



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 15, 2010

Ms. Shirley Thomas
Senior Assistant General Counsel
Dallas Area Rapid Transit
P.O. Box 660163
Dallas, Texas 75266-0163

OR2010-00821

Dear Ms. Thomas:

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# 367441 (ORR# 6938).

Dallas Area Rapid Transit ("DART") received a request for the requestor's employment personnel file. You claim the submitted 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.

Initially, we note a portion of the submitted information, which we have marked, is not responsive to the instant request for information because it pertains to an individual who is not the requestor. This ruling does not address the public availability of any information that is not responsive to the request and DART is not required to release such information in response to this request.

Next, we note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

(a) [T]he 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). The submitted information contains completed evaluations that are expressly public under section 552.022(a)(1). DART must release this information, which we have marked, pursuant to section 552.022 unless it is excepted from disclosure under section 552.108 of the Government Code or is expressly made confidential under other law. *See id.* You claim this information is subject to section 552.103 of the Government Code. Section 552.103 is a discretionary exception to disclosure that protects the governmental body's interests and is therefore not "other law" that makes information expressly confidential for purposes of section 552.022(a). *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Consequently, DART may not withhold any of the information we have marked under section 552.022(a)(1) pursuant to section 552.103 of the Government Code. As you raise no other exceptions against the disclosure of this information, it must be released.

We also note the remaining information contains medical records. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."¹ Gov't Code § 552.101. Section 552.101 of the Government Code encompasses the Medical Practice Act ("MPA"), subtitle B of title 3 of the Occupations Code. *See* Occ. Code § 151.001. 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.

Id. § 159.002(b)-(c). This office has determined 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). Information subject to the MPA includes both medical

¹The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

records and information obtained from those medical records. *See id.* This office has concluded 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 must be released upon the patient's signed, written consent, provided 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. 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). A portion of the remaining information contains the requestor's medical records. Accordingly, the medical records we have marked may only be released in accordance with the MPA.

Section 552.101 of the Government Code also encompasses section 611 of the Health and Safety Code. Section 611.002 provides in pertinent 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); *see id.* § 611.001 (defining "patient" and "professional"). 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. *See id.* § 611.001(2). Upon review, we find a portion of the submitted information, which we have marked, consists of a mental health record that is subject to chapter 611 of the Health and Safety Code. In this case, the requestor is the individual whose mental health record is at issue, and may have a right of access to the mental health record. Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals. *See ORD 565.* 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. Accordingly, DART may release the marked mental health record only in accordance with sections 611.004 and 611.0045.

We now address your claim under section 552.103 of the Government Code for the remaining information not subject to section 552.022. 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 it seeks to withhold. To meet this burden, the governmental body must demonstrate: (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 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.). 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).*

Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See Open Records Decision No. 452 at 4 (1986).* To demonstrate 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.* This office has found a pending complaint with the Equal Opportunity Employment Commission ("EEOC") indicates litigation is reasonably anticipated. *See Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982), 281 at 1 (1981).*

You state, and provide documentation showing, prior to DART's receipt of the instant request, the requestor filed discrimination claims against DART with the EEOC. Based on your arguments and our review of the submitted information, we find DART reasonably anticipated litigation on the date this request was received. You also state the information at issue pertains to the substance of the discrimination claims. Based on your representations and our review, we find the information at issue is related to the anticipated litigation. Therefore, section 552.103 is generally applicable to this information.

We note, however, it appears the opposing party has seen or had access to most of the information at issue. The purpose of section 552.103 is to enable a governmental body to

protect its position in litigation by forcing parties seeking information relating to the litigation to obtain such information through discovery procedures. *See* ORD 551 at 4-5 (1990). Thus, once the opposing party in pending litigation has seen or had access to information that is related to the litigation, there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Accordingly, DART may withhold the portions of the remaining information that the opposing party to the litigation has not seen or had access to under section 552.103 of the Government Code. We note the applicability of section 552.103 ends once the related litigation concludes. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982). To the extent the opposing party has seen or had access to the remaining information, we will address the applicability of other exceptions to disclosure of this information.

Section 552.101 of the Government Code also encompasses federal law such as the Family Medical Leave Act (the "FMLA"), section 2654 of title 29 of the United States Code. Section 825.500 of chapter V of title 29 of the Code of Federal Regulations identifies the record-keeping requirements for employers that are subject to the FMLA. Subsection (g) of section 825.500 states:

[r]ecords and documents relating to medical certifications, recertifications or medical histories of employees or employees' family members, created for purposes of FMLA, shall be maintained as confidential medical records in separate files/records from the usual personnel files, and if ADA is also applicable, such records shall be maintained in conformance with ADA confidentiality requirements[], except that:

- (1) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations;
- (2) First aid and safety personnel may be informed (when appropriate) if the employee's physical or medical condition might require emergency treatment; and
- (3) Government officials investigating compliance with FMLA (or other pertinent law) shall be provided relevant information upon request.

29 C.F.R. § 825.500(g). We note a portion of the submitted documents, which we have marked, is confidential under section 825.500 of title 29 of the Code of Federal Regulations. Further, we find none of the release provisions of the FMLA apply to this information. Accordingly, DART must withhold the information we have marked under section 552.101 of the Government Code in conjunction with the FMLA.

We note the submitted information contains W-4 forms. Prior decisions of this office have held section 6103(a) of title 26 of the United States Code renders tax return information confidential for purposes of section 552.101 of the Government Code. Attorney General Opinion H-1274(1978) (tax returns); Open Records Decision Nos. 600 (1992) (W-4 forms). Section 6103(b) defines the term "return information" as "a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments . . . or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary [of the Internal Revenue Service] with respect to a return or with respect to the determination of the existence, or possible existence, of liability . . . for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense[.]" See 26 U.S.C. § 6103(b)(2)(A). Federal courts have construed the term "return information" expansively to include any information gathered by the Internal Revenue Service regarding a taxpayer's liability under title 26 of the United States Code. See *Mallas v. Kolak*, 721 F. Supp 748, 754 (M.D.N.C. 1989), *aff'd in part*, 993 F.2d 1111 (4th Cir. 1993).

Subsections (c) and (e) of section 6103 are exceptions to the confidentiality provisions of section 6103(a) and provide for disclosure of tax information to the taxpayer or the taxpayer's designee. See 26 U.S.C. § 6103(c), (e)(1)(A)(i) (tax return information may be disclosed to taxpayer), (e)(7) (information may be disclosed to any person authorized by subsection(e) to obtain such information if Secretary of Treasury determines such disclosure would not seriously impair tax administration); see also *Lake v. Rubin*, 162 F.3d 113 (D.C. Cir. 1998) (26 U.S.C. § 6103 represents exclusive statutory route for taxpayer to gain access to own return information and overrides individual's right of access under the federal Freedom of Information Act). Section 6103(c) provides, unless the Secretary of Treasury determines that disclosure would seriously impair tax administration, tax record information may be released to any person or persons as the taxpayer may designate in a consent to such disclosure. See 26 U.S.C. § 6103(c). The submitted information contains the requestor's W-4 forms, which we have marked. Therefore, pursuant to section 6103(c) of title 26 of the United States Code, DART must release these forms to the requestor if the Secretary of Treasury determines such disclosure would not seriously impair federal tax administration. Otherwise, the marked W-4 forms are confidential under section 6103 of title 26 of the United States Code and must be withheld under section 552.101 of the Government Code.

We also note the information at issue includes federal I-9 forms. Section 552.101 also encompasses section 1324a of title 8 of the United States Code, which provides that an Employment Eligibility Verification Form I-9 and "any information contained in or appended to such 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. See 8 U.S.C. § 1324a(b)(5); see also 8 C.F.R. § 274a.2(b)(4). Release of the forms in this instance would be "for purposes other than for enforcement" of the referenced federal statutes. Accordingly, we conclude the submitted I-9 forms, which we have marked, are confidential pursuant to section 552.101 of the Government Code in conjunction with section 1324a of

title 8 of the United States Code and may only be released in compliance with the federal laws and regulations governing the employment verification system.²

In summary, DART must release the information we have marked under section 552.022(a)(1) of the Government Code. The marked medical record may be released only in accordance with the MPA. The marked mental health records may be released only in accordance with sections 611.004 and 611.0045 of the Health and Safety Code. To the extent the opposing party in the pending litigation has not seen or had access to the remaining information, DART may withhold it under section 552.103 of the Government Code. To the extent the opposing party to the litigation has seen or had access to the remaining information, it may not be withheld under section 552.103. In releasing such information, (1) DART must withhold the information we have marked under section 552.101 of the Government Code in conjunction with FMLA; (2) DART must withhold the requestor's W-4 forms, which we have marked, pursuant to section 552.101 in conjunction with section 6103 of title 26 of the United States Code, unless such disclosure would not seriously impair federal tax administration; (3) DART must withhold the submitted I-9 forms, which we have marked, under section 552.101 of the Government Code in conjunction with section 1324a of title 8 of the United States Code; and (4) the remaining information must be released.³

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.

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, 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

²We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including a Form I-9 and attachments under section 552.101 of the Government Code in conjunction with section 1324a of title 8 of the United States Code, without the necessity of requesting an attorney general decision.

³We note the requestor has a special right of access to some of the information being released in this instance. See Gov't Code § 552.023(b) (governmental body may not deny access to person to whom information relates or person's agent on ground that information is considered confidential by privacy principles); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individuals request information concerning themselves). Because such information may be confidential with respect to the general public, if DART receives another request for this information from a person other than the requestor or her authorized representative, it should again seek a ruling from this office. See Gov't Code §§ 552.301, .302.

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,

A handwritten signature in black ink, appearing to read "Claire Morris Sloan". The signature is fluid and cursive, with a long horizontal stroke at the end.

Claire V. Morris Sloan
Assistant Attorney General
Open Records Division

CVMS/jb

Ref: ID# 367441

Enc. Submitted documents

c: Requestor
(w/o enclosures)