



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

July 23, 1997

Ms. Tamara Armstrong  
Assistant County Attorney  
County of Travis  
P. O. Box 1748  
Austin, Texas 78767

OR97-1675

Dear Ms. Armstrong:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 107193.

The Travis County Sheriff's Office (the "sheriff's office") received a request for "I.A. Case #97-06, to include any and all documents, findings, case transcripts regarding Patricia Barba/Petofi." You assert that the sheriff's office has located certain responsive records which have been or will be released to the requestor. However, you seek to withhold the remaining responsive records pursuant to sections 552.101, 552.103, and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We note that if the requested records overlap with any information which was the subject of our previous ruling in Open Records Letter No. 97-1177 (1997), then the sheriff's office should withhold or release this information as directed in that ruling. A copy of that ruling is enclosed for your convenience.

You have submitted four categories of information, labeled as Exhibits A, B, C, and D, all of which you contend should be withheld pursuant to section 552.103. Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the governing body is or may be a party. The sheriff's office has the burden of providing relevant facts and documents to show that 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, and (2) the information at issue is related to that litigation. *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 (1990) at 4. The sheriff's office must meet both prongs of this test for information to be excepted under section 552.103(a).

Litigation cannot be regarded as "reasonably anticipated" unless there is concrete evidence showing that the claim that litigation may ensue is more than mere conjecture. Open Records Decision Nos. 452 (1986), 331 (1982), 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's letter demands damages and threatens to file suit, Open Records Decision No. 551 (1990), and when an attorney makes a written demand for disputed payments and promises further legal action if they are not forthcoming. Open Records Decision Nos. 555 (1990).

You state that a hearing and grievance is pending before the Civil Service Commission (the "commission") in this case. You characterize this process as an adversarial administrative hearing. However, a hearing before the commission is not a "contested case" under the Administrative Procedure Act, Gov't Code §§ 2001.001 *et seq.* (1993), and we have not recognized such a hearing as a quasi-judicial proceeding under section 552.103(a). *See* Open Records Decision No. 588 (1991). We have considered your arguments regarding the applicability of section 552.103. However, we conclude that the sheriff's office may not withhold any of the submitted records pursuant to this exception at this time.

We next address your other claimed exceptions for the submitted exhibits. With respect to Exhibit A, we note that section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses the common-law right to privacy. Information is protected by the doctrine of common-law privacy if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). To the extent the submitted information relates to a public employee's job performance, we conclude that the public has legitimate right to this information. Therefore, having reviewed the information at issue, we note that we did not find any information in Exhibit A which is protected by the common-law right to privacy.

Section 552.101 of the Government Code also excepts from disclosure information that is made confidential by statute. Exhibit B is a polygraph examiner's summary of an examination administered to an individual other than the requestor. You claim that section 19A of article 4413(29cc), V.T.C.S. makes the information in Exhibit B confidential. Section 19A provides :

(b) Except as provided by Subsection (d) of this section, a person for whom a polygraph examination is conducted or an employee of the person may not disclose to another person information acquired from the examination.

Section 19A(b) makes Exhibit B, containing polygraph records, confidential in the sheriff's office's hands, and therefore the information is excepted from required public disclosure by section 552.101 of the Government Code. This includes the test results wherever they may appear.

We next address Exhibit C containing a prescription for medication, which you claim is confidential in its entirety pursuant to the Texas Pharmacy Act, article 4542a-1 V.T.C.S. Section 5 (13) of the Texas Pharmacy Act states as follows

(13) "Confidential record" means any health-related record maintained by a pharmacy or pharmacist such as a patient medication record, prescription drug order, or medication order.

We conclude that the records in Exhibit C are confidential and privileged. Furthermore, as the requestor is not one of the enumerated persons or entities entitled access to this information, the sheriff's office must withhold the information in Exhibit C.

You also claim that requested records contain information that is confidential and excepted from disclosure under section 552.101, in conjunction with section 5.08(b) of the Medical Practice Act (the "MPA") V.T.C.S. art. 4495b.<sup>1</sup> Medical records may be released only in accordance with the MPA. Open Records Decision No. 598 (1991); *see* V.T.C.S. art. 4495b, § 5.08(c), (j). After reviewing the submitted records we did not find any information which appeared to be protected pursuant to the MPA.

We also note that section 552.117(2) excepts from required public disclosure information relating to the home address, home telephone number, and social security number of "a peace officer as defined by Article 2.12, Code of Criminal Procedure." Unlike other public employees, a peace officer need not affirmatively claim confidentiality for this information. Open Records Decision No. 488 (1988); *see also* Open Records Decision No. 506 (1988). Section 552.117(2) also makes confidential any information that reveals the

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<sup>1</sup>Section 5.08(b) of the MPA provides as follows:

(b) Records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician are confidential and privileged and may not be disclosed except as provided in this section.

identities of a peace officer's family members.<sup>2</sup> Accordingly, we have marked some of the types of information in Exhibits A and D, which should be redacted, however, we advise you to review the records in order to withhold the information which is subject to section 552.117(2). The sheriff's office, therefore, must withhold such information from the requestor.

In summary, we note that you should withhold the types of information, marked in Exhibits A and D, which are subject to section 552.117. Exhibit B should be withheld pursuant to section 19A of article 4413(29cc), V.T.C.S. Exhibit C should also be withheld pursuant to sections 5(13) and 40C of article 4542a-1, V.T.C.S. However, we note that the information in Exhibit D, for which you raised section 552.103 as an exception, may only be withheld from the requestor to the extent that sections 552.101 or 552.117 are applicable. The sheriff's office must release the remaining information.<sup>3</sup>

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 on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,



Sam Haddad  
Assistant Attorney General  
Open Records Division

SH/rho

Ref.: ID# 107193

Enclosures: Marked documents

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<sup>2</sup>We note that we did see some of this information in the submitted materials.

<sup>3</sup>We advise you to review the records and exercise caution in releasing any of the information. Section 552.352 of the Open Records Act imposes criminal penalties for the release of confidential information. See Gov't Code § 552.352.

cc: Ms. Julie Martinets  
5312 Grover  
Austin, Texas 78756  
(w/o enclosures)

