



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

September 21, 2009

Ms. Jakki A. Hansen  
Assistant General Counsel  
Metropolitan Transit Authority  
P.O. Box 61429  
Houston, Texas 77208-1429

OR2009-13259

Dear Ms. Hansen:

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# 355983 (MTA No. 2009-0218).

The Metropolitan Transit Authority ("METRO") received a request for several categories of information concerning a specified hiring decision and the subsequent grievance and investigation arising from the hiring decision, any past claims of alleged discrimination relating to past hiring decisions, and the personnel file of the requestor's client. You claim 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 submitted information.<sup>1</sup> We have also received and 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).

Initially, we note the requestor contends that he was not properly notified of METRO's request for a ruling from this office as required by section 552.301(d)(2) of the Government Code. *See id.* § 552.301(d) (governmental body must provide requestor with copy of governmental body's written communication to attorney general asking for decision).

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<sup>1</sup> To the extent any additional responsive information existed on the date METRO received this request, we assume you have released it. If you have not released any such records, you must do so at this time. *See Gov't Code* §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

Pursuant to section 552.302, a governmental body's failure to timely provide the requestor with a copy of its written communication to this office results in the presumption that the information is public. The request submitted by METRO indicates that METRO received the written request for information on July 1, 2009. We note that METRO was closed on July 3, 2009, in observance of Independence Day. Thus, METRO was required to request a ruling from this office and provide the requestor with a copy of its written communication with this office by July 16, 2009. METRO requested a decision from our office on July 16, 2009. *See id.* § 552.308(a) (prescribing standards for timeliness of action by United States or common or contract carrier). Further, the submitted information indicates METRO simultaneously sent a copy of the request for a decision to the requestor. This office is unable to resolve disputes of fact in the open records ruling process. Accordingly, we must rely upon the facts alleged to us by the governmental body requesting our opinion, or upon those facts that are discernable from the documents submitted for our inspection. *See Open Records Decision No. 522 at 4 (1990)*. Based on the submitted information and METRO's representations, we find that METRO complied with the procedural requirements of section 552.301 in requesting this ruling. Accordingly, we will address METRO's arguments against disclosure.

Next, we note the submitted information includes the requestor's client's fingerprints. The public availability of fingerprints is governed by chapter 560 of the Government Code. *See id.* §§ 560.001(1) ("biometric identifier" means retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry), .003 (biometric identifier in possession of governmental body is exempt from disclosure under Act). Section 560.002 provides, however, that "[a] governmental body that possesses a biometric identifier of an individual . . . may not sell, lease, or otherwise disclose the biometric identifier to another person unless . . . the individual consents to the disclosure[.]" *Id.* § 560.002(1)(A). Thus, the requestor has a right of access to his client's fingerprints under section 560.002(1)(A). *See Open Records Decision No. 481 at 4 (1987)* (privacy theories not implicated when individual requests information concerning himself). Although METRO seeks to withhold the fingerprints under section 552.103 of the Government Code, the exceptions to disclosure found in the Act are generally not applicable to information that other statutes make public. *See Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989)*. Therefore, the fingerprints that we have marked must be released to this requestor pursuant to section 560.002 of the Government Code.

Next, we note that some of the submitted documents constitute the requestor's client's medical records. Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."<sup>2</sup> Gov't Code § 552.101. This section encompasses the Medical Practice

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<sup>2</sup>The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987)*.

Act (the "MPA"), chapter 159 of the Occupations Code, which governs access to medical records. Section 159.002 of the Occupations Code 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* Occ. Code. § 159.002(a)-(c); *see also* Open Records Decision No. 598 (1991).

We have marked the records that are subject to the MPA. As the attorney representing the individual who is the subject of these records, the requestor may have a right of access to the medical records. These medical records must be released to the requestor on receipt of a signed, written consent from the requestor's client, 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. Any subsequent release of medical records must be consistent with the purposes for which the governmental body obtained the records. *See* Open Records Decision No. 565 at 7 (1990). If this consent is not received, the medical records must be withheld from disclosure pursuant to the MPA and section 552.101 of the Government Code.

We next note that some of the remaining information falls within the scope of section 552.022(a)(1) 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). In this instance, the submitted information includes completed evaluations of the requestor that were made for or by METRO. Although you seek to withhold the information at issue under section 552.103 of the Government Code, this section is a discretionary exception to disclosure 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). Therefore, METRO may not withhold any of the information subject to section 552.022(a)(1) under section 552.103 of the Government Code.

Next, we address your claim for the rest of the submitted information under section 552.103. Section 552.103 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 has 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. To meet this burden, the governmental body must demonstrate: (1) that litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) that the information at issue is related to that 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.); *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. *Id.*

Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986). To demonstrate that litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and 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"). This office has also found that a pending EEOC complaint indicates litigation is reasonably anticipated. Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982), 281 at 1 (1981). 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). We also note that 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 that the submitted information is excepted under section 552.103 because METRO anticipates litigation from the requestor's client. You state and provide documentation showing that the requestor's client is currently appealing a decision regarding an internal grievance he filed with respect to one of METRO's hiring decisions. You also state that the requestor's client has indicated that he intends to file a complaint with the EEOC against METRO. We note, however, that, as of the date METRO received the request, the requestor's client had not yet filed a complaint with the EEOC. Furthermore, beyond a general statement that METRO anticipates litigation in this instance based on the requestor's client's complaints and his representation by an attorney in relation to the grievance process, you have failed to demonstrate that the individual at issue or his attorney has taken any objective step toward filing litigation against METRO as of the date METRO received the request. Accordingly, we find that you have failed to establish by concrete evidence that METRO reasonably anticipated litigation when it received this request for information. *See* Gov't Code § 552.103(c). We therefore conclude METRO may not withhold the remaining submitted information under section 552.103 of the Government Code.

We note that some of the remaining information is excepted under section 552.117 of the Government Code. Section 552.117(a)(2) excepts from disclosure the home address, home telephone number, and social security number of a peace officer, as well as information that reveals whether the peace officer has family members, regardless of whether the peace officer complies with sections 552.024 or 552.1175 of the Government Code. *Id.* § 552.1117(a)(2). Section 552.117(a)(2) adopts the definition of peace officer found at article 2.12 of the Code of Criminal Procedure. Accordingly, METRO must withhold the information we have marked under section 552.117(a)(2).

In summary, METRO must release the requestor's client's fingerprints under section 560.002 of the Government Code. The marked medical records may only be released pursuant to the MPA. METRO must withhold the information we have marked pursuant to section 552.117(a)(2) of the Government Code. The remaining information must be released to the requestor.<sup>3</sup>

This letter ruling is limited to the particular information 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 information or any other circumstances.

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<sup>3</sup>Because some of the information being released is confidential with regard to the general public, if METRO receives another request for this information from an individual other than this requestor or his client, METRO should again seek our decision.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Amy L.S. Shipp  
Assistant Attorney General  
Open Records Division

ALS/rl

Ref: ID# 355983

Enc. Submitted documents

cc: Requestor  
(w/o enclosures)