



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 18, 2010

Mr. Hyattye O. Simmons
General Counsel
Dallas Area Rapid Transit
P.O. Box 660163
Dallas, Texas 75266-0163

OR2010-02483

Dear Mr. Simmons:

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# 370496 (DART ORR #7020).

Dallas Area Rapid Transit ("DART") received a request for information relating to a specified incident and a named individual. You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, and 552.130 of the Government Code. We have considered the exceptions you claim and 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). We have marked completed reports made of, for, or by DART that are subject to disclosure under section 552.022(a)(1). We note that DART does not claim an exception to disclosure under section 552.108. Although DART does seek to withhold the submitted information under section 552.103 of the Government Code, that 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 (discretionary exceptions generally). As such, section 552.103 is not other law that makes information confidential for the purposes of

section 552.022(a)(1). Therefore, DART may not withhold any of the information that is subject to section 552.022(a)(1) under section 552.103. DART also claims sections 552.101 and 552.130 of the Government Code, which are other law that makes information confidential for the purposes of section 552.022(a)(1). Accordingly, we will determine whether DART must withhold any of the submitted information, including the information that is subject to section 552.022(a)(1), under section 552.101 or section 552.130. We also will determine whether the information that is not subject to section 552.022(a)(1) may be withheld under section 552.103.

Section 552.101 of the Government Code 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 information that other statutes make confidential. Medical records are confidential under 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(b)-(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). 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 relating to the requestor's client that are confidential under the MPA. The marked medical records must be withheld under section 159.002(b) of the MPA, unless DART receives the required written consent for release under sections 159.004 and 159.005.

Section 552.101 of the Government Code also encompasses common-law privacy, which protects information that contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and is not of legitimate concern to the public. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Common-law privacy protects 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). Although DART claims section 552.101 in conjunction with common-law privacy, we find that none of the information that is subject to section 552.022(a)(1) is intimate or embarrassing and not a matter of legitimate public interest. We therefore conclude that DART may not withhold any of that information under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.130 of the Government Code excepts from disclosure information relating to a personal identification document issued by an agency of this state or a local agency authorized to issue an identification document. *See* Gov't Code § 552.130(a)(3). The information that is subject to section 552.022(a)(1) includes a Texas personal identification number that DART would ordinarily be required to withhold under section 552.130. We note, however, that section 552.130 protects personal privacy. As an attorney for the individual whose personal identification number is at issue, the requestor is her authorized representative. As such, the requestor has a right of access to his client's personal identification number under section 552.023 of the Government Code. *See id.* § 552.023.¹ Therefore, the submitted personal identification number may not be withheld from this requestor under section 552.130 of the Government Code and must be released. *See* Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning herself).

We note that section 552.117 of the Government Code may be applicable to some of the information that is subject to section 552.022(a)(1).² Section 552.117(a)(1) excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former official or employee of a governmental body who requests that this information be kept confidential under section 552.024 of the Government Code. Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be

¹Section 552.023 provides in part that "[a] person or a person's authorized representative has a special right of access, beyond the right of the general public, to information held by a governmental body that relates to the person and that is protected from public disclosure by laws intended to protect that person's privacy interests." Gov't Code § 552.023(a).

²Unlike other exceptions to disclosure under the Act, this office will raise section 552.117 on behalf of a governmental body, as this exception is mandatory and may not be waived. *See* Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

withheld under section 552.117(a)(1) on behalf of a current or former official or employee who did not timely request under section 552.024 that the information be kept confidential. We have marked information relating to a current or former employee of DART that must be withheld under section 552.117(a)(1) to the extent that the employee concerned timely requested confidentiality for the marked information under section 552.024.

Next, we address DART's claim under section 552.103 for the submitted information that is not subject to section 552.022(a)(1). 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 at issue. To meet this burden, a 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).*

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.* This office has concluded that a governmental body's receipt of a claim that it represents to be in compliance with the notice requirements of the Texas Tort Claims Act (the "TTCA"), chapter 101 of the Civil Practice and Remedies Code, is sufficient to establish that litigation is reasonably anticipated. If this representation is not made, then the receipt of the claim letter is a factor that we will consider in determining, from the totality of the circumstances presented, whether the governmental body has established that litigation is reasonably anticipated. *See Open Records Decision No. 638 at 4 (1996).*

You indicate that the information that is not subject to section 552.022(a)(1) is related to a personal injury claim that DART received from the requestor's client. You have provided documentation of the claim, which you state is in compliance with the TTCA. According to a notation in the submitted information, DART received the claim prior to its receipt of this request for information. Accordingly, we find that the submitted information that is not subject to section 552.022(a)(1) is related to litigation that DART reasonably anticipated on the date of its receipt of the instant request for that information. We therefore conclude that section 552.103 is generally applicable to the submitted information that is not subject to section 552.022(a)(1).

We note, however, that some of the information in question was provided to the opposing party in the anticipated litigation. 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 litigation through discovery procedures. *See* ORD 551 at 4-5. If the opposing party has seen or had access to information relating to anticipated 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). Thus, the marked document that DART provided to the opposing party in the anticipated litigation may not be withheld under section 552.103 and must be released. Except for that document, the submitted information that is not subject to section 552.022(a)(1) may be withheld at this time under section 552.103. We note that the applicability of this exception ends once the related litigation concludes or is no longer reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary: (1) the marked medical records must be withheld under section 159.002(b) of the MPA, unless DART receives the required written consent for release under sections 159.004 and 159.005; (2) the marked information relating to the current or former employee of DART must be withheld under section 552.117(a)(1) of the Government Code to the extent that the employee concerned timely requested confidentiality for the marked information under section 552.024 of the Government Code; and (3) except for the marked document that was provided to the opposing party and must be released, DART may withhold the submitted information that is not subject to section 552.022(a)(1) of the Government Code under section 552.103 of the Government Code. The rest of the submitted information must be released.³

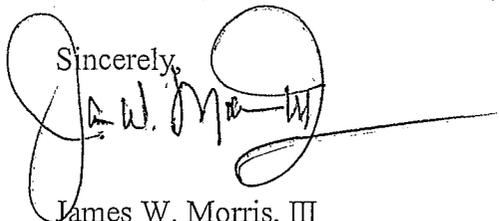
You also ask this office to issue a previous determination that would authorize DART to withhold "Texas driver's license numbers, motor vehicle identification numbers, motor vehicle plates and personal identification numbers" under section 552.130 of the Government Code without the necessity of requesting a decision by this office under the Act. *See* Gov't

³We note that the information to be released includes this requestor's client's Texas personal identification number, which DART would ordinarily be required to withhold under section 552.130 of the Government Code. Should DART receive another request for these same records from a person who would not have a right of access to the requestor's client's private information, DART should resubmit these records and request another ruling. *See* Gov't Code §§ 552.301, .302.

Code § 552.301(a); Open Records Decision No. 673 (2001) (previous determinations). We note that this office recently issued a previous determination in Open Records Decision No. 684 (2009) that generally authorizes any governmental body subject to the Act to withhold a Texas driver's license number, a copy of a Texas driver's license, a Texas license plate number, the portion of a photograph that reveals a Texas license plate number, and the portion of any video depicting a discernible Texas license plate number under section 552.130 without seeking a decision from this office. *See* ORD 684 at 7-8. We decline to grant DART a previous determination for any other types of information at this time. 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 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 'J.W. Morris, III', with a long horizontal line extending to the right.

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

JWM/cc

Ref: ID# 370496

Enc: Submitted information

c: Requestor
(w/o enclosures)