



April 25, 2000

Ms. Peri H. Alkas  
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OR2000-1612

Dear Ms. Alkas:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 134485.

The Wharton County Sheriff's Department (the "department"), which you represent, received a request for sixteen items of information relating to a named individual; incident reports involving or including certain named Wharton County Jail employees; the department's documentation relating to suicides, attempted suicides, use of force or excessive force, inappropriate interrogation, and failure to comply with Texas Commission on Jail Standards regarding suicide; the department's past and current suicide prevention plans; Wharton County Jails, inspection reports ; and reports of Wharton County Jail's noncompliance with the Texas Commission on Jail Standards from 1991 to the present. We note that you have submitted representative samples for items 10, 11, 13(a), and 16(a).<sup>1</sup> You claim that the requested information is excepted from disclosure under sections 552.103 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

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<sup>1</sup>We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). Here, we do not address any other records to the extent that those records contain substantially different types of information than those submitted to this office.

Before considering the exceptions you claim exempt the requested information from public disclosure, we will address your assertion that you do not have responsive documents for items 9, 12, and 13 (c), (d), and (e) of the request. The Public Information Act (the “Act”) does not require a governmental body to prepare new information in response to open records requests. Open Records Decisions Nos. 452 (1986), 342 (1982). Furthermore, the Act does not ordinarily require a governmental body to obtain new information to comply with a request. Open Records Decision No. 561 (1990). The act only applies to information already in existence. In this instance it appears the department does not have the requested information. Therefore, the department need not create any new documents to respond to the open records request.

Initially, we note that the submitted documents contain newspaper clippings. We find that these documents constitute information that is within the public domain and, as such, cannot be withheld under section 552.103 of the Government Code. We have marked the documents to be released.

Additionally, we note that the submitted documents contain autopsy reports. Section 11 of article 49.25 of the Code of Criminal Procedure requires that autopsy reports be made available to the public. *See* Open Records Decision No. 525 (1989). Section 11 provides that

[t]he records [of an autopsy] are subject to *required* public disclosure in accordance with Chapter 552, Government Code, except that a photograph or x-ray of a body taken during an autopsy is excepted from required public disclosure in accordance with Chapter 552, Government Code, but is subject to disclosure:

- (1) under subpoena or authority of other law; or
- (2) if the photograph or x-ray is of the body of a person who died while in the custody of law enforcement.

Crim. Proc. Code art. 49.25, § 11. The department must release the autopsy reports to the requestor.

Furthermore, we note that the submitted documents contain information that falls within the purview of section 552.022 of the Government Code. Section 552.022 provides several categories of information that are not excepted from required public disclosure unless they “are expressly confidential under other law.” Section 552.103 of the Government Code is a discretionary exception to public disclosure and not “other law” for the purposes of

section 552.022.<sup>2</sup> Therefore, you may not withhold the section 552.022 information discussed below under section 552.103 of the Government Code.

Section 552.022(a)(1) reads in pertinent part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by section 552.108.

Gov't Code § 552.022(a)(1). We conclude that the documents responsive to item 4 and 13(b) contain completed investigations. Although the department has claimed section 552.108 of the Government Code as an exception for the public disclosure of the submitted documents, we find that department has not specifically explained which subsection of section 552.108 applies to the submitted documents. Therefore, we cannot find section 552.108 is applicable to the documents at issue. Consequently, we have marked those documents responsive to item 4 in and item 13(b) that must be released under section 552.022(a)(1).

Next, section 552.022(a)(3) states that “information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body” is not excepted from public disclosure unless it is expressly made confidential under other law. We conclude that item 7 represents a contract which relates to the expenditure of government funds. Therefore, item 7 is public information that is not excepted from public disclosure under section 552.103 and must be released under section 552.022(a)(3).

Additionally, section 552.022(a)(14) states that “administrative staff manuals and instructions to staff that affect a member of the public” are public information and not excepted from required disclosure under this chapter unless they are expressly confidential

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<sup>2</sup>Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See eg.*, Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 592 at 8 (1991) (governmental body may waive 552.104, information relating to competition or bidding), 549 at 6 (1990) (governmental body may waive informer's privilege), 522 at 4 (1989) (discretionary exceptions in general). Discretionary exceptions therefore do not constitute “other law” that makes information confidential.

under other law. We conclude that items 14 and 15 fall within the purview of section 552.022(a)(14). Therefore, the department must release these documents.

Moreover, we find that the submitted information contains documents that have been filed with a court. Section 552.022(a)(17) of the Government Code provides that information contained in a public court record is not excepted from public disclosure unless the information is made expressly confidential under other law. Therefore, these documents are not excepted from public disclosure under section 552.103. We have marked the documents to be released under section 552.022(a)(17). *See also Star-Telegram v. Walker*, 834 S.W.2d 54, 57 (Tex. 1992).

First, we find that the required documents to be released under section 552.022 also include information excepted under section 552.130 of the Government Code. This section governs the release and use of information obtained from motor vehicle records, and states in relevant part:

(a) Information is excepted from [required public disclosure] if the information relates to:

(1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]

(2) a motor vehicle title or registration issued by an agency of this state[.]

Gov't Code § 552.130(a)(1), (2). You must withhold driver's license numbers, VIN numbers, and license plate numbers pursuant to section 552.130. We have marked the types of information that must be redacted prior to the documents' release.

We further note that some of the section 552.022 documents contain information which relate to sexual assaults. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses common law privacy and excepts from disclosure private facts about an individual. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information is excepted from required public disclosure by a common law right of privacy if the information (1) 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.*, 540 S.W.2d 668.

This office has concluded that information which either identifies or tends to identify a victim of sexual assault or other sex-related offense may be withheld under common law privacy. Open Records Decision No. 393 at 2 (1983); *see* Open Records Decision No. 339 (1982); *see also Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied) (identity of witnesses to and victims of sexual harassment was highly intimate or embarrassing information and public did not have a legitimate interest in such information). We have marked the identifying information that must be withheld from public disclosure under common law privacy and section 552.101.

Finally, we find that the section 552.022 documents also contain social security numbers. Social security numbers may be withheld in some circumstances under section 552.101 of the Government Code. A social security number or "related record" may be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that any of the social security numbers in the records here are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure on the basis of that federal provision. We caution, however, that section 552.353 of the Public Information Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained pursuant to any provision of law, enacted on or after October 1, 1990.

Next, we note that the submitted documents contain custodial death reports. 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, including attachments, are deemed privileged under article 49.18(b) and must be withheld from the public. *Id.* at 5. Accordingly, the department must withhold all portions of Parts II through V, including attachments, of all the custodial death reports. The department must release only Part I of the custodial death reports.

Additionally, it appears that some of the records you submitted as responsive to the request were prepared by emergency medical service personnel or physician. Section 773.091 of the Health and Safety Code provides in part:

(b) Records of the identity, evaluation, or treatment of a patient by emergency services personnel or by a physician providing medical supervision that are created by the emergency medical services personnel or physician or maintained by an emergency medical service provider are confidential and privileged and may not be disclosed except as provided by this chapter.

Health & Safety Code § 773.091. Therefore, you must withhold most of the information contained in the EMS records. However, subsection (g) of section 773.091 specifically provides that information as to “the presence, nature of injury or illness, age, sex, occupation, and city of residence of a patient receiving emergency medical services” is not protected by the confidentiality provisions of section 773.091. Thus, the information in subsection (g) must be released unless it is confidential by other law.

Moreover, we note that the submitted responsive documents contain medical records. Section 159.002 of the Occupations Code, known as the Medical Practice Act (“MPA”), in conjunction with section 552.101 of the Government Code<sup>3</sup> provides for the confidentiality of medical records. The MPA provides in relevant part:

(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 . . . 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(b), (c). The MPA requires that any subsequent release of medical records be consistent with the purposes of which a governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Thus, the MPA governs access to medical records. Open Records Decision No. 598 (1991). Moreover, information that is subject to the MPA includes both medical records and information obtained from those medical records. *See* Occ. Code §159.002(a), (b), (c); Open Records Decision No. 598 (1991). We have marked the medical records of the deceased that appear in the submitted documents.

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<sup>3</sup>Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Section 552.101 encompasses information protected by other statutes.

You may release these records only in accordance with the MPA. We note that the requestor is an attorney representing the deceased's estate. Section 159.003(a) provides an exception to the confidentiality provision of section 159.002 of the Occupations Code. Section 159.003(a)(4) states the medical records may be released

in a civil action or administrative proceeding, if relevant, brought by the patient or person on the patient's behalf, if the patient or person is attempting to recover monetary damages for a physical or mental condition including the patient's death.

Occ. Code § 159.003(a)(4). We conclude that section 159.003(a)(4) is applicable in this instance. Therefore, we find that the attorney representing the deceased's estate may have access to those medical records provided he complies with the access provisions of the MPA. *See* Occ. Code §§ 159.004(5), 159.005(5) (providing that otherwise confidential medical information may be released to a personal representative of the patient if the patient is deceased, subject to certain requirements).

Furthermore, section 552.101 also encompasses confidentiality provisions such as those found in the Family Code. Prior to its repeal by the Seventy-fourth Legislature, section 51.14(d) of the Family Code provided for the confidentiality of juvenile law enforcement records.<sup>4</sup> Law enforcement records pertaining to conduct occurring before January 1, 1996 are governed by the former section 51.14(d), which was continued in effect for that purpose. Act of May 27, 1995, 74th Leg., R.S., ch. 262, § 100, 1995 Tex. Gen. Laws 2517, 2591 (Vernon). After a review of the documents, we conclude that the submitted documents contain information that is a law enforcement record pertaining to juvenile conduct occurring prior to January 1, 1996. Therefore, section 51.14(d) is applicable only to these documents. Section 51.14(d) provides in pertinent part:

(d) Except as provided by Article 15.27, Code of Criminal Procedure, and except for files and records relating to a charge for which a child is transferred under section 54.02 of this code to a criminal court for prosecution, the law-enforcement files and records [of a child] are not open to public inspection nor may their contents be disclosed to the public, but inspection of the files and records is permitted by:

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<sup>4</sup>We note that the Seventy-fourth Legislative repealed section 51.14 of the Family Code and replaced it with section 58007 of the Family Code. We note also that the Seventy-fifth Legislature amended section 58.007 of the Family Code.

- (1) a juvenile court having the child before it in any proceeding;
- (2) an attorney for a party to the proceeding; and
- (3) law-enforcement officers when necessary for the discharge of their official duties.

None of the exceptions to former section 51.14(d) appears to apply to the requestor. *See* Act of May 22, 1993, 73d Leg., R.S., ch. 461, § 3, 1993 Tex. Gen. Laws 1850, 1852 (repealed 1995) (formerly Fam. Code § 51.14(d) (1), (2), (3)). Accordingly, we have marked the documents that must be withheld in their entirety under section 552.101 of the Government Code in conjunction with former section 51.14(d) of the Family code.

Lastly, we will consider your section 552.103 claim as to the remainder of the documents. Section 552.103(a) reads 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 part 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.

Gov't Code § 552.103(a). A governmental body has the burden of providing relevant facts and documents to show the applicability of an exception in a particular situation. The test of establishing that section 552.103(a) applies is a two-prong 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 Col*, 684 S.W.2d 479 (Tex.App.–Houston [1<sup>st</sup> Dist.] 1984, writ ref'd n.r.e.; Open Records Decision No. 588 (1991). You provide documentation demonstrating that Cause No. G-00-044 is pending. Therefore, you have met the first prong of the test. After a review of the submitted information, we conclude that some of the information relates to the pending litigation. We have marked the documents that we conclude are related to the litigation that you may withhold under section 552.103 of the Government Code. You must release the remaining documents that do not relate to the pending litigation. We note that section 552.103 does not except basic information in an offense report. Open Records Decision No. 367 (1983). Basic information is considered to be front page offense report information held to be public in *Houston Chronicle Publ'g 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). *See* Open Records Decision No. 127 (1976).

We note that if the opposing party in the litigation has seen or had access to any of the information in these records, there is no section 552.103(a) interest in withholding that information from the requestor. Open Records Decision Nos. 349 (1982), 320 (1982). In addition, the applicability of section 552.103(a) ends once the litigation concludes. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982). However, if the records contain information that is confidential by law, you must not release such information even at the conclusion of the litigation. Gov't Code §§ 552.101, .352.

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.

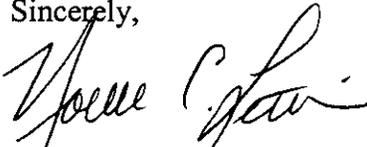
This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge 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 Department 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,

A handwritten signature in black ink, appearing to read "Noelle C. Letteri". The signature is fluid and cursive, written over the printed name.

Noelle C. Letteri  
Assistant Attorney General  
Open Records Division

NCL/nc

Ref: ID# 134485.

Encl. Submitted documents

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