



October 12, 2001

Ms. Amanda Crawford  
Assistant Attorney General  
Public Information Coordinator  
Office of the Attorney General  
P.O. Box 12548  
Austin, Texas 78711-2548

OR2001-4631

Dear Ms. Crawford:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 153247.

The Office of the Attorney General (the "OAG") received a written request for all records pertaining to a named individual who died while a patient at Turner Geriatric Center. You indicate that the OAG has released some responsive documents to the requestor. You have submitted two briefs to this office on behalf of the OAG's Elder Law and Public Health Division ("Elder Law") and Medicaid Fraud Control Unit ("MFCU"), respectively, arguing that certain records held by the OAG are excepted from public disclosure. You have submitted to our office the following exhibits as representative samples of the records at issue: Exhibit 2 (handwritten surveyor notes), Exhibit 3 (correspondence between the OAG and the Department of Human Services (the "department"), Exhibit 4 (resident identifier key), Exhibit 5 (medical records), Exhibit 6 (internal department investigation documents), Exhibit 7 (violation log), Exhibit 8 (correspondence between the department and Turner Geriatric Center), Exhibit 9 (photographs), and Exhibit 10 (MFCU records).<sup>1</sup> You contend that these records are excepted from public disclosure pursuant to sections 552.101, 552.103, 552.107(1), 552.108, and 552.111 of the Government Code.

Section 552.101 of the Government Code protects from public disclosure information that is made confidential by law. You contend that most of the information at issue is made

---

<sup>1</sup>In reaching our conclusion here, 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 No. 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.

confidential by section 242.127 of the Health and Safety Code. That section provides that “[a] report, record, or other working paper used or developed in an investigation under [subchapter E, chapter 242] is confidential and may be disclosed only for purposes consistent with rules adopted by the Texas Board of Human Services or the “designated agency.” See Health & Safety Code § 242.126 (investigation of complaint of abuse or neglect by Department of Human Services or designated agency).

This office has previously determined that the confidentiality provision in section 242.127 extends to MFCU’s reports, records, or working papers used or developed in an investigation under subchapter E. You additionally inform us that many of the records at issue held by Elder Law directly pertain to a section 242.126 investigation conducted by the department. We therefore agree that the documents you submitted as Exhibits 2, 4, 5, 6, 8, 9, and 10 are subject to section 242.127 of the Health and Safety Code. Because you have not advised us of any rules permitting disclosure of these exhibits, we conclude that these exhibits are made confidential under section 242.127 and therefore must be withheld in their entirety pursuant to section 552.101 of the Government Code,<sup>2</sup> with the following exception.

We note that among the documents you submitted as Exhibit 5 is 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. 529 (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 a 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. [Emphasis added.]

Accordingly, we conclude that the OAG must release the autopsy report to the requestor.<sup>3</sup>

You also contend that the OAG may withhold Exhibits 3 and 7 pursuant to section 552.103 of the Government Code. Section 552.103 is commonly referred to as the “litigation

---

<sup>2</sup>Because we resolve your request under section 242.127 of the Health and Safety Code, we need not address the applicability of the other exceptions you raised.

<sup>3</sup>The submitted documents do not appear to include photographs or x-rays taken during the autopsy. To the extent that such photographs or x-rays exist, they must be withheld pursuant to article 49.25 of the Code of Criminal Procedure.

exception.” Under section 552.103(a) and (c), the governmental body raising this exception must demonstrate that (1) litigation involving the governmental body was pending or reasonably anticipated at the time of the records request, and (2) the information at issue is related to that litigation. *See also 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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103.

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). You inform us that

[i]n this case, although the lawsuit has not been filed, litigation is anticipated as the OAG is in the process of preparing to file suit. The OAG received the Turner Geriatric Center case on referral from [the department]. The referral specifically instructed the OAG to file suit for civil penalties. The only reason that [Elder Law] receives a referral from TDHS is to pursue litigation. Additionally, this law suit will be brought in the name of the “State of Texas.”

The records before us indicate that this litigation was reasonably anticipated prior to the OAG’s receipt of the current records request. Furthermore, after reviewing Exhibits 3 and 7, we conclude that these records “relate” to the litigation for purposes of section 552.103 of the Government Code. Accordingly, the OAG may withhold Exhibits 3 and 7 pursuant to section 552.103.

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).

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,



Jennifer Bialek  
Assistant Attorney General  
Open Records Division

JHB/RWP/seg

Ref: ID# 153247

Enc. Submitted documents

c: Mr. Wes Cleveland  
Davis & Wilkerson, P.C.  
1801 South Mopac, Suite 300  
Austin, Texas 78746  
(w/o enclosures)