



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

February 23, 2011

Mr. Kipling D. Giles  
Senior Counsel  
Legal Services Division  
CPS Energy  
P.O. Box 1771  
San Antonio, Texas 78296

OR2011-02671

Dear Mr. Giles:

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# 411280.

The City Public Service Board of the City of San Antonio d/b/a CPS Energy ("CPS") received a request for a safety accident report/root cause analysis that determined the requestor's termination of employment and the requestor's personnel file. You claim the requested 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 the submitted information contains completed reports and evaluations that are subject to section 552.022 of the Government Code. Under section 552.022(a)(1), a completed report, audit, evaluation, or investigation made of, for, or by a governmental body is expressly public unless it either is excepted under section 552.108 of the Government Code or is expressly confidential under other law. Although you assert this information is excepted under section 552.103 of the Government Code, this section is a discretionary exception under the Act and does not constitute "other law" for purposes of section 552.022. *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. 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived).

Accordingly, CPS may not withhold the information subject to section 552.022, which we have marked, under section 552.103.

Next, we address CPS's obligations under section 552.301 of the Government Code, which prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request. Gov't Code § 552.301(b). CPS received the request for information on December 17, 2010, and we understand CPS was closed for business on December 24, 2010. Thus, the ten-business-day-deadline for CPS to request a ruling from this office under section 552.301(b) was January 3, 2011. However, the envelope in which you requested a ruling from this office has two postmarks: the first is postmarked January 4, 2011, and the second is postmarked January 5, 2011. *See id.* § 552.308 (describing rules for calculating submission dates of documents sent via first class United States mail). Thus, CPS failed to comply with the procedural requirements mandated by section 552.301(b).

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); *see also* Open Records Decision No. 630 (1994). A compelling reason exists when third-party interests are at stake or when information is confidential under other law. Open Records Decision No. 150 (1977). Section 552.103 of the Government Code is discretionary in nature; it serves only to protect a governmental body's interests. *See Dallas Area Rapid Transit*, 4 S.W.3d at 475-76; *see also* Open Records Decision No. 522 (1989) (discretionary exceptions in general). Thus, CPS's claim under section 552.103 is not a compelling reason to overcome the presumption of openness. Therefore, CPS may not withhold any of the information at issue under section 552.103. Section 552.101 of the Government Code, however, can provide a compelling reason to overcome this presumption.<sup>1</sup> Therefore, we will consider whether this section requires CPS to withhold the submitted information.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information protected by other statutes, including the Medical Practice Act (the

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<sup>1</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body. *See* Open Records Decision Nos. 481 at 2 (1987), 480 at 5 (1987); *see, e.g.*, Open Records Decision No. 470 at 2 (1987) (because release of confidential information could impair rights of third parties and because improper release constitutes a misdemeanor, attorney general will raise predecessor statute of section 552.101 on behalf of governmental bodies).

“MPA”), subtitle B of title 3 of the Occupations Code. Section 159.002 of the MPA provides in part 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). 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. *Id.* §§ 159.004, .005. Section 159.002(c) also requires any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991).

The submitted information contains documents created by a physician that constitute medical records; therefore, CPS may only release the physician records, which we have marked, in accordance with the MPA. We have also marked the records of a registered nurse who is employed by CPS. To the extent the nurse's records were created under the supervision of a physician, they also constitute medical records within the scope of the MPA. Thus, if the marked nurse's records were created under the supervision of a physician, then CPS may only release this information in accordance with the MPA. *See id.* However, if the nurse's records were not created under the supervision of a physician, then they are not subject to the MPA and CPS must release them to the requestor.

To conclude, CPS may only release the marked physician records in accordance with the MPA. CPS may only release the marked nurse's records in accordance with the MPA if they were created under the supervision of a physician. CPS must release the remaining information.<sup>2</sup>

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<sup>2</sup>The requestor has a right of access to information in the submitted documents that otherwise would be exempted from release under the Act. *See* Gov't Code § 552.023(a) (“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”); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individuals request information concerning themselves). Thus, CPS must again seek a decision from this office if it receives a request for this information from a different requestor.

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 L. Coggeshall  
Assistant Attorney General  
Open Records Division

JLC/tf

Ref: ID# 411280

Enc. Submitted documents

c: Requestor  
(w/o enclosures)