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ATTORNEY GENERAL OF TEXAS

June 16, 2016

Ms. Holly A. Sherman
Counsel for Lamar Consolidated Independent School District
Rogers Morris & Grover, LLP
5718 Westheimer Road, Suite 1200
Houston, Texas 77057

OR2016-13677

Dear Ms. Sherman:

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# 616842.

The Lamar Consolidated Independent School District (the "district"), which you represent, received a request for the requestor's personnel file. The district states it is redacting some information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.¹ The district also states it will make some of the requested information available to the requestor, but claims the submitted information is excepted from disclosure under sections 552.103 and 552.107 of the

¹The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office FERPA does not permit state and local educational authorities to disclose to this office, without parental consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act. The DOE has determined FERPA determinations must be made by the educational authority in possession of the education records. We have posted a copy of the letter from the DOE to this office on the Attorney General's website: <https://www.texasattorneygeneral.gov/files/og/20060725usdoe.pdf>.

Government Code.² We have considered the claimed exceptions and reviewed the submitted representative sample of information.³

Initially, we note some of the submitted information may be subject to section 552.022(a)(15) of the Government Code, which provides the following:

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 unless made confidential under this chapter or other law:

...

(15) information regarded as open to the public under an agency's policies[.]

Gov't Code § 552.022(a)(15). We have marked a job description that is subject to section 552.022(a)(15) if the district considers it to be open to the public under the district's policies. Although the district asserts this information is excepted from disclosure under section 552.103 of the Government Code, this section is discretionary 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 No. 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the district may not withhold the information subject to section 552.022 under section 552.103. Accordingly, the district must release the job description we have marked under section 552.022(a)(15) of the Government Code if the district considers it to be open to the public under the district's policies. To the extent the job description is not subject to section 552.022(a)(15), we address the district's arguments to withhold it.

Section 552.103 of the Government Code provides, in relevant 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

²Although the district also raises section 552.101 in conjunction with the attorney-client privilege, this office has concluded section 552.101 does not encompass discovery privileges. Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990) (predecessor statute).

³We assume the "representative sample" of records submitted to this office is 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 those records contain substantially different types of information than that submitted to this office.

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, orig. proceeding); *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 from disclosure under section 552.103(a).

This office has stated a pending complaint with the Equal Employment Opportunity Commission (the "EEOC") indicates litigation is reasonably anticipated. Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982). The district has submitted information to this office showing that, prior to the district's receipt of the request for information, the requestor filed a complaint against the district with the EEOC. Upon review, we find the district has demonstrated litigation was reasonably anticipated when it received the request for information. Our review of the information at issue also shows it is related to the anticipated litigation for purposes of section 552.103(a). Therefore, we agree section 552.103 of the Government Code is applicable to the information at issue.

However, once the information has been obtained by all parties to the anticipated litigation, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). We note the requestor is the opposing party to the anticipated litigation at issue, and she has seen or had access to some of the submitted information. Therefore, the district may not withhold this information pursuant to section 552.103. Nevertheless, we agree the district may withhold the remaining information at issue, which we have marked, under section 552.103.⁴ We also note the applicability of

⁴As our ruling is dispositive, we do not address the other argument of the district to withhold this information.

section 552.103(a) ends when the litigation at issue has concluded. Attorney General Opinion MW-575 (1982) at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.”⁵ Gov’t Code § 552.101. This section encompasses the Medical Practice Act (the “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 relevant part, the following:

(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). Information subject to the MPA includes both medical records and information obtained from those records. *See id.* §§ 159.002, .004. This office has concluded 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 at 3-4 (1988), 370 at 2 (1983), 343 at 1 (1982). Upon review, we find a portion of the remaining information constitutes medical records. Accordingly, the district must withhold this information, which we have marked, under section 552.101 of the Government Code in conjunction with the MPA.

To conclude, the district must release the job description we have marked under section 552.022(a)(15) of the Government Code if the district considers it to be open to the public under the district’s policies. The district may withhold the information we have marked under section 552.103 of the Government Code. The district must withhold the

⁵The 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).

information we have marked under section 552.101 of the Government Code in conjunction with the MPA. The district must release the remaining information.⁶

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/eb

Ref: ID# 616842

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁶Because the requestor has a special right of access to some of the information being released, the district must again seek a decision from this office if it receives another request for the same information from another requestor.