject to section 552.022 of the Government Code, the authority may withhold the remaining information under section 552.103 of the Government Code, except for the information that the opposing party in the lawsuit has seen or to which she has had access; (5) the authority must withhold the information that we have marked under section 552.101 of the Government Code in conjunction with common-law privacy; (6) the marked Texas driver’s license and motor vehicle information must be withheld under section 552.130 of the Government Code; and (7) the marked insurance policy number must be withheld under section 552.136 of the Government Code.² The rest of the submitted information must be released.³

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 file suit in

²We note that the submitted information contains social security numbers. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person’s social security number from public release without the necessity of requesting a decision from this office under the Act. The requestor has a right, however, to his client’s social security number. *See generally* Gov’t Code § 552.023(b) (governmental body may not deny access to person to whom information relates, or that person’s representative, solely on grounds that information is considered confidential by privacy principles).

³We note that the authority would be required to withhold some of the remaining information from the public to protect the opposing party’s privacy. In this instance, however, the submitted information reflects that the requestor is the opposing party’s attorney. As such, he has a right of access to his client’s private information under section 552.023 of the Government Code. *See* Gov’t Code § 552.023(a) (person or person’s authorized representative has special right of access, beyond right of general public, to information held by governmental body that relates to that person and is protected from public disclosure by laws intended to protect person’s privacy interests); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning herself).

Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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).

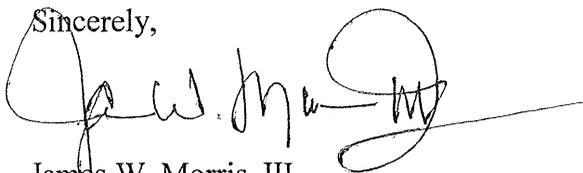
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 challenge 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 Office of the Attorney General 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,

A handwritten signature in black ink, appearing to read "James W. Morris, III". The signature is fluid and cursive, with a long horizontal line extending to the right.

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

JWM/ma

Ref: ID# 297965

Enc: Submitted documents

c: Mr. Rory S. Alter
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(w/o enclosures)