



December 9, 1999

Mr. Richard Hubbert
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P.O. Box 10236
Lubbock, Texas 79408

OR99-3573

Dear Mr. Hubbert:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 130197.

Childress County (the "county"), which you represent, received a request for eighteen categories of information concerning a custodial death. You have provided the requestor with information responsive to items two and three. You state that you have no records responsive to item one. You claim that the remainder of the requested information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, we note that the documents responsive to item 12 include an autopsy report that is public by statute. The Public Information Act's exceptions do not, as a general rule, apply to information made public by other statutes. Open Records Decision No. 525 (1989). Section 11, article 49.25 of the Code of Criminal Procedure provides as follows:

The medical examiner shall keep full and complete records properly indexed, giving the name if known of every person whose death is investigated, the place where the body was found, the date, the cause and manner of death, and shall issue a death certificate. The full report and detailed findings of the autopsy, if any, shall promptly be delivered to the proper district, county, or criminal district attorney in any case where further investigation is advisable. The records are subject to required public disclosure in accordance with Chapter 552, Government Code

Code Crim. Proc. art. 49.25, § 11. Pursuant to section 11, the autopsy report is a public record and must be released to the requestor.

The submitted documents responsive to item 12 also include a custodial death report. This office has concluded that Part I of a custodial death report is public information in accordance with article 49.18(b) of the Code of Criminal Procedure. *See* Open Records Decision No. 521 (1989). Parts II through V of the report are not public information. *See id.* The county must release Part I of the custodial death report.

Next, we note that some of the responsive information is made public by section 552.022 of the Government Code. Specifically, items four and five relate to the county's insurance policies and coverages, which constitute "information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body." Gov't Code § 552.022(a)(3). Furthermore, items 13-15 and 17 relate to the county's policies and procedures concerning inmates, which constitute "administrative staff manuals and instructions to staff that affect a member of the public." Gov't Code § 552.022(a)(14). Information enumerated under section 552.022 is public information and "not excepted from required disclosure under [chapter 552 of the Public Information Act] unless [it is] expressly confidential under other law." Gov't Code § 552.022(a). You raise section 552.103 of the Government Code. Section 552.103 is an exception under the Public Information Act and is not other law that makes the requested information confidential. Accordingly, pursuant to subsections 552.022(a)(3) and 552.022(a)(14), the information responsive to items 4, 5, 13-15, and 17 is public, and the county must release the requested information.

Lastly, we address your section 552.103 claim for the remainder of the submitted information. Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state is or may be a party. The county 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. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.--Austin, 1997, no pet.); *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. 551 at 4 (1990). The county 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 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 (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 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 (1990), 551 (1990).

You submit a letter from an attorney who represents the estate of the deceased. The letter states, "should litigation become necessary, our theories of liability will sound in tort, and under both state and federal civil rights statutes. I have contacted my client to solicit a settlement offer that will represent a savings of potential litigation costs to all sides." Having reviewed the arguments and submitted information, we believe that the county reasonably anticipates litigation, and that the remainder of the submitted documents are related to the anticipated litigation. Consequently, the county may withhold the remaining requested information under section 552.103 of the Government Code.

When the opposing party in the litigation has seen or had access to any of the information in these records, there is no justification for withholding that information from the requestor pursuant to section 552.103(a). Open Records Decision Nos. 349 (1982), 320 (1982). In addition, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report

that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL/ljp

Ref.: ID# 130197

Encl. Submitted documents

cc: Mr. Mont McClendon
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(w/o enclosures)