



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 28, 2011

Ms. Julie Y. Fort
McKamie Krueger, L.L.P.
2007 N. Collins Boulevard, Suite #501
Richardson, Texas 75080

OR2011-09205

Dear Ms. Fort:

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# 422294.

The City of Van Alstyne (the "city"), which you represent, received a request for any files pertaining to the requestor. You claim that 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 some of the submitted information was created after the request was received. This information, which we have marked, is not responsive to the request. This decision does not address the public availability of the non-responsive information, and that information need not be released.

Next, we note a portion of the responsive information falls within the scope of section 552.022(a)(3) of the Government Code, which provides that information in an account, voucher, or contract relating to receipt or expenditure of public or other funds by a governmental body is subject to required public disclosure unless it is made expressly confidential under "other law." Gov't Code § 552.022(a)(3). You claim the responsive information is excepted from disclosure under section 552.103 of the Government Code. However, this is a discretionary exception to disclosure that protects a governmental body's interests 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 Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived). As

such, section 552.103 is not other law that makes information confidential for the purposes of section 552.022. Therefore, you may not withhold the information at issue, which we have marked, under section 552.103 of the Government Code. We note, however, some of this information is subject to section 552.136 of the Government Code.¹ Because this exception is other law for purposes of section 552.022, we will consider its applicability.

Next, we note the responsive information includes the requestor's medical record. 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 Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. *See* Occ. Code §§ 151.001-165.160. 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.

Id. § 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). Information subject to the MPA includes both medical records and information obtained from those medical records. *See id.* 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). Medical records must be released upon 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). We have marked the requestor's medical record that may only be released in accordance with the MPA.

¹The Office of the Attorney General will raise a mandatory exception 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 now turn to your argument under section 552.103 of the Government Code for the remaining responsive information that is not subject to section 552.022. Section 552.103 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). A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was 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). A 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, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *Id.* 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. Open Records Decision No. 555 (1990); *see* 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).

In this instance, you state prior to the city's receipt of the present request, the requestor's employment with the city had been terminated and she appealed the termination. You also

state that following the appeal, which was unsuccessful, the requestor stated her intention to hire an attorney to pursue claims against the city. However, you have not demonstrated, at the time of the request, the requestor had taken concrete steps towards litigation. *See* Open Records Decision No. 361 (1983). Thus, we find you have failed to establish that the city reasonably anticipated litigation when it received the request for information. Accordingly, we conclude none of the information at issue may be withheld under section 552.103.

We note, however, the remaining responsive information contains the requestor's I-9 form. Section 1324a of title 8 of the United States Code provides that an Employment Eligibility Verification Form I-9 "may not be used for purposes other than for enforcement of this chapter" and for enforcement of other federal statutes governing crime and criminal investigations. *See* 8 U.S.C. § 1324a(b)(5); *see also* 8 C.F.R. § 274a.2(b)(4). The release of the submitted I-9 form in response to this request for information would be "for purposes other than for enforcement" of the referenced federal statutes. Accordingly, the I-9 form is excepted from disclosure under section 552.101 of the Government Code in conjunction with federal law and may be released only for purposes of compliance with the federal laws and regulations governing the employment verification system.

Section 552.130 of the Government Code provides that information relating to a motor vehicle operator's or driver's license or permit issued by an agency of this state or another state or country is excepted from public release. Act of May 30, 1997, 75th Leg., R.S., ch. 1187, § 4, 1997 Tex. Gen. Laws 4575, 4580 *amended by* Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 4 (to be codified as an amendment to Gov't Code § 552.130(a)). The department must withhold the copy of a Texas driver's license, which we have marked, under section 552.130.

Section 552.136 of the Government Code provides "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136(b). An access device number is one that may be used to (1) obtain money, goods, services, or another thing of value, or (2) initiate a transfer of funds other than a transfer originated solely by paper instrument, and includes an account number. *See id.* § 552.136(a) (defining "access device"). Accordingly, the city must withhold the bank account and routing numbers and insurance policy numbers we have marked under section 552.136.

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 at issue are not a type specifically excluded by section 552.137(c). Accordingly, the city must withhold the e-mail addresses we have marked under

section 552.137, unless the owners of the e-mail addresses have affirmatively consented to their disclosure.²

In summary, the marked medical record may only be released in accordance with the MPA. The city must withhold the I-9 form under section 552.101 of the Government Code in conjunction with federal law. The city must withhold the information we have marked under sections 552.130, 552.136, and 552.137 of the Government Code, unless the owners of the e-mail addresses have affirmatively consented to their disclosure. The city must release the remaining responsive information.³

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,



Tamara H. Holland
Assistant Attorney General
Open Records Division

THH/bs

²We note this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including a Form I-9 under section 552.101 of the Government Code in conjunction with section 1324a of title 8 of the United States Code; a copy of a Texas driver's license number under section 552.130 of the Government Code; a bank account and routing number and an insurance policy number under section 552.136 of the Government Code; and a personal e-mail address under section 552.137 of the Government Code; without the necessity of requesting an attorney general decision.

³We note this requestor has a right of access to information the city would be required to withhold from the general public. Should the city receive another request for this same information from a different requestor, the city should resubmit this information and request another decision. See Gov't Code §§ 552.301(a), .302.

Ref: ID# 422294

Enc. Submitted documents

c: Requestor
(w/o enclosures)