



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

February 22, 2010

Ms. Rebecca Brewer  
Abernathy, Roeder, Boyd & Joplin, P.C.  
Attorneys for City of Wylie  
P.O. Box 1210  
McKinney, Texas 75070-1210

OR2010-02613

Dear Ms. Brewer:

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# 370779.

The City of Wylie (the "city"), which you represent, received a request for a named individual's personnel records from January 1, 2008 to November 24, 2009. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.103, and 552.117 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note some of the submitted information is not responsive to the instant request, as it was created outside the date range specified in the request. This decision does not address the public availability of the non-responsive information, which we have marked, and it need not be released in response to the present request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dism'd);

---

<sup>1</sup>Although you raise section 552.024 of the Government Code, we note that this section is not an exception to public disclosure under the Act. Rather, this section permits a current or former official or employee of a governmental body to choose whether to allow public access to certain information relating to the current or former official or employee that is held by the employing governmental body. *See Gov't Code* § 552.024. Section 552.117 of the Government Code is instead the proper exception to assert.

Open Records Decision No. 452 at 3 (1986) (governmental body not required to disclose information that did not exist at time request was received).

Section 552.103 of the Government Code 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 to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing (1) litigation is pending or reasonably anticipated on the date the governmental body receives the request for information, and (2) the information at issue is related to that litigation. *See 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). The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). *See* ORD 551 at 4.

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 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. *See* Open Records Decision No. 555 (1990); *see also* 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). 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. *See* Open Records Decision No. 361 (1983).

You contend the submitted information is excepted under section 552.103 because the request itself, the responsive information in Exhibit B, and the additional e-mail you have submitted to this office reveal litigation is reasonably anticipated from the requestor. We note, however, that the request itself and the information in Exhibit B do not reveal the requestor has filed or intends to file litigation. Further, the additional e-mail you submitted was received after the date the city received the request for information. You have not otherwise demonstrated the requestor had taken concrete steps towards litigation on the date the request was received. *See* Open Records Decision No. 331 (1982). Thus, we find you have failed to establish the city reasonably anticipated litigation when it received the instant request for information. *See* Gov't Code § 552.103(c). Therefore, the city may not withhold any of the submitted information under section 552.103 of the Government Code.

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. Section 552.101 encompasses the doctrine of common-law privacy. Section 552.102(a) of the Government Code excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled the test to be applied to information claimed to be protected under section 552.102(a) is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101. Accordingly, we address the city's section 552.102(a) claim in conjunction with its common-law privacy claim under section 552.101 of the Government Code.

In *Industrial Foundation*, the Texas Supreme Court stated information is excepted from disclosure if it (1) contains highly intimate or embarrassing facts, the release of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. 540 S.W.2d at 685. The type of information considered intimate or embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. 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 that the

public's interest was sufficiently served by the disclosure of such documents. *Id.* In concluding, the *Ellen* court held that "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.*

Thus, if there is an adequate summary of an investigation of alleged sexual harassment, the investigation summary must be released along with the statement of the accused under *Ellen*, but the identities of the victims and witnesses of the alleged sexual harassment must be redacted, and their detailed statements must be withheld from disclosure. *See* Open Records Decision Nos. 393 (1983), 339 (1982). If no adequate summary of the investigation exists, then all of the information relating to the investigation ordinarily must be released, with the exception of information that would identify the victims and witnesses. Because 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, the identity of the individual accused of sexual harassment is not protected from public disclosure. *See* Open Records Decision Nos. 438 (1986), 405 (1983), 230 (1979), 219 (1978).

The submitted information contains an allegation of sexual harassment. Upon review, we find the submitted information includes an adequate summary of the investigation into the allegation at issue; thus, this summary is not confidential. However, we note information within the summary that identifies the victim and witnesses is confidential under common-law privacy. *See Ellen*, 840 S.W.2d at 525. Accordingly, the city must release the summary, but withhold the information we have marked in the summary under common-law privacy. Further, the city must withhold the additional records of the sexual harassment investigation we have marked under common-law privacy and the court's holding in *Ellen*.<sup>2</sup>

You claim the remainder of Exhibit B is also excepted from disclosure under common-law privacy and the ruling in *Ellen*. However, upon review, we find this information consists entirely of administrative documents that pertain to the named individual's background and are unrelated to the sexual harassment allegation at issue. Consequently, the city may not withhold the remainder of Exhibit B under common-law privacy on the basis of *Morales v. Ellen*.

Common-law privacy also protects certain types of personal financial information. However, this office has found that although personal financial information relating only to an individual ordinarily satisfies the first requirement of the test for common-law privacy, there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. *See* Open Records Decision Nos. 600 (finding personal financial information to include designation of beneficiary of employee's retirement benefits

---

<sup>2</sup>As our ruling is dispositive, we do not address your remaining arguments against disclosure of this information.

and optional insurance coverage; choice of particular insurance carrier; direct deposit authorization; and forms allowing employee to allocate pretax compensation to group insurance, health care, or dependent care), 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history). This office has also found information pertaining to the work conduct and job performance of public employees is subject to a legitimate public interest and, therefore, generally not protected from disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (1987) (public employee's job performance does not generally constitute employee's private affairs), 455 (1987) (public employee's job performance or abilities generally not protected by privacy), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employee), 423 at 2 (1984) (scope of public employee privacy is narrow). Upon review, we find you have failed to demonstrate any of the remaining information is highly intimate or embarrassing and not of legitimate public interest. Therefore, the city may not withhold any of the remaining information under common-law privacy.

You claim the submitted information may be excepted from disclosure under the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 42 U.S.C. §§ 1320d-1320d-8. At the direction of Congress, the Secretary of Health and Human Services ("HHS") promulgated regulations setting privacy standards for medical records, which HHS issued as the Federal Standards for Privacy of Individually Identifiable Health Information. *See* HIPAA, 42 U.S.C. § 1320d-2 (Supp. IV 1998) (historical & statutory note); Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. Pts. 160, 164 ("Privacy Rule"); *see also* Attorney General Opinion JC-0508 at 2 (2002). These standards govern the releasability of protected health information by a covered entity. *See* 45 C.F.R. pts. 160, 164. Under these standards, a covered entity may not use or disclose protected health information, except as provided by parts 160 and 164 of the Code of Federal Regulations. 45 C.F.R. § 164.502(a).

This office has addressed the interplay of the Privacy Rule and the Act. *See* Open Records Decision No. 681 (2004). In that decision, we noted that section 164.512 of title 45 of the Code of Federal Regulations provides that a covered entity may use or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law. *See* 45 C.F.R. § 164.512(a)(1). We further noted that the Act "is a mandate in Texas law that compels Texas governmental bodies to disclose information to the public." *See* ORD 681 at 8; *see also* Gov't Code §§ 552.002, .003, .021. We therefore held that disclosures under the Act come within section 164.512(a) of title 45 of the Code of Federal Regulations. The Third Court of Appeals has also held that disclosures under the Act come within section 164.512(a). *See Abbott v. Tex. Dep't of Mental Health & Mental Retardation*, 212 S.W.3d 648, 662 (Tex. App.—Austin 2006, no. pet.). Consequently, the Privacy Rule does not make information confidential for the purpose of section 552.101 of the Government

Code. ORD 681 at 9; *see also* Open Records Decision No. 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). Because the Privacy Rule does not make confidential information that is subject to disclosure under the Act, the city may withhold protected health information from the public only if the information is confidential under other law or an exception in subchapter C of the Act applies. Accordingly, we will address your arguments that the submitted information contains mental health and medical records.

Section 552.101 of the Government Code encompasses information protected by other statutes, such as section 611.002 of the Health and Safety Code. Section 611.002 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); *see id.* § 611.001 (defining “patient” and “professional”). You state the remaining information relates to the identity, diagnosis, and treatment of a patient created and/or maintained by a professional and is therefore confidential pursuant to section 611.002. We have marked mental health records in the information at issue that the city must withhold under section 552.101 in conjunction with section 611.002 of the Health and Safety Code. However, upon review, we find the remaining information at issue does not constitute mental health records, and it may not be withheld on that basis.

You claim unidentified portions of responsive records contain information protected under the Medical Practices Act (“MPA”). Section 552.101 of the Government Code encompasses information protected by the MPA, chapter 159 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 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). Upon review, we conclude none of the remaining information consists of medical records that are subject to the MPA, and none of it may be withheld on that basis.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Gov't Code § 552.117. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is received. *See* Open Records Decision No. 530 at 5 (1989). We note that section 552.117 also encompasses personal cellular telephone numbers, provided that the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular mobile phone numbers paid for by governmental body and intended for official use). The protection afforded by section 552.117, however, does not extend to information relating to a deceased family member. *Cf.* Attorney General Opinions JM-229, H-917 (1976) (stating court's opinion that Texas courts would follow the almost uniform rule of other jurisdictions that the right of privacy lapses upon death); Open Records Decision No. 272 (1981). You state the remaining information contains the personal information of employees who timely requested confidentiality under section 552.024. Accordingly, the city must withhold the information we have marked under section 552.117(a)(1) of the Government Code.

We note section 552.130 of the Government Code excepts from disclosure "information [that] relates to . . . a motor vehicle operator's or driver's license or permit issued by an agency of this state [or] a motor vehicle title or registration issued by an agency of this state."<sup>3</sup> Gov't Code § 552.130(a). Therefore, the city must withhold the Texas motor vehicle record information we have marked in the remaining information under section 552.130 of the Government Code.

Additionally, we note section 552.137 of the Government Code excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body," unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See id.* § 552.137(a)-(c). The e-mail addresses we have marked in the remaining information are not a type specifically excluded by section 552.137(c). Accordingly, the city must withhold

---

<sup>3</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).

these e-mail addresses under section 552.137 of the Government Code, unless their owner has affirmatively consented to their disclosure.<sup>4</sup>

In summary, the city must withhold the information we have marked under common-law privacy. The city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 611.002 of the Health and Safety Code. The city must withhold the information we have marked under sections 552.117, 552.130, and 552.137 of the Government Code. The remaining information must be released.<sup>5</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.

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,



James McGuire  
Assistant Attorney General  
Open Records Division

JM/cc

---

<sup>4</sup> We 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 Texas motor vehicle information under section 552.130 of the Government Code and e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

<sup>5</sup> We note the requestor has a special right of access to some of the information being released in this instance. Gov't Code § 552.023 (person or person's authorized representative has a 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). Because such information may be confidential with respect to the general public, if the city receives another request for this information from a different requestor, the city must again seek a ruling from this office.

Ref: ID# 370779

Enc. Submitted documents

c: Requestor  
(w/o enclosures)