



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

April 22, 2003

Mr. John F. Roehm III
Fanning Harper & Martinson
4849 Greenville Avenue, Ste. 1300
Dallas, Texas 75206

OR2003-2678

Dear Mr. Roehm:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 179792.

Hood County (the "county"), which you represent, received a request for any and all videotapes, taped oral conversations, photographs, complete and unaltered inmate file and other documents pertaining to the observation and incarceration of a specific individual. You state that you do not have videos or tapes of oral conversations.¹ You claim that the submitted 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.

We first note that some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides in part as follows:

- (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:

¹The Public Information Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.--San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

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

...

(17) information that is also contained in a public court record[.]

Gov't Code § 552.022(a)(1), (17). In this instance, the submitted information includes a completed arrest report made of, for, or by a governmental body and information that is also contained in public court records. The completed report must be released under section 552.022(a)(1) unless it is excepted from public disclosure under section 552.108 or expressly confidential under other law. The court-filed records must be released under section 552.022(a)(17) unless they are expressly confidential under other law. In this instance, you raise section 552.103 of the Government Code which is a discretionary exception to disclosure that only protects the governmental body's interests. As such, this exception is not other law that makes information confidential for the purposes of section 552.022(a). *See* Open Records Decision No. 551 (1990) (statutory predecessor to Gov't Code § 552.103 serves only to protect a governmental body's position in litigation and does not itself make information confidential).

We note, however, that the documents that are subject to section 552.022 contain information that is confidential by law. Specifically, one of the documents contains a fingerprint that is confidential under section 559.003 of the Government Code. Section 559.003 provides that "a biometric identifier in the possession of a governmental body is exempt from disclosure under Chapter 552." Gov't Code § 559.003. Additionally, these records contain information that is confidential under section 552.130 of the Government Code. Section 552.130 excepts from disclosure information relating to a driver's license or motor vehicle title or registration issued by an agency of this state. Gov't Code § 552.130. Both section 559.003 and section 552.130 were enacted to protect an individual's privacy. The requestor in this instance is the individual's authorized representative. Under section 552.023 of the Government Code, a person or a person's authorized representative has 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 public disclosure by laws intended to protect that person's privacy interests. Gov't Code § 552.023(a). Therefore, the requestor in this instance has a special right of access to his client's fingerprint and Texas driver's license and motor vehicle or title information. If the county should received a subsequent request for this information from an individual other than this requestor or the individual who is the subject of the request, the county should again seek our decision.

We also note that the submitted information contains a document that is subject to the Medical Practice Act ("MPA"). Access to medical records is governed by the MPA, chapter 159 of the Occupations Code. 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).

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). The MPA permits disclosure of MPA records to the patient, a person authorized to act on the patient's behalf, or a person who has the written consent of the patient. Occ. Code §§ 159.003, .004, .005. Here, the requestor is a person authorized to act on behalf of the person whose medical record is at issue. Thus, the county may release the submitted medical record, which we have marked, only in accordance with the MPA. Open Records Decision No. 598 (1991).

We will now address your section 552.103 argument for the remaining submitted information. Section 552.103 of the Government Code 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 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, 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 county 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). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986). In Open Records Decision No. 638 (1996), this office stated that a governmental body has met its burden of showing that litigation is reasonably anticipated when it received a notice of claim letter and the governmental body represents that the notice of claim letter is in compliance with the requirements of the Texas Tort Claims Act ("TTCA"), Civ. Prac. & Rem. Code, ch. 101, or an applicable municipal ordinance.

You inform us, and provide documentation showing, that the requestor has mailed several county employees notices of claims regarding his client. You state that the letters are in compliance with the notice requirements of the TTCA and therefore show that litigation is reasonably anticipated. After reviewing your arguments and the submitted documents, we conclude that litigation is reasonably anticipated in this instance. The county may, therefore, withhold the remaining information from disclosure pursuant to section 552.103.

We note that 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). In addition, the applicability of section 552.103(a) ends once litigation concludes. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

To summarize, we have marked the documents which must be released under section 552.022 of the Government Code. We have also marked the documents which must be released in accordance with the MPA. The county may withhold the remaining documents 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 Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



Sarah I. Swanson
Assistant Attorney General
Open Records Division

SIS/lmt

Ref: ID# 179792

Enc. Submitted documents

c: Terry K. Fleming
Law Offices of Terry Fleming
4425 West Vickery Blvd., Ste. 100
Fort Worth, Texas 76107
(w/o enclosures)