



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 1, 2008

Mr. Ben Stool
Assistant District Attorney
Dallas County
411 Elm Street, 5th Floor
Dallas, Texas 75202

OR2008-13487

Dear Mr. Stool:

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# 323472.

The Dallas County Constable, Precinct 5 (the "constable") received a request for the entire personnel file of a named individual, as well as any documents or materials that relate to the individual's termination. You claim that the requested information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Section 552.103 of the Government Code 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.

Id. § 552.103(a), (c). A governmental body 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 was pending or reasonably anticipated on the date that the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Thomas v. Cornyn*, 71 S.W.3d 473, 487 (Tex. App.—Austin 2002, no pet.); *Univ. of Tex. Law Sch. v. Tex. 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(a).

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. See Open Records Decision No. 452 at 4 (1986). To establish that litigation is reasonably anticipated, a governmental body must provide this office with “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” *Id.* 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, 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. Open Records Decision No. 361 (1983).

You argue the constable anticipated litigation on the day it received the instant request for information from the former deputy’s attorney because he stated he represents the former deputy in an appeal of his termination. However, as we stated above, the fact that a party has hired an attorney who makes a request for information is insufficient to show that litigation is reasonably anticipated. *Id.* You further state the day after the constable received the request, the former deputy, through his attorney, filed a formal grievance with the county seeking reinstatement. However, because the constable, through the county, received the grievance after its receipt of the request for information, you have not demonstrated the requestor or his client had taken concrete steps towards litigation at the time of the constable’s receipt of the instant request. Thus, we find you have failed to establish the constable reasonably anticipated litigation when it received this request for information.

Accordingly, we conclude none of the submitted information may be withheld under section 552.103.

We note, however, that some of the submitted information is confidential by law. 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 section encompasses the doctrine of common-law privacy, which protects from public disclosure private information that (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. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976).

In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied), the court addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment. The investigation files in *Ellen* contained individual witness statements, an affidavit by the individual accused of the misconduct responding to the allegations, and conclusions of the board of inquiry that conducted the investigation. *Ellen*, 840 S.W.2d at 525. The court ordered the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating the public's interest was sufficiently served by the disclosure of such documents. *Id.* In concluding, the *Ellen* court held "the public did not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released." *Id.*

When there is an adequate summary of a sexual harassment investigation, the summary must be released along with the statement of the accused, but the identities of the victims and witnesses must be redacted and their detailed statements withheld from disclosure. However, when no adequate summary exists, detailed statements regarding the allegations must be released, but the identities of witnesses and victims must still be redacted from the statements. In either case, the identity of the individual accused of sexual harassment is not protected from public disclosure. Common-law privacy does not protect information about a public employee's alleged misconduct on the job or complaints made about a public employee's job performance. See Open Records Decision Nos. 438 (1986), 405 (1983), 230 (1979), 219 (1978).

Some of the submitted information relates to a sexual harassment investigation. Upon review, we find that the submitted information contains an adequate summary of the investigation and a statement of the accused. Because there is a summary and a statement of the accused, the remaining investigative documents are confidential under common-law privacy. We have also marked the identifying information of the victim and witnesses contained in the summary and statement that are confidential under common-law privacy and must be withheld pursuant to section 552.101 of the Government Code. See *Ellen*, 840

S.W.2d at 525. The remaining information in the summary and statement, however, must be released.

Section 552.101 encompasses the Medical Practice Act ("MPA"). Occ. Code §§ 151.001-165.160. Section 159.002 of the Occupations Code provides in pertinent part:

(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.

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 id.* Information subject to the MPA includes both medical records and information obtained from those medical records. *See* 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).

Medical records may be released only as provided under the MPA. ORD 598. In this instance, the requestor is the attorney for the individual who is the subject of the medical records. Thus, the attorney may have a right of access to the medical records. The constable may only disclose the medical records we have marked in accordance with the access provisions of the MPA. Absent the applicability of an MPA access provision, the constable must withhold the records under section 552.101 of the Government Code.

Section 552.101 also encompasses section 611.002 of the Health and Safety Code, which governs the public availability of mental health records and provides in part:

(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.

Health & Safety Code § 611.002(a)-(b). 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. *Id.* § 611.001(b). The submitted information contains mental health records that are subject to section 611.002 of the Health and Safety Code. Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals. *See* Open Records Decision No. 565 (1990). These sections permit disclosure of mental health records to a patient, a person authorized to act on the patient's behalf, or a person who has the written consent of the patient. Health & Safety Code § 611.004, .0045. Because the patient's attorney is the requestor, he may have a right of access to his client's mental health information under sections 611.004 and 611.0045. If not, then the constable must withhold the marked information under section 552.101 in conjunction with section 611.002 of the Health and Safety Code.

The submitted information contains an F-5 form. Section 552.101 also encompasses section 1701.454 of the Occupations Code which governs the release of F-5 forms. Section 1701.454 provides in relevant part that "[a] report or statement submitted to the commission under this subchapter is confidential and is not subject to disclosure under Chapter 552, Government Code, unless the person resigned or was terminated due to substantiated incidents of excessive force or violations of the law other than traffic offenses." Occ. Code § 1701.454(a). In this instance, the submitted information indicates that the officer at issue was not terminated due to substantiated incidents of excessive force or violations of the law other than traffic offenses. Therefore, the constable must withhold the submitted F-5 form, which we have marked, pursuant to section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code.

Section 552.130 of the Government Code excepts from disclosure information that "relates to... a motor vehicle title or registration issued by an agency of this state." *Id.* § 552.130(a)(2). The submitted documents contain the license plate number of a county vehicle. The constable must withhold the information we have marked under section 552.130 of the Government Code.

In summary, we have marked the information in the sexual harassment investigation that must be withheld under section 552.101 of the Government Code in conjunction with common-law privacy. The constable may only release the marked medical records in accordance with the MPA. The constable may only release the marked mental health records in accordance with section 611.004 and section 611.0045 of the Health and Safety Code. The constable must withhold the F-5 form under section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code. The constable must withhold

the Texas motor vehicle information we have marked under section 552.130 of the Government Code. The remaining information must be released.¹

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 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). If the governmental body does not file suit over 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

¹We note that the requestor in this instance has a special right of access to some of the information being released. Gov't Code § 552.023 (person or person's authorized representative has special right of access to records that contain information relating to the person that are protected from public disclosure by laws intended to protect that person's privacy interests). Should the county attorney receive another request for these same records from a person who would not have a special right of access to the private information, the county attorney should resubmit this same information and request another ruling from this office. *See id.* §§ 552.301(a), .302.

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 cursive script that reads "Olivia A. Maceo".

Olivia A. Maceo
Assistant Attorney General
Open Records Division

OM/sdk

Ref: ID# 323472

Enc. Submitted documents

c: Mr. Lance F. Wyatt
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(w/o enclosures)