



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

July 13, 2020

Ms. Dylbia L. Jefferies Vega  
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1100 East Monroe Street  
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OR2020-17337

Dear Ms. Vega:

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# 835425 (PIR No. W001361-042120).

Cameron County (the "county") received a request for communications sent to or received by named individuals pertaining to specified keywords during a defined period of time. You claim the submitted information is excepted from disclosure under sections 552.103 and 552.111 of the Government Code. We understand you notified the City of Harlingen (the "city"), Veranda Rehabilitation and Healthcare ("Veranda"), and Windsor Atrium and Regency Integrated Health Services ("Windsor") of the request for information and of the opportunity to submit comments to this office as to why the submitted information should not be released. *See* Gov't Code §§ 552.304 (interested party may submit comments stating why information should or should not be released), .305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have received comments from the city, Veranda, and Windsor. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note the city argues against the release of some information that was not submitted by the county. This ruling does not address information that was not submitted by the county and is limited to the information the county has submitted for our review.<sup>1</sup>

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<sup>1</sup> As we are able to make this determination, we need not address the city's arguments against disclosure of this information.

*See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit copy of specific information requested).

Veranda generally asserts the submitted information is not subject to the Act pursuant to section 552.002(d) of the Government Code. The Act applies to “public information,” which is defined in section 552.002(a) of the Government Code as “information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business[.]” *See id.* § 552.002(a)(1). However, “protected health information” as defined by section 181.006 of the Health and Safety Code is expressly excluded from the Act’s definition of “public information.” *See id.* § 552.002(d). Section 181.006 of the Health and Safety Code provides:

[F]or 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[.]

Health & Safety Code § 181.006(1). Section 181.001(b)(2)(A) defines “covered entity,” in part, as any person who:

for commercial, financial, or professional gain, monetary fees, or dues, or on a cooperative, non-profit, 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). Veranda asserts itself and the county are covered entities for the purposes of section 181.006. However, in order to determine whether Veranda or the county is a covered entity for the purposes of section 181.006, we must address whether Veranda or the county engages in the practice of collecting, analyzing, using, evaluating, storing or transmitting protected health information. Section 181.001 states, “[u]nless otherwise defined in this chapter, each term that is used in this chapter has the meaning assigned by the Health Insurance Portability and Accountability Act and Privacy Standards [“(HIPPA)”].” *Id.* § 181.001(a). Accordingly, as chapter 181 does not define “protected health information,” we turn to HIPPA’s definition of the term. HIPPA defines “protected health information” as individually identifiable health information that is transmitted or maintained in electronic media or any other form or medium. *See* 45 C.F.R. § 160.103. HIPPA defines “individually identifiable health information” as information that is a subset of health information, including demographic information collected from an individual, and:

(1) Is created or received by a health care provider, health plan, employer, or health care clearinghouse; and

(2) Relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual; and

(i) That identifies the individual; or

(ii) With respect to which there is a reasonable basis to believe the information can be used to identify the individual.

*Id.* Further, “health care” is defined as “care, services, or supplies related to the health of an individual.” *Id.* Although Veranda asserts itself and the county are covered entities, Veranda has not explained the information at issue consists of protected health information. Thus, we find Veranda has failed to demonstrate the applicability of section 181.006. Accordingly, we find the information at issue is subject to the Act, and the county must release it unless it falls within an exception to public disclosure under the Act. *See* Gov’t Code §§ 552.006, .021, .301, .302.

Next, we note the county seeks to withhold press releases that may have been released to the public. The Act does not permit selective disclosure of information to the public. *See id.* §§ 552.007, .021; Open Records Decision No. 463 at 1-2 (1987). Information that has been voluntarily released to a member of the public may not subsequently be withheld from another member of the public, unless public disclosure of the information is expressly prohibited by law or the information is confidential under law. *See* Gov’t Code § 552.007(a); Open Records Decision Nos. 518 at 3 (1989), 490 at 2 (1988). Although you raise sections 552.103 and 552.111 of the Government Code and Windsor raises section 552.108 for the information at issue, these sections do not prohibit the release of information or make information confidential. *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 Gov’t Code § 552.103); Open Records Decision Nos. 665 at 2 n.5 (2000), (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 470 at 7 (1987) (deliberative process privilege under statutory predecessor to section 552.111 subject to waiver), 177 (1977) (governmental body may waive statutory predecessor to section 552.108). Thus, if the county voluntarily released the submitted press releases to the public, the county may not withhold such information under section 552.103, section 552.108, or section 552.111. However, because sections 552.101, 552.102, 552.110, and 552.1101 of the Government Code make information confidential, we will consider the applicability of these exceptions to the submitted press releases.

Next, we note some of the remaining information is subject to section 552.022 of the Government Code. Section 552.022 provides, in relevant part, the following:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

...

(17) information that is also contained in a public court record[.]

Gov't Code § 552.022(a)(17). The remaining information contains court-filed documents that are subject to section 552.022(a)(17). This information, which we marked, must be released unless it is made confidential under the Act or other law. *See id.* The county seeks to withhold the information subject to section 552.022(a)(17) under sections 552.103 and 552.111 of the Government Code and Windsor seeks to withhold the information subject to section 552.022(a)(17) under section 552.108 of the Government Code. However, these sections are discretionary in nature and do not make information confidential under the Act. *See Dallas Area Rapid Transit*, 4 S.W.3d at 475-76; ORDs 665, 663, 470, 177. Therefore, the county may not withhold any of the information subject to section 552.022 under these exceptions. However, as sections 552.101, 552.102, 552.110, and 552.1101 of the Government Code can make information confidential for purposes of section 552.022, we will consider Windsor's arguments under these sections for the information subject to section 552.022. In addition, we will consider the county's arguments under sections 552.103 and 552.111 of the Government Code for the information not subject to section 552.022(a)(17).

Section 552.103 of the Government Code provides, in 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 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 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 the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing (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, 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, a governmental body must provide this office “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” *See* Open Records Decision No. 452 at 4 (1986). 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* ORD 518 at 5 (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). In Open Records Decision No. 638 (1996), this office stated a governmental body has met its burden of showing that litigation is reasonably anticipated when it received a notice of claim letter and the governmental body represents that the notice of claim letter is in compliance with the requirements of the Texas Tort Claims Act (“TTCA”), Civ. Prac. & Rem. Code, ch. 101. 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 county states prior to the date it received the instant request for information, the county received a notice of claim from a county resident alleging the county has violated his constitutional rights. The county affirmatively states the notice of claim meets the requirements of the TTCA. Thus, we find the county reasonably anticipated litigation prior to the date of the instant request. The county further states the information at issue is related to the anticipated litigation. Based upon these representations and our review, we find the information at issue is related to litigation that was reasonably anticipated on the date the county received the request for information. Therefore, the county may withhold the information not subject to section 552.007 or section 552.022 of the Government Code under section 552.103 of the Government Code.<sup>2</sup>

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to all parties to the anticipated litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

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

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<sup>2</sup> As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

Code § 552.101. Windsor generally raises section 552.101 of the Government Code in conjunction with section 181.006 of the Health and Safety Code. However, Windsor does not inform us it is a covered entity for purposes of section 181.006 of the Health and Safety Code. Thus, we find Windsor has failed to demonstrate any of the remaining information at issue is subject to section 181.006 of the Health and Safety Code, and the county may not withhold it under section 552.101 of the Government Code on this basis.

Section 552.101 of the Government Code also encompasses the Medical Practice Act (“MPA”), subtitle B of title 3 of the Occupations Code, which governs the release of medical records. Section 159.002 of the MPA provides, in relevant 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.

Occ. Code § 159.002(a)-(c). Information subject to the MPA includes both medical records and information obtained from those medical 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 (1987), 370 (1983), 343 (1982).* Windsor generally asserts the information at issue is confidential pursuant to section 159.002 of the Occupations Code. However, upon review, we find none of the remaining information at issue constitutes the identity, diagnosis, evaluation, or treatment of a patient by someone under the supervision of a physician that were created or are maintained by a physician or someone under the supervision of a physician. Accordingly, the county may not withhold any of the remaining information at issue on that basis.

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 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 (Tex. 2010). Windsor generally asserts the remaining information at issue is excepted from disclosure under section 552.102(a) of the Government Code. Upon review, we find Windsor has failed to demonstrate any portion of the remaining

information at issue is subject to section 552.102(a) of the Government Code, and the county may not withhold any of the remaining information at issue on that basis.

Section 552.110(c) of the Government Code excepts from disclosure “commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]” Gov’t Code § 552.110(c). Windsor generally asserts the remaining information at issue consists of commercial or financial information subject to section 552.110(c). Upon review, we find Windsor has failed to provide specific factual evidence demonstrating the remaining information at issue constitutes commercial or financial information, the release of which would result in substantial competitive harm. Therefore, the county may not withhold any portion of the remaining information at issue under section 552.110(c) of the Government Code.

Section 552.110(b) of the Government Code states “information is [excepted from required disclosure] if it is demonstrated based on specific factual evidence that the information is a trade secret.” *See id.* § 552.110(b). Section 552.110(a) defines a trade secret as all forms and types of information if:

(1) the owner of the trade secret has taken reasonable measures under the circumstances to keep the information secret; and

(2) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information.

*Id.* § 552.110(a). Windsor generally argues the remaining information at issue consists of trade secrets subject to section 552.110(b). However, upon review, we find Windsor has failed to provide specific factual evidence demonstrating any portion of the remaining information at issue is a trade secret. Therefore, the county may not withhold any portion of the remaining information at issue under section 552.110(b) of the Government Code.

Windsor generally asserts section 552.1101. Section 552.1101(a) excepts from disclosure “information *submitted to a governmental body* by a vendor, contractor, potential vendor, or potential contractor *in response to a request for a bid, proposal, or qualification*[.]” *Id.* § 552.1101(a) (emphasis added). Upon review, we find Windsor has failed to demonstrate the applicability of section 552.1101(a) to any portion of the remaining information at issue. Accordingly, the county may not withhold any of the remaining information at issue under section 552.1101(a) of the Government Code.

In summary, if the county voluntarily released the submitted press releases to the public, the county must release the press releases pursuant to section 552.007 of the Government Code. The county must release the information we marked pursuant to section 552.022(a)(17) of the Government Code. The county may withhold the information not subject to section 552.007 or section 552.022 of the Government Code under section 552.103 of the Government Code.

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,

Kimbell Kesling  
Assistant Attorney General  
Open Records Division

KK/mo

Ref: ID# 835425

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

2 Third Parties  
(w/o enclosures)

Interested Party  
(w/o enclosures)