



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 12, 2012

Mr. Tom McCasland
Interim Chief Executive Officer
Harris County Housing Authority
8933 Interchange
Houston, Texas 77054

OR2012-10835

Dear Mr. McCasland:

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# 458616.

The Harris County Housing Authority (the "authority") received a request for all documents relating to a specified check number. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.117, and 552.136 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note a portion of the submitted information, which we have marked, contains a check and other information subject to section 552.022(a)(3) of the Government Code, which provides that "information in an account, voucher, or contract relating to the 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 the Act or "other law." Gov't Code § 552.022(a)(3). Although you raise section 552.103 of the Government Code for this information, this section is a discretionary exception that may be waived and does not make information confidential under the Act. *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 does not make information confidential for the purposes of section 552.022(a)(3), and this information may not be withheld under this section. However, you also raise sections 552.101, 552.117, and 552.136 of the Government Code.

¹In correspondence to this office dated June 29, 2012, you withdraw your claim that section 552.108 of the Government Code excepts the submitted information from public disclosure.

Because these sections make information confidential under the Act, we will address the applicability of sections 552.101, 552.117, and 552.136 to the information subject to section 552.022.

Section 552.101 of the Government Code exempts 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 other statutes make confidential, including the Medical Practice Act (“MPA”), subtitle B of title 3 of the Occupations Code. *See Occ. Code §§ 151.001-168.202.* Section 159.002 of the MPA provides in pertinent part:

(a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.

(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(a)-(c). Upon review, we find you have failed to demonstrate how any portion of the information subject to section 552.022 of the Government Code constitutes a physician-patient communication or a record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that was created or is maintained by a physician. Accordingly, the authority may not withhold any portion of the information subject to section 552.022 under section 552.101 of the Government Code in conjunction with the MPA.

Section 552.117(a)(1) of the Government Code exempts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Gov’t Code § 552.117(a)(1). Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See Open Records Decision No. 530 at 5 (1989).* Therefore, a governmental body must withhold information under section 552.117 on behalf of a current or former employee only if the individual made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Accordingly, if the individual whose information is at issue in the information subject to section 552.022 of the Government Code timely requested confidentiality pursuant to section 552.024, the information we have marked must

be withheld under section 552.117(a)(1). However, the authority may not withhold the marked information under section 552.117(a)(1) if the individual did not make a timely election to keep the information confidential.

Section 552.136 of the Government Code provides that “[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. *Id.* § 552.136(a). Upon review, we find the information subject to section 552.022 of the Government Code contains a bank routing number and a bank account number, which we have marked, that the authority must withhold under section 552.136. As you raise no additional exceptions for the remaining information subject to section 552.022, the authority must release this information pursuant to section 552.022 of the Government Code.

Next, we will address your claim under section 552.103 of the Government Code for the information not subject to section 552.022 of the Government Code. Section 552.103 provides in part as follows:

(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.

Id. § 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 showing that (1) litigation is pending or reasonably anticipated on the date the governmental body received the request, 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). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103.

In order to demonstrate that litigation is reasonably anticipated, the governmental body must provide this office “concrete evidence showing that the claim that litigation might ensue is more than a mere conjecture.” Open Records Decision No. 452 at 4 (1986). 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 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 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). The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* ORD 452 at 4.

You state, and provide documentation demonstrating, that the authority received a letter from an attorney giving notice of an anticipatory breach of buy-out agreement and a demand for immediate payment. Further, we note the letter states a lawsuit will be filed if immediate payment is not received by the attorney’s client. Based on your representations and our review, we agree the authority reasonably anticipated litigation on the date it received the present request for information. You also argue the submitted information not subject to section 552.022 of the Government Code is related to the anticipated litigation. Upon review, we agree the information at issue is related to the anticipated litigation for purposes of section 552.103. Therefore, you may generally withhold the submitted information not subject to section 552.022 under section 552.103 of the Government Code.

We note, however, 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 that litigation to obtain it through discovery procedures. *See* ORD 551 at 4-5. Therefore, if the opposing party has seen or had access to information relating to anticipated litigation through discovery or otherwise, there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). In this instance, the opposing party in the anticipated litigation has already seen or had access to some of the information at issue. Accordingly, this information may not be withheld from the requestor under section 552.103. Thus, the authority may only withhold the information we have marked under section 552.103. We note the applicability of section 552.103 ends once the related litigation concludes or is no longer reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Next, we note some of the remaining information not subject to section 552.022 of the Government Code consists of dental records. Section 552.101 of the Government Code also encompasses section 258.102 of the Occupations Code, which provides in pertinent part as follows:

(a) The following information is privileged and may not be disclosed except as provided by this subchapter:

- (1) a communication between a dentist and a patient that relates to a professional service provided by the dentist; and
- (2) a dental record.

Occ. Code § 258.102(a). A “dental record” means dental information about a patient that is created or maintained by a dentist and relates to the history or treatment of the patient. *See id.* § 258.101(1). Information that is privileged under chapter 258 of the Occupations Code may be disclosed only under certain specified circumstances. *See id.* § 258.104 (consent to disclosure); *see also id.* §§ 258.105, .106, .107 (exceptions to privilege). The written consent for the release of privileged information required under section 258.104 must specify (1) the information covered by the release, (2) the person to whom the information is to be released, and (3) the purpose for the release. *Id.* § 258.104(c). A person who receives information that is privileged under section 258.102 of the Occupations Code may disclose that information to another person only to the extent that disclosure is consistent with the purpose for which the information was obtained. *See id.* § 258.108. The authority must withhold the dental records we have marked under section 552.101 of the Government Code in conjunction with section 258.102 of the Occupations Code unless the authority receives the required consent for release of those records under section 258.104 of the Occupations Code.²

Lastly, we note the remaining information not subject to section 552.022 of the Government Code is protected by common-law privacy. Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information if it (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). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. This office has found that personal financial information not related to a financial transaction between an individual and a governmental body is highly intimate or embarrassing and of no legitimate public interest. *See* Open Records Decision Nos. 600 (1992), 545 (1990). Upon review, we find the information we have marked is highly intimate or embarrassing and of no legitimate public interest. Accordingly, the authority must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy.³

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

³As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

In summary, if the individual whose information is at issue in the information subject to section 552.022(a)(3) of the Government Code timely requested confidentiality pursuant to section 552.024 of the Government Code, the authority must withhold the information we have marked under section 552.117(a)(1) of the Government Code. The authority must withhold the information we have marked under section 552.136 of the Government Code. The authority must release the remaining information subject to section 552.022(a)(3) of the Government Code. The authority may withhold the marked information not subject to section 552.022(a)(3) of the Government Code under section 552.103 of the Government Code. The authority must withhold the dental records we have marked under section 552.101 of the Government Code in conjunction with section 258.102 of the Occupations Code unless the authority receives the required consent for release of those records under section 258.104 of the Occupations Code. The authority must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy.

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,



Sean Nottingham
Assistant Attorney General
Open Records Division

SN/bhf

Ref: ID# 458616

Enc. Submitted documents

c: Requestor
(w/o enclosures)