



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 9, 2010

Mr. David M. Swope
Ms. Dori Wind
Harris County Attorney's Office
1019 Congress, 15th Floor
Houston, Texas 77002-1700

OR2010-13729

Dear Mr. Swope and Ms. Wind:

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# 392896 (C.A. File No. 10GEN1015).

Harris County (the "county") received three requests from two requestors for several categories of information pertaining to a named former employee (the "first requestor") and agreements between the county's sheriff's office and another named individual. You indicate that the county has no information responsive to portions of the requests.¹ You claim the submitted information is excepted from disclosure under sections 552.101 and 552.103 of

¹The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

the Government Code.² We have considered the exception you claim and reviewed the submitted representative sample of information.³

Initially, we note the submitted information includes the first requestor's W-4 form. 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 information protected by other statutes. Prior decisions of this office have held section 6103(a) of title 26 of the United States Code renders tax return information confidential. *See* Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision No. 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.2d1111 (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) (section 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). The submitted information contains the first requestor's W-4 form, which we have marked. The county must release the marked W-4 form to the first requestor pursuant to section 6103 of title 26 of the United States Code. However, the

²Although you also raise sections 552.107 and 552.139 of the Government Code, you have submitted no arguments in support of the applicability of those exceptions. Therefore, this decision does not address sections 552.107 and 552.139. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must submit written comments stating why claimed exceptions apply to information at issue).

³We assume that the "representative samples" of records submitted to this office are truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

county must withhold the W-4 form from the other requestor under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code.

Next, we note that the submitted information includes the first requestor's fingerprints. Section 552.101 of the Government Code also encompasses section 560.003 of the Government Code, which provides that "[a] biometric identifier in the possession of a governmental body is exempt from disclosure under [the Act]." Gov't Code § 560.003; *see id.* § 560.001(1) ("biometric identifier" means retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry). Section 560.002 of the Government Code 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). Although you seek 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). Thus, the fingerprints we have marked must be released to the first requestor 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). The fingerprints must be withheld from the other requestor under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code.

We also note the submitted information includes the first requestor's medical records. Section 552.101 of the Government Code also encompasses the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. Section 159.002 of the MPA provides the following:

(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). This office has also 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). 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) 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). The medical records we have marked must be withheld from both requestors under section 552.101 of the Government Code in conjunction with section 159.002 of the MPA, unless the county receives the required written consent for release under sections 159.004 and 159.005.

Next, we note portions of the remaining information are subject to section 552.022 of the Government Code, which provides in pertinent part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the 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). In this instance, some of the information at issue consists of completed reports, evaluations, and investigations made of, for, or by the county. Pursuant to section 552.022(a)(1), a completed report, evaluation, or investigation made of, for, or by a governmental body is expressly public unless the information is either excepted under 552.108 of the Government Code or expressly confidential under other law. Section 552.103 of the Government Code is a discretionary exception that protects a governmental body's interest and may be waived. *See 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. 552 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation and does not itself make information confidential); *see also* 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 confidential for purposes of section 552.022. Consequently, the information subject to section 552.022(a)(1), which we have marked, may not be withheld under section 552.103 of the Government Code. However, because information subject to section 552.022(a)(1) may be withheld under sections 552.117 and 552.137 of the Government Code, we will consider whether any of the information at issue must be withheld under those exceptions.⁴ We will also consider your arguments under section 552.103 for the information not subject to section 552.022.

⁴The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

We first address your claim under section 552.103 of the Government Code for the remaining information not subject to section 552.022, as it is potentially the most encompassing exception to disclosure. 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 that claims 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, the 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).*

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." ORD 452 at 4. 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.⁵ *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

⁵Among other examples, this office has concluded that litigation was reasonably anticipated where the opposing party took the following objective steps toward litigation: (1) filed a complaint with the Equal Employment Opportunity Commission, *see Open Records Decision No. 336 (1982)*; (2) hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see Open Records Decision No. 346 (1982)*; and (3) threatened to sue on several occasions and hired an attorney, *see Open Records Decision No. 288 (1981)*.

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).

You state, and provide documentation showing, that prior to receiving the first request for information, the county received a notice to preserve information submitted by the first requestor's attorney, in which the first requestor's attorney alleged the county violated section 554.002 of the Government Code. In this notice to preserve information, the first requestor's attorney states that he will be seeking information in anticipation of litigation. Based on your representations, our review of the submitted information, and the totality of the circumstances, we conclude the county reasonably anticipated litigation on the date it received the first request for information. Further, you state, and provide documentation showing, that the first requestor did, in fact, file a lawsuit against the county before it received the other requestor's requests for information. Thus, litigation was pending when the county received the remaining requests. Furthermore, we find the submitted information relates to the litigation concerned. Therefore, we conclude that section 552.103 is generally applicable to the information not subject to section 552.022.

We note that 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. Thus, when the opposing party has seen or had access to information relating to pending litigation, there is no interest in withholding that information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). In this instance, the first requestor has already seen or had access to some of the information at issue. However, this requestor had access to some of the accessed information only in the usual scope of his employment with the county. Such information is not considered to have been obtained by the opposing party to the litigation and may, thus, be withheld under section 552.103. However, the information seen or accessed by the first requestor outside his usual scope of employment may not be withheld under section 552.103. Therefore, with the exception of the information seen or accessed by the first requestor outside his usual scope of employment, the county may withhold the information not subject to section 552.022(a)(1) of the Government Code under section 552.103. We have marked the information that may be withheld under section 552.103. We note that 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).

We now address the information seen or accessed by the first requestor outside his usual scope of employment and the information subject to section 552.022(a)(1) of the Government Code. Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which excepts from public disclosure private information about an individual if the information (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of

legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The types of information considered highly 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. This office has found some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (1987) (information pertaining to illness from severe emotional and job-related stress protected by common-law privacy), 455 (1987) (information pertaining to prescription drugs, specific illnesses, operations and procedures, and physical disabilities protected from disclosure). This office has also found that information that reflects an individual's personal financial decisions and is not related to a financial transaction between the individual and a governmental body is protected by common-law privacy. *See* Open Records Decision Nos. 600 (1992), 545 (1990). Upon review, we find that portions of the submitted information are highly intimate or embarrassing and of no legitimate public interest. However, the first requestor is the individual to whom the marked information pertains. Section 552.023 of the Government Code provides that a person has a special right of access to information that is excepted from public disclosure under laws intended to protect that person's privacy interests. *See* Gov't Code § 552.023(a). Therefore, the first requestor has a special right of access to his private information, and it may not be withheld from him on the basis of common-law privacy. *See id.* However, the county must withhold the information we have marked from the other requestor under section 552.101 of the Government Code in conjunction with common-law privacy.

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 of the Government Code. *See id.* §§ 552.117(a)(1), .024. We note section 552.117 also encompasses a personal cellular telephone or pager number, unless the cellular or pager service is paid for by a governmental body. *See* Open Records Decision Nos. 670 at 6 (2001), 506 at 5-7 (1988) (statutory predecessor to section 552.117 not applicable to cellular telephone numbers provided and paid for by governmental body and intended for official use). Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). The county may only withhold information under section 552.117(a)(1) on behalf of a former or current employee who has made a request for confidentiality under section 552.024 prior to the date on which the request for information was made. In this instance, we have marked the information within the remaining information that may be subject to section 552.117. You do not inform this office whether the employees whose information we have marked elected to keep their personal information confidential before the county received the present request for information. Therefore, we must rule conditionally. To the extent the individuals whose

personal information we have marked timely elected to withhold such information under section 552.024, the marked information must be withheld under section 552.117(a)(1). However, the information pertaining to the first requestor may not be withheld from him under section 552.117. *See* Gov't Code § 552.023(a). Furthermore, the county may only withhold the marked cellular telephone number if the employee at issue paid for the cellular telephone service with his own funds. To the extent the individuals whose personal information we have marked did not timely elect to withhold such information under section 552.024, the marked information may not be withheld under section 552.117(a)(1).

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." *Id.* § 552.130(a)(1). Accordingly, the county must withhold the copies of a Texas driver's license, which we have marked, from the second requestor under section 552.130. However, because section 552.130 protects personal privacy, the first requestor has a right of access to his own Texas motor vehicle record information pursuant to section 552.023 of the Government Code. *See id.* § 552.023(a). Therefore, the first requestor's information may not be withheld from him under section 552.130. *See id.* § 552.023(a).

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). We have marked personal e-mail addresses that do not appear to be of a type specifically excluded by section 552.137(c) of the Government Code. We note, however, one of the e-mail addresses at issue belongs to the first requestor. Therefore, pursuant to section 552.137(b), the county may not withhold that requestor's e-mail address from him under section 552.137(a). *See id.* § 552.137(b). However, the county must withhold that e-mail address from the other requestor under section 552.137, unless the owner has affirmatively consented to its public disclosure. Furthermore, the county must withhold the other e-mail address we have marked from both requestors under section 552.137, unless the owner has affirmatively consented to its public disclosure.

We note that the first requestor contends that section 552.023 of the Government Code applies to all of the information encompassed by his request. As previously noted, section 552.023 grants a person or a person's authorized representative 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 the person's privacy interests. *Id.* § 552.023(a); ORD 481 at 4. However, section 552.023 does not apply where interests other than the first requestor's privacy are being protected. *See, e.g.,* ORD 565 (provisions of MPA making medical records confidential are intended to protect more than just the privacy interests of the patient). In this instance, portions of the information at issue are excepted under section 552.103 of the Government Code, which protects a governmental body's interests rather than privacy rights

of an individual. Furthermore, some of the information that is or may be protected by sections 552.117 and 552.137 of the Government Code pertains to individuals other than the first requestor. Therefore, section 552.023 does not apply to the information subject to section 552.103 or the information we have marked under sections 552.117 and 552.137 that pertains to individuals other than the first requestor.

Finally, we note that some of the remaining information at issue may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1978). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; see Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, (1) the county must release the marked W-4 form to the first requestor pursuant to section 6103 of title 26 of the United States Code; however, the county must withhold the W-4 form from the other requestor under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code; (2) the county must release the fingerprints we have marked to the first requestor under section 560.002(1)(A) of the Government Code; however, the county must withhold the marked fingerprints from the other requestor under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code; (3) the county must withhold the medical records we have marked under section 552.101 of the Government Code in conjunction with section 159.002 of the MPA, unless the county receives the required written consent for release; (4) the county may withhold the information we have marked under section 552.103 of the Government Code; (5) the county must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy from the second requestor; (6) to the extent the individuals whose personal information we have marked timely elected to withhold such information under section 552.024 of the Government Code, the information we have marked must be withheld under section 552.117(a)(1) of the Government Code; however, the information pertaining to the first requestor may not be withheld from him under section 552.117; furthermore, the county may only withhold the marked cellular telephone number if the employee at issue paid for the cellular telephone service with his own funds; (7) the county must withhold the information we have marked under section 552.130 of the Government Code from the second requestor; (8) the county must withhold the first requestor's e-mail address from the second requestor under section 552.137 of the Government Code, unless the first requestor consents to its disclosure; and the county must withhold the remaining e-mail address we have marked from both requestors under section 552.137, unless its owner consents to its

disclosure.⁶ The remaining information must be released to the requestors, but any information that is protected by copyright may only be released in accordance with copyright law.

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,



Christopher D. Sterner
Assistant Attorney General
Open Records Division

CDSA/eeg

Ref: ID# 392896

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁶We 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 W-4 form under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code; a fingerprint under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code; a copy of a Texas driver's license under section 552.130 of the Government Code; and an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.