



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

May 10, 1995

Ms. Eugenia A. Cano
City Attorney
City of Alvin
216 West Sealy
Alvin, Texas 77511

OR95-272

Dear Ms. Cano:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act. Your request was assigned ID# 32176.

The City of Alvin (the "city") received a written request for certain Alvin Police Department records and emergency services ("EMS") records, and a verbal request for a custodial death report, all pertaining to the death of a prisoner while she was incarcerated. We have considered the exceptions you claimed, specifically sections 552.103 and 552.108, and article 49.18 of the Code of Criminal Procedure, as well as section 552.101, and have reviewed the documents you submitted.¹ You indicate in your letter that the city has agreed to provide the requestor with certain of the information requested, copies of which you also submitted. Therefore, we do not address whether that information falls within any claimed exception.

Section 552.103(a) applies to information:

(1) relating to litigation of a civil or criminal nature or settlement negotiations, 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; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

¹The Office of the Attorney General will raise section 552.101 on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481, 480, 470 (1987).

Gov't Code § 552.103(a). This section applies only if litigation is pending or reasonably anticipated. *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 452 (1986). Litigation cannot be regarded as "reasonably anticipated" unless there is more than a "mere chance" of it--unless, in other words, we have concrete evidence showing that the claim that litigation may ensue is more than mere conjecture. Open Records Decision Nos. 452 (1986), 331, 328 (1982). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision Nos. 452 (1986), 350 (1982). This office has concluded that litigation is reasonably anticipated when an attorney makes a written demand for disputed payments and promises further legal action if they are not forthcoming, and when a requestor hires an attorney who threatens to sue a governmental entity. Open Records Decision Nos. 555, 551 (1990).

In your letter, you mention that the requestor threatened litigation during conversations you had with him during a meeting in your office. However, at that time, he was not represented by counsel, although he had previously had an attorney representing him. It does appear that since the time of your meeting the requestor has retained an attorney who states that he is representing the requestor in a "possible claim" against the city. You do not include any written demands from an attorney purporting to represent the requestor, nor do you indicate that any papers were served on the city. We understand that the city has not received any such demands or papers. Where a requestor publicly states on more than one occasion an intent to sue, that alone does not trigger section 552.103(a). Open Records Decision No. 452 (1986); *see* Open Records Decision No. 361 (1983) (fact that request for records made by attorney not enough to trigger 552.103(a)). It is the opinion of this office that these conversations, without more, are insufficient to invoke the protection of section 552.103(a). Therefore, none of the documents are protected by section 552.103(a).²

The autopsy report must be disclosed. It is expressly made public by the Code of Criminal Procedure. Code Crim. Proc. art. 49.25, § 11. You indicate in your letter that the requestor may be receiving a copy of the autopsy report from the medical examiner's office.

You claim that sections II through V and the attachments to the custodial death report are excepted from disclosure pursuant to article 49.18 of the Code of Criminal Procedure and Open Records Decision No. 521. Pursuant to that authority, you may withhold sections II through V of the custodial death report. *See* Code Crim. Proc. art. 49.18; Open Records Decision No. 521 (1989). Similarly, the documents compiled and attached to the custodial death report as attachments may also be withheld. Open Records Decision No. 521 (1989) at 7.

²No exception other than section 552.103 has been advanced for the evidence submission form. As we have found that this exception does not apply, the evidence submission form must be disclosed.

You also claim that the theft investigation documents specified in 5(ii) and (iii) are excepted from disclosure pursuant to section 552.108 because the release of these documents would unduly interfere with the city's law enforcement activities. Section 552.108 excepts from required public disclosure:

(a) A record of a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . ;

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution

Gov't Code § 552.108. When applying section 552.108, this office distinguishes between information relating to cases that are still under active investigation and other information. Open Records Decision No. 611 (1992) at 2. In cases that are still under active investigation, section 552.108 excepts from disclosure all information except that generally found on the first page of the offense report. *See generally Houston Chronicle Publishing Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.--Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976); Open Records Decision No. 127 (1976). Otherwise, when the "law enforcement" exception is claimed, the agency claiming it must reasonably explain, if the information does not supply the explanation on its face, how its release would unduly interfere with law enforcement. Open Records Decision No. 434 (1986) at 3 (citing *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977)). Whether information falls within the section 552.108 exception must be determined on a case-by-case basis. Open Records Decision No. 434 (1986) at 2.

As Gay Lynn Morris is now deceased, there can be no prosecution of her, as you acknowledge in your letter. Therefore, the requested information does not relate to a pending law enforcement investigation. Although you claim that the requested information would unduly interfere with the city's law enforcement activities, you do not explain how that would occur. Therefore, section 552.108 does not protect the information specified in sections 5(ii) and 5(iii), and this information must be disclosed.³

Finally, we will consider whether section 552.101 excepts any of the documents from disclosure. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information protected by other statutes. Article 4495b protects from disclosure "[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician." V.T.C.S. art. 4495b, § 5.08(b). The records from Alvin Community Hospital fall within this statute's protection. Although the patient is now deceased, the confidentiality

³You state on the last page of your letter that, absent the section 552.103(a) exception, you believe that only the first pages of the theft offense reports must be disclosed. This conclusion is incorrect; all of the offense reports must be disclosed.

provided for by article 4495b does not lapse upon the patient's death. Attorney General Opinion JM-229 (1984) at 4. However, article 4495b also provides that, if the patient is deceased, a personal representative may consent to the disclosure of the protected records. V.T.C.S. art. 4495b, § 5.08(j). Therefore, disclosure of these records is permissible if the requirements of article 4495b are met. *See id.* § 5.08(j)(3).

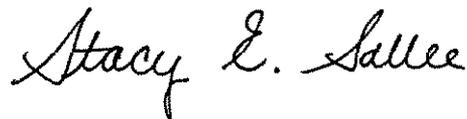
Similarly, the records from the City of Alvin Emergency Medical Services are excepted from disclosure in part. Portions of these records fall within the protection of section 773.091 of the Health & Safety Code, which protects:

[r]ecords of the identity, evaluation, or treatment of a patient by emergency medical services personnel . . . that are created by the emergency medical services personnel . . . or maintained by an emergency services provider. . . .

Health & Safety Code § 773.091(b). However, that protection does not extend to information regarding the presence, nature of injury or illness, age, sex, occupation, and city of residence of a patient who is receiving emergency medical services. *Id.* § 773.091(g). Therefore, the portion of the records reflecting this information must be disclosed unless it is protected by constitutional or common law privacy. *See id.*; Open Records Decision No. 343 (1982) (applying same standard under 4495b). However, as Ms. Morris is deceased, her constitutional and common law privacy rights have lapsed. Attorney General Opinion JM-229 (1984) at 3-4; *see* Open Records Decision No. 432 (1985) at 4-6 (citing *Justice v. Belo Broadcasting Corp.*, 472 F. Supp. 145, 146-47, 148 (N.D. Tex. 1979)). Therefore, the information excepted from protection in section 773.091(g) must be disclosed. The information that must be disclosed is marked on the documents. Absent the consent provided for in section 773.093, the remainder of the EMS records cannot be disclosed.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Stacy E. Sallee
Assistant Attorney General
Open Government Section

SES/KHG/rho

Ref.: ID# 32176

Enclosures: Submitted documents

cc: Mr. Rick Morris
2101 Mustang Road #99
Alvin, Texas 77511
(w/o enclosures)