



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

June 29, 2010

Ms. Neera Chatterjee
Office of General Counsel
The University of Texas System
201 West Seventh Street
Austin, Texas 78701

OR2010-09611

Dear Ms. Chatterjee:

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# 384770 (OGC No. 129780).

The University of Texas System (the "system") received a request for sixteen categories of information pertaining to the construction of the College of Health Sciences/School of Nursing Building and a specified accident taking place during the construction of that building. You state that the system maintains information responsive to five categories of the request, but does not maintain information responsive to the remaining categories of the request.¹ You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, and 552.136 of the Government Code. You also assert that the release of the submitted information may implicate the proprietary interests of a third party, JT Vaughn Construction Company ("Vaughn"). Accordingly, you state, and provide documentation showing, the system has notified Vaughn of the request and of the company's opportunity to submit arguments to this office as to why its information should be excepted from public disclosure. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990). (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

¹The Act does not require a governmental body to do disclose information that did not exist when the request for information was received, nor does it require a governmental body to prepare new information in response to a request. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. App.—San Antonio 1978, writ dismissed); Attorney General Opinion H-90 (1973), Open Records Decision Nos. 452 at 2-3 (1986), 342 at 3(1982).

Initially, we note an interested third party is allowed ten business days after the date of its receipt of a governmental body's notice under section 552.305(d) of the Government Code to submit its reasons, if any, as to why requested information relating to that party should be withheld from disclosure. *See id.* § 552.305(d)(2)(B). As of the date of this letter, Vaughn has not submitted comments to this office explaining why any portion of the submitted information relating to the company should not be released to the requestor. Because we have not received comments from the interested third party, we have no basis to conclude that the release of any portion of the submitted information would implicate the proprietary interests of Vaughn. Accordingly, none of the information pertaining to Vaughn may be withheld on that basis. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (stating that business enterprise that claims exception for commercial or financial information under section 552.110(b) must show by specific factual evidence that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret).

Next, we note that some of the submitted information, which we have marked, consists of completed reports made by or for the system, which are subject to section 552.022(a)(1) of the Government Code, and contracts relating to the expenditure of public funds by the system, which are subject to section 552.022(a)(3) of the Government Code. Section 552.022(a)(1) provides for the required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108" and section 552.022(a)(3) provides for the required public disclosure of "information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body." Gov't Code §§ 552.022(a)(1), (a)(3). Pursuant to section 552.022(a)(1), a completed report is expressly public unless it is either excepted under 552.108 of the Government Code or is expressly confidential under other law. Pursuant to section 552.022(a)(3), information in a contract relating to the expenditure of public funds by a governmental body is expressly public unless it is expressly confidential under other law. Although you raise section 552.103 of the Government Code for the information at issue, section 552.103 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 section 552.103); Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 (1999) (governmental body may waive section 552.103). As such, section 552.103 is not "other law" that makes information confidential for the purposes of section 552.022. Therefore, the system may not withhold the marked reports and contracts under section 552.103 of the Government Code. As you raise no further exceptions against disclosure of this information, it must be released.

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. We note a portion of the remaining information is subject to the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code, which governs the public availability of medical records. 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 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 records and information obtained from those medical records. *See id.* §§ 159.002, .004; Open Records Decision No. 598 (1991). 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). This office has also determined when a file is created as the result of a hospital stay, all of the documents in the file that relate to diagnosis and treatment constitute either physician-patient communications or records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician. *See* Open Records Decision No. 546 (1990). 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. We have marked the information that constitutes medical records subject to the MPA. In this instance, the requestor's client is the individual whose medical information is at issue. Thus, the medical records we have marked must be withheld, unless the system receives written consent for release of those records that complies with the MPA.

You assert that the remaining information is excepted from disclosure under section 552.103 of the Government Code, which provides in relevant 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). The governmental body claiming this exception bears the burden of providing relevant facts and documents to demonstrate the applicability of the exception. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *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).

To establish that litigation is reasonably anticipated for purposes of section 552.103, a governmental body must provide this office with "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." See Open Records Decision No. 452 at 4 (1986). In the context of anticipated litigation in which the governmental body is the prospective plaintiff, the concrete evidence must at least reflect that litigation is "realistically contemplated." See Open Records Decision No. 518 at 5 (1989); see also Attorney General Opinion MW-575 (1982) (investigatory file may be withheld if governmental body attorney determines that it should be withheld pursuant to section 552.103 and that litigation is "reasonably likely to result"). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. See ORD 452 at 4.

In this instance, you state that the requestor represents an injured employee in a worker's compensation claim arising out of the construction of the College of Health Sciences/School of Nursing Building. You inform this office that the requestor's client is "insured through the Rolling Owner Controlled Insurance Program ("ROCIP") which provides workers' compensation, general liability, and excess liability insurance coverage for all contractors working on designated projects for [the] system." You further state a third party claim by the requestor, an attorney for the injured worker, has been filed regarding the accident at issue, and you have provided documentation demonstrating that the system's Claims Coordinator within the system's Office of Risk Management anticipates that the system will be named in a lawsuit arising out of the accident. You state that the system received notice of the claim being filed before the present request for information was received. Further, you assert that the submitted information is related to the claim filed by the requestor. The requestor contends, however, that section 552.103 is not applicable in this instance because "[n]o lawsuit has been filed against the system. No claim or lawsuit has been filed against any third party. Nothing has been asserted to make the [system] believe it is being sued." See Gov't Code § 552.103(a). However, we note that a governmental body need not show that a lawsuit has been filed against it to obtain the protection of section 552.103 of the Government Code, but may instead demonstrate that it reasonably anticipates litigation. See *id.* § 552.103(c). Based on the system's representations and the submitted information, we agree that on the date the present request for information was received, the system

anticipated litigation. We also agree the information at issue relates to this anticipated litigation. Accordingly, the remaining information may be withheld under section 552.103 of the Government Code.²

However, once the information at issue has been obtained by all parties to the anticipated litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to the information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to all parties to the anticipated litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has concluded or is no longer anticipated. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

In summary, the system must release the reports and contracts we have marked as subject to sections 552.022(a)(1) and 552.022(a)(3) of the Government Code. Unless the system receives proper written consent for their release, the system must withhold the medical records we have marked under the MPA. The remaining information may be withheld under section 552.103 of the Government Code.

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,



Jonathan Miles
Assistant Attorney General
Open Records Division

JM/jb

²As our ruling is dispositive, we need not address your remaining arguments against disclosure.

Ref: ID# 384770

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. J. Thomas Vaughn
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Houston, Texas 77042-5312
(w/o enclosures)