



January 2, 2001

Ms. Sarajane Milligan  
Assistant County Attorney  
Harris County  
1019 Congress, 15<sup>th</sup> Floor  
Houston, Texas 77002-1700

OR2001-0003

Dear Ms. Milligan:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 142742.

Harris County Judge Robert Eckels ("Judge Eckels") received a request for three categories of information relating to Daniel O. Rodriguez ("Rodriguez"). The Harris County Sheriff's Department (the "department") subsequently received a request for copies of all reports, memoranda, and investigations relating to Rodriguez, as well "copies of all documents relating in any way to claims, complaints or notifications relating to allegations that persons were injured while in the custody of Harris County law enforcement personnel" from January 1, 1995 to the present. You state that because the two requests are from the same requestor and involve the same information, you are submitting a single brief on behalf of Judge Eckels and the department. You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.108, 552.111, and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.<sup>1</sup>

Section 552.103(a) excepts from disclosure information relating to litigation to which a governmental body is or may be a party. The governmental body has the burden of providing

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<sup>1</sup>You inform us that the information submitted as Exhibit D is a representative sample of information responsive to that part of the request received by the department in which the requestor seeks documents related to claims regarding alleged injuries to persons in the custody of Harris County law enforcement personnel for a five-year period. 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). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

relevant facts and documents to show that section 552.103(a) is applicable in a particular situation. In order to meet this burden, the governmental body must show 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, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). Section 552.103(c) provides that information relating to litigation is excepted from disclosure under subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information. In order to establish that litigation is reasonably anticipated, section 552.103 requires concrete evidence that litigation may ensue. The governmental body must furnish evidence that litigation is realistically contemplated and is more than mere conjecture. Open Records Decision No. 518 at 5 (1989). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986). A governmental body may establish that litigation is reasonably anticipated by showing that 1) it has received a claim letter from an allegedly injured party or his attorney and 2) the governmental body states that the letter complies with the notice of claim provisions of the Texas Tort Claims Act (TTCA) or applicable municipal statute or ordinance. Open Records Decision No. 638 (1996).

You inform us that the request letter received by Judge Eckels from the requestor is a demand/notice letter, and that this letter meets the requirements to serve as notice of a claim under the TTCA as a prerequisite to the filing of a lawsuit against Harris County and the department. We therefore find that you have established that litigation was reasonably anticipated on the date of receipt of both of these requests for information.<sup>2</sup> You also inform us that the documents requested either deal directly with the incident at the Harris County jail involving Rodriguez or concern other allegations of injury in the Harris County jail. *See* Open Records Decision No. 638 (1996) (governmental body must explain how requested information relates to subject of litigation). Based on your representations and upon review of the submitted information, we conclude that it is related to the subject matter of the anticipated litigation. Therefore, the requested information may be withheld from disclosure under section 552.103(a) of the Government Code, with the following exceptions.

You inform us that the requestor has requested through discovery the very documents he seeks in his request to Judge Eckels and the department.<sup>3</sup> We note that when the opposing

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<sup>2</sup>The second request in this matter, made by the requestor to the department, was received on October 18, 2000, 8 days after the date Judge Eckels received the request which contained the notice of claim.

<sup>3</sup>You state that on October 23, 2000, the requestor filed a lawsuit on behalf of Rodriguez' family against Harris County in Cause No. 2000-54028, in the 125<sup>th</sup> Judicial District Court of Harris County, Texas. You further assert that the lawsuit "was filed to obtain depositions and the production of documents to investigate the potential claims the family has against Harris County for the alleged injuries to Rodriguez."

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).

We further note that the information contained in Exhibit C appears to relate to a completed internal affairs investigation conducted by the department, IAD Case Number 99-0177-1007. The Seventy-sixth Legislature amended section 552.022 of the Government Code to make certain information expressly public, and therefore not subject to discretionary exceptions to disclosure. Section 552.022 now states in relevant 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 are not excepted from required disclosure under this chapter unless they are expressly confidential under other law.

Gov't Code § 552.022. One such category of expressly public information under section 552.022 is "a completed report, audit evaluation, or investigation made of, for, or by a governmental body, except as provided by [s]ection 552.108 . . . ." Gov't Code § 552.022(a)(1). Therefore, as prescribed by section 552.022, records of the completed internal affairs investigation contained in Exhibit C must be released to the requestor unless they are confidential under other law.

You argue that the information in Exhibit C is excepted from disclosure under section 552.103. Section 552.103 is a discretionary exception and not "other law" for purposes of section 552.022.<sup>4</sup> Therefore, the information in Exhibit C may not be withheld under section 552.103.

However, both Exhibits C and D include medical records which are subject to section 159.002 of the Occupations Code, known as the Medical Practice Act ("MPA")<sup>5</sup>, in

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<sup>4</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, e.g.*, 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 section 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.

<sup>5</sup>The Seventy-sixth Legislature repealed article 4495b of Vernon's Texas Civil Statutes. *See* Act of May 13, 1999, 76<sup>th</sup> Leg., R.S., ch. 388, § 6, 1999 Tex. Sess. Laws 1431, 2439 (Vernon) (adopting Occupations Code). The former article 4495b of Vernon's Texas Civil Statutes now is codified as the Medical Practice Act at subtitle B of title 3 of the Occupations Code, and the former section 5.08 of article 4495b is codified at chapter 159 of the Occupations Code.

conjunction with section 552.101 of the Government Code. Section 552.101 encompasses confidentiality provisions such as the MPA. 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 for 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 with green tags the medical record information that is contained in the submitted exhibits. You may release these records only in accordance with the MPA. In this regard, we note that the requestor asserts in his request letter to Judge Eckels that he is submitting an authorization for release of medical records signed by his client, the mother of Rodriguez. Among the documents submitted to this office in Exhibit C is a "Consent For Disclosure of Medical Record Information" signed by the mother of Rodriguez, which authorizes the Harris County Hospital District to release to her Rodriguez's health care information. Section 159.004 of the MPA provides certain exceptions to confidentiality. As applicable to the instant request, that section provides as follows:

An exception to the privilege of confidentiality in a situation other than a court or administrative proceeding, allowing disclosure of confidential information by a physician, exists only with respect to the following:

...

(5) A person who has the written consent of the patient or other person authorized to act on the patient's behalf for the release of confidential information, *as provided by Section 159.005[.]*

(Emphasis added). Section 159.005 provides the consent requirements by which medical records are to be released. In pertinent part, section 159.005 provides as follows:

(a) Consent for the release of confidential information must be in writing and signed by:

(5) a personal representative of the patient if the patient is deceased[.]

....

Upon review of the consent form, we note that the authorization states that it expires 180 days from the date of signature, and that the form was signed on August 9, 1999. We do not have information as to whether the requestor has submitted an updated, valid authorization to Judge Eckels. Nor are we able to determine whether Rodriguez's mother is his "personal representative" for purposes of section 159.005(a)(5) of the Occupations Code. Therefore, we are unable to determine whether the "Consent For Disclosure of Medical Record Information" signed by the mother of Rodriguez authorizes the release of the submitted medical record information relating to Rodriguez, or whether in fact Judge Eckels has a valid authorization. Because we cannot resolve questions of fact in the open records process, we must rely on the representations of the governmental body requesting our opinion. Open Records Decision Nos. 554 (1990), 552 (1990). You state in this regard that "proper medical releases from the prisoners have not been provided with the request for documents. Thus, Harris County and the Department are prohibited from releasing any requested documents involving medical information." Based on your representation, we conclude the medical records must not be released to the requestor.

The information contained in Exhibit C also includes Texas driver's license numbers. Section 552.130 of the Government Code governs the release and use of information obtained from motor vehicle records. Section 552.130 provides in relevant part as follows:

(a) Information is excepted from the requirement of Section 552.021 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[.]

We have marked with a yellow tag the information in Exhibit C that must be withheld under section 552.130. We note that the driver's license number of Rodriguez' brother, David Rodriguez, as well as his social security number, are included among the information we have marked with a yellow tag. A social security number is excepted from required public disclosure under section 552.101 of the act in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), if it was obtained or is maintained by a governmental body pursuant to any provision of law enacted on or after October 1, 1990. See Open Records Decision No. 622 (1994). We further note, however, that Section 552.023 gives a person or a person's authorized representative a special right of

access, beyond the right of the general public, to information held by a governmental body that relates to the person and that is protected from disclosure by laws intended to protect that person's privacy interest. In this case, the requestor is representing the Rodriguez family in its claims against Harris County. Therefore, if the requestor is in fact acting as David Rodriguez' authorized representative, then section 552.023 provides the requestor a special right of access to his driver's license and social security numbers.

Finally, we note that Exhibit C contains an autopsy report. Section 11 of article 49.25 of the Code of Criminal Procedure requires that autopsy reports be made available to the public. Open Records Decision No. 525 (1989). We have marked the autopsy report information with a blue tag.

To summarize, the information contained in Exhibit D may be withheld under section 552.103, with the exception of medical record information which may only be released in accordance with the MPA.<sup>6</sup> The information in Exhibit C must be released under section 552.022(a)(1), as information relating to a completed internal affairs investigation, with the exception of driver's license numbers which must be withheld under section 552.130 except as noted above, social security numbers that may be excepted under section 552.101, and medical record information which may only be released in accordance with the MPA. The autopsy report in Exhibit C must be released as provided by section 11 of article 49.25 of the Code of Criminal Procedure.

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;

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<sup>6</sup>As we resolve your request for the information in Exhibit D under section 552.103, we need not address your arguments against disclosure of this information under section 552.101, 552.111 and 552.117.

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).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

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,



Michael A. Pearle  
Assistant Attorney General  
Open Records Division

MAP/seg

Ref: ID# 142742

Encl. Submitted documents

cc: Mr. John W. Tavormina  
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(w/o enclosures)