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ATTORNEY GENERAL OF TEXAS

June 16, 2020

Mr. Juan E. Gonzalez
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Law Office of Juan E. Gonzalez
3110 East Business Highway 83
Weslaco, Texas 78596

OR2020-16200

Dear Mr. Gonzalez:

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# 833024.

The City of Weslaco (the "city"), which you represent, received a request for a specified letter. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Section 552.101 of the Government Code excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. You raise section 552.101 of the Government Code in conjunction with the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). At the direction of Congress, the Secretary of Health and Human Services ("HHS") promulgated regulations setting privacy standards for medical records, which HHS issued as the Federal Standards for Privacy of Individually Identifiable Health Information. *See* HIPAA, 42 U.S.C. § 1320d-2 (historical and statutory notes); Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. pts. 160, 164 ("Privacy Rule"); *see also* Tex. Att'y Gen. Op. No. JC-0508 (2002) at 2. These standards govern the releasability of protected health information by a covered entity. *See* 45 C.F.R. pts. 160, 164. Under these standards, generally a covered entity may not use or disclose protected health information, except as provided by parts 160 and 164 of the Code of Federal Regulations. *Id.* § 164.502(a). This office has addressed the interplay of the Privacy Rule and the Act. In Open Records

Decision No. 681 (2004) we considered section 164.512 of title 45 of the Code of Federal Regulations, which provides that “[a] covered entity may use or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law.” *See* 45 C.F.R. § 164.512(a)(1). We noted the Act “is a mandate in Texas law that compels Texas governmental bodies to disclose information to the public.” ORD 681 at 8. Therefore, we held that disclosures under the Act come within section 164.512(a). *See id.* Consequently, the Privacy Rule does not make information confidential for purposes of section 552.101 of the Government Code. *Id.* at 9; *see also Abbott v. Tex. Dep’t of Mental Health & Retardation*, 212 S.W.3d 648, 652, 660 (Tex. App.—Austin 2006, no pet.); Open Records Decision No. 478 at 2 (1987) (as a general rule, statutory confidentiality requires express language making information confidential). Because the Privacy Rule does not make confidential information that is subject to disclosure under the Act, the city may not withhold any portion of the submitted information on this basis.

Section 552.101 of the Government Code also encompasses information made confidential by section 181.006 of the Health and Safety Code. Section 181.006 states that:

For a covered entity that is a governmental unit, an individual’s protected health information:

- (1) includes any information that reflects that an individual received health care from the covered entity; and
- (2) is not public information and is not subject to disclosure under [the Act].

Health & Safety Code § 181.006. Section 181.001(b)(2) defines “[c]overed entity,” in part, as any person who:

(A) for commercial, financial, or professional gain, monetary fees, or dues, or on a cooperative, nonprofit, or pro bono basis, engages, in whole or in part, and with real or constructive knowledge, in the practice of assembling, collecting, analyzing, using, evaluating, storing, or transmitting protected health information. The term includes a business associate, health care payer, governmental unit, information or computer management entity, school, health researcher, health care facility, clinic, health care provider, or person who maintains an Internet site[.]

Id. § 181.001(b)(2)(A). You do not inform us the city is a covered entity for purposes of section 181.006 of the Health and Safety Code. Thus, we find you have failed to demonstrate the submitted information is subject to section 181.006 of the Health and Safety Code, and the city may not withhold it under section 552.101 of the Government Code on this basis.

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 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 section 552.103(a) 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. *See 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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). *See* ORD 551.

To establish litigation is reasonably anticipated for the purposes of section 552.103, a governmental body must provide this office with “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” *See* Open Records Decision No. 452 at 4 (1986). In the context of anticipated litigation in which the governmental body is the prospective plaintiff, the concrete evidence must at least reflect litigation is “realistically contemplated.” *See* Open Records Decision No. 518 at 5 (1989); *see also* Attorney General Opinion MW-575 (1982) (finding investigatory file may be withheld if governmental body attorney determines it should be withheld pursuant to section 552.103 and litigation is “reasonably likely to result”). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* ORD 452 at 4.

The submitted information consists of a demand letter from the city to Hidalgo County (the “county”). The demand letter threatens litigation against the county if certain health information is not disclosed to the city. Thus, you argue the submitted information pertains to litigation the city reasonably anticipates will occur in the future. Upon review, we find section 552.103 is generally applicable to the submitted information.

However, as noted above, the city provided the demand letter to the county, the opposing party. The purpose of section 552.103 of the Government Code is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to the litigation to obtain such information through discovery procedures. *See* ORD 551 at 4-5. Thus, once the opposing party in anticipated or pending litigation has seen or had access to information that is related to the litigation, there is no interest in withholding such

information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Therefore, we find the opposing party has seen the submitted information and the city may not withhold the submitted information under section 552.103 of the Government Code. The submitted 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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,

Paige Lay
Assistant Attorney General
Open Records Division

PL/gw

Ref: ID# 833024

Enc. Submitted documents

c: Requestor
(w/o enclosures)