



May 30, 2001

Mr. J. David Dodd, III
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OR2001-2220

Dear Mr. Dodd:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 147763.

The City of Allen Police Department (the "department") received a request for eleven categories of information, including:

- (1) a copy of dispatch and arrest records from a specific incident;
- (2) copies of all photographs taken of the incident;
- (3) a copy of any videotape pertaining to the incident;
- (4) the names and duty assignments of all officers who assisted in the investigation or arrest in the incident;
- (5) the names, addresses, and telephone numbers of all witnesses to the incident;
- (6) a copy of all witness statements;
- (7) a copy of any field notes, file notes, or other scene data;
- (8) the medical and duty records of a named police officer since December 9, 2000;
- (9) any internal memoranda sent to or received by four named police officers;
- (10) any disciplinary memoranda sent to the four named officers; and
- (11) any disciplinary documents for the four named officers regarding the excessive use of force or violations of civil rights.

You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We begin by noting that it appears you have not fully complied with section 552.301 of the Government Code in requesting a decision. Pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. Although you submitted some information responsive to the request, it appears you did not submit the duty rosters that you state are responsive to the request. Furthermore, you have not indicated that the submitted information is a representative sample of the requested information.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to submit to this office the information required in section 552.301(e) results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. Gov't Code § 552.302; *see Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). Generally, a compelling reason under section 552.302 is demonstrated only when the information is confidential by law or its release implicates third party interests. *See, e.g.*, Open Records Decision No. 150 (1977). Because you have not submitted the duty rosters, we have no basis for concluding that a compelling reason exists for withholding them. Thus, we have no choice but to order the responsive duty rosters released pursuant to section 552.302. We caution that the distribution of confidential information constitutes a criminal offense. *See* Gov't Code § 552.352. If you believe the information is confidential and may not lawfully be released, you must challenge the ruling in court as outlined below.

Next, we address your argument that some of the requested information is confidential under the Medical Practice Act (the "MPA"). Section 159.002 of the MPA provides:

- (a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.

(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, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See* Occ. Code §§ 159.002, .004; Open Records Decision No. 598 (1991). This office has concluded that the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). We have further found that when a file is created as the result of a hospital stay, all the documents in the file relating to diagnosis and treatment constitute physician-patient communications or "[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician." Open Records Decision No. 546 (1990).

The medical records must be released upon the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Occ. Code §§ 159.004, .005. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). We agree that portions of the submitted information are medical records that are confidential under the MPA and may be released only in accordance therewith. We have marked this information.

With respect to the remainder of the information, we note that some of the information is subject to section 552.022(a)(1) of the Government Code. Section 552.022 provides 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 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). The submitted information contains several completed reports. Under section 552.022, the completed reports may only be withheld if they are confidential under other law or if they are excepted under section 552.108 of the Government Code. You raise both section 552.103 and section 552.108 of the Government Code with respect to the completed reports. Section 552.103 is a discretionary exception and is not other law for purposes of section 552.022. *See* Open Records Decision No. 551 (1990). Therefore, you may not withhold the completed reports contained in the submitted information under section 552.103.

Section 552.108 provides, in relevant part:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:

(1) release of the information would interfere 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 is excepted from [required public disclosure] if:

(1) release of the internal record or notation would interfere with law enforcement or prosecution;

....

Generally, a governmental body claiming section 552.108 must reasonably explain, if the information does not supply the explanation on its face, how and why the release of the requested information would interfere with law enforcement. *See* Gov't Code §§ 552.108(a)(1), (b)(1), .301(e)(1)(a); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state that some of the requested information relates to a criminal case in which the suspect was recently indicted. Based on this representation, we understand you to say that the criminal case was still pending at the time the department received the request for information. Some of the completed reports were produced as a part of the investigation into the alleged crime. We conclude that these reports appear on their face to relate to the ongoing criminal case, and therefore, the release of these reports would interfere with the detection, investigation, or prosecution of crime. *See 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) (court delineates law enforcement interests that are present in active cases). Consequently, we find you may generally withhold these reports under section 552.108(a)(1). We note, however, that information normally found on the front page of an offense report is generally considered public. *See generally* Gov't Code §

552.108(c); *Houston Chronicle*, 531 S.W.2d 177; Open Records Decision No. 127 (1976). Thus, you must release the types of information that are considered to be front page offense report information, even if this information is not actually located on the front page of the offense report. Although section 552.108(a)(1) authorizes you to withhold the remaining information from disclosure, you may choose to release all or part of the information at issue that is not otherwise confidential by law. See Gov't Code § 552.007.

With respect to the remaining completed report, which relates to a prior personnel incident, you contend the information is excepted under section 552.108(b)(1) because "release of these records would interfere with the City of Allen Police Department performing its duties and the prosecution" of the named defendant in the pending criminal case. However, beyond this conclusory statement, you have not specifically indicated how the release of the personnel reports would interfere with the department's law enforcement efforts or the prosecution of the defendant. Therefore, we find that you may not withhold the personnel reports under section 552.108. Furthermore, because you have not argued, nor does it appear, that these reports are otherwise confidential, you must release these reports. We have marked all of the reports that are subject to section 552.022 and have further marked which reports may generally be withheld under section 552.108 and which reports must be released.

With respect to the information that is not subject to the MPA or section 552.022 of the Government Code, we address your argument under section 552.103 of the Government Code. Section 552.103 provides 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 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.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body 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.

The department 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, 481 (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). The department must meet both prongs of this test for information to be excepted under 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly and when the potential opposing party threatened to sue on several occasions and hired an attorney. *See* Open Records Decision Nos. 346 (1982), 288 (1981). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Furthermore, the single fact that an individual hires an attorney to investigate a matter does not alone show that litigation concerning the matter is reasonably anticipated. Open Records Decision No. 361 (1983).

Here, the requestor, an attorney for the individual involved in the assault incident with department police, indicates that he has been hired to investigate the alleged assault incident involving his client. The submitted information indicates that the individual involved in the assault incident threatened to sue based on injuries he sustained during the incident. You further indicate that attorneys for the individual have threatened to file civil lawsuits in meetings with staff for the City of Allen. Based on your contentions and our review of the submitted information, we agree that the submitted information relates to reasonably anticipated litigation. Thus, the department may withhold the submitted information that is not otherwise subject to the MPA or section 552.022 of the Government Code under section 552.103.

However, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. We also note that 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).

In summary, the department must release the requested duty rosters to the requestor. The department must also release the completed personnel report that we have marked. The department must withhold the marked medical records under the MPA unless otherwise authorized thereunder. Furthermore, the department may generally withhold the marked criminal investigation reports under section 552.108, except for basic information. Finally, the department may withhold the remainder of the submitted information under section 552.103 of the Government Code.

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 Pub. 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,



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Assistant Attorney General
Open Records Division

Ref: ID# 147763

Enc: Submitted documents

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