



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 6, 2013

Mr. Steven H. Weller
Bickerstaff Heath Delgado Acosta, L.L.P.
3711 South Mopac Expressway, Building One, Suite 300
Austin, Texas 78746

OR2013-07439

Dear Mr. Weller:

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# 486371.

The El Paso Water Utilities Public Service Board (the "board"), which you represent, received a request for certain records pertaining to the injury of a named individual on a specified date, excluding any medical records. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.117, 552.137, and 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, you indicate some of the responsive information was the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2012-12796 (2012). In that ruling, we determined the board anticipated litigation and ruled the submitted information was excepted from disclosure under section 552.103 of the Government Code. We note, however, that circumstances have changed since the issuance of the previous ruling. Thus, we find the board may not rely on Open Records Letter No. 2012-12796 as a previous determination in this instance. *See* Open Records Decision No. 673 (2001) (stating if law, facts, and circumstances have changed since issuance of prior ruling, that ruling may no longer be used as previous determination). Accordingly, we will address your arguments against disclosure of the submitted information.

Section 552.103 of the Government Code provides, in relevant part, the following:

(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 has the burden of providing relevant facts and documents to show the section 552.103(a) exception is applicable in a particular situation. 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).

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To demonstrate that litigation is reasonably anticipated, the board must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* Concrete evidence to support a claim 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. *See* Open Records Decision No. 555 (1990); *see also* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). In addition, this office has concluded litigation was reasonably anticipated when the potential opposing party hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, or when an individual threatened to sue on several occasions and hired an attorney. *See* Open Records Decision Nos. 346 (1982), 288 (1981). On the other hand, this office has determined 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). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish litigation is reasonably anticipated. *See* Open Records Decision No. 361 (1983).

The board informs us the information being requested concerns a construction site incident involving the injury of a board employee while at work. You state the injured employee has

filed suit against the manufacturer of the equipment involved in the incident, the company that distributed and maintained the equipment, and a private safety contractor. You acknowledge that the board has not been named as a defendant in the litigation. However, you assert that the board maintains a reasonable expectation that one of the parties to the present litigation may seek to join the board as a defendant or responsible third party. We note, however, you have not provided this office with evidence that any party has taken any objective steps toward filing a claim against the board. *See* Gov't Code § 552.301(e); ORD 331. Accordingly, we find the board did not reasonably anticipate litigation on the date it received the request for information. Therefore, the board may not withhold any of the information at issue under section 552.103 of the Government Code.

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 made confidential by statute, such as the Medical Practice Act ("MPA"), subtitle B of title 3 of the Occupations Code, which governs release of medical records. *See* Occ. Code §§ 151.001-168.202. Section 159.002 of the MPA provides, in relevant 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). Information subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004. Upon review, we find a portion of the submitted information, which we have marked, constitutes records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that were created or are maintained by a physician and information obtained from a patient's medical records. Accordingly, the board must withhold the marked medical records under section 552.101 of the Government Code in conjunction with the MPA.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information that (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 to be intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* include 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 that the following types of information are

excepted from required public disclosure under common-law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps); and personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990). Upon review, we find the submitted information pertains to a worker's compensation claim, and thus there is a legitimate public interest in the remaining information. *See* Open Records Decision Nos. 545 at 4 (attorney general has found kinds of financial information not excepted from public disclosure by common law privacy to generally be those regarding receipt of governmental funds or debts owed to governmental entities), 423 at 2 (1984) (scope of public employee privacy is narrow). Therefore, the board may not withhold any of the remaining information at issue under section 552.101 of the Government Code in conjunction with common-law privacy.

Next, we note some of the remaining information is subject to section 552.102 of the Government Code.¹ Section 552.102(a) of the Government Code excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). The Texas Supreme Court held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336, 347-48 (Tex. 2010). Having reviewed the information at issue, the board must withhold the employee's date of birth we have marked under section 552.102 of the Government Code.

Section 552.117 of the Government Code provides in relevant part:

(a) Information is excepted from the requirements of Section 552.021 if it is information that relates to the home address, home telephone number, emergency contact information, or social security number of the following person or that reveals whether the person has family members:

(1) a current or former official or employee of a governmental body, except as otherwise provided by Section 552.024[.]

Gov't Code § 552.117(a)(1). Section 552.117(a)(1) excepts from disclosure the personal information of a current or former official or employee of a governmental body who requests that this information be kept confidential under section 552.024 of the Government Code. *See id.* §§ 552.117, .024. Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of

¹The 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).

the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Thus, if the individual whose information is at issue timely requested confidentiality under section 552.024, the board must withhold the information we have marked under section 552.117(a)(1). Conversely, if the individual whose information is at issue did not make a timely election under section 552.024, the board may not withhold such information under section 552.117(a)(1). However, the remaining information at issue does not consist of any current or former employees' home address, home telephone number, emergency contact information, social security number, or family member information. Accordingly, the remaining information may not be withheld under section 552.117 of the Government Code.

You also raise section 552.147 of the Government Code for the submitted information. This section provides "[t]he social security number of a living person is excepted" from required public disclosure under the Act. Gov't Code § 552.147. To the extent section 552.117 of the Government Code does not apply to the marked social security number, the board may withhold it under section 552.147.²

We note some of the remaining information is subject to section 552.136 of the Government Code. Section 552.136 of the Government Code states 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). Section 552.136(a) defines "access device" as "a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to . . . obtain money, goods, services, or another thing of value [or] initiate a transfer of funds other than a transfer originated solely by paper instrument." *Id.* § 552.136(a) (defining access device). This office has determined insurance policy numbers are access device numbers for purposes of section 552.136. Accordingly, the board must withhold the insurance policy number we have marked under section 552.136 of the Government Code.

Section 552.137 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). Gov't Code § 552.137(a)-(c). Upon review, we find no portion of the remaining information constitutes an e-mail address of a member of the

²Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act. *See* Gov't Code § 552.147.

public. Consequently, the board may not withhold any of the remaining information under section 552.137 of the Government Code.

In summary, the board: (1) must withhold the information we have marked under section 552.101 of the Government Code in conjunction with the MPA; (2) must withhold the employee's date of birth we have marked under section 552.102 of the Government Code; (3) must withhold the information we have marked under section 552.117 of the Government Code if the individual whose information is at issue timely requested confidentiality pursuant to section 552.024; (4) to the extent section 552.117 does not apply, may withhold the marked social security number under section 552.147 of the Government Code; and (5) must withhold the insurance policy number we have marked under section 552.136 of the Government Code. The remaining information must be released.

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,



Eamon D. Briggs
Assistant Attorney General
Open Records Division

EDB/som

Ref: ID#486371

Enc. Submitted documents

c: Requestor
(w/o enclosures)