



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

February 9, 2004

Mr. Robert R. Ray  
Assistant City Attorney  
City of Longview  
P.O. Box 1952  
Longview, Texas 75606-1952

OR2004-0965

Dear Mr. Ray:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 195986.

The City of Longview (the "city") received two requests from the same requestor for "the information Officer Rick Bellatti has forwarded to [the Office of the Attorney General (the "OAG")] regarding the Globe Inn," and "the lawsuit Officer Rick Bellatti has forwarded to the [OAG] against the Globe Inn." You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.108, 552.111, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments submitted to this office by the Public Information Coordinator of the OAG. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

As a preliminary matter, you indicate that some of the submitted information may be excepted from disclosure under section 552.101 of the Government Code in conjunction with federal regulations promulgated pursuant to the Health Insurance Portability and Accountability Act of 1996 ("HIPAA").<sup>1</sup> At the direction of Congress, the Secretary of

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<sup>1</sup>Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," and encompasses information made confidential by other statutes.

Health and Human Services (“HHS”) promulgated regulations setting privacy standards for medical records, which HHS issued as the Federal Standards for Privacy of Individually Identifiable Health Information. *See* HIPAA, 42 U.S.C. § 1320d-2 (Supp. IV 1998) (historical & statutory note); Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. Pts. 160, 164; *see also* Attorney General Opinion JC-0508 at 2 (2002). These standards govern the releasability of protected health information by a covered entity. *See* 45 C.F.R. Pts. 160, 164. Under these standards, a covered entity may not use or disclose protected health information, except as provided by parts 160 and 164 of the Code of Federal Regulations. 45 C.F.R. § 164.502(a).

Section 160.103 of title 45 of the Code of Federal Regulations defines a covered entity as a health plan, a health clearinghouse, or a health care provider that transmits any health information in electronic form in connection with a transaction covered by subchapter C, subtitle A of title 45. 45 C.F.R. § 160.103. In this instance, you inform us that all of the submitted information is held by the Longview Police Department (the “department”), and was created by the department for use in matters related to law enforcement. Thus, while you state “the city appears to be [a covered entity] subject to the provisions of HIPAA,” you have not explained how the department is a covered entity for purposes of section 160.103. Consequently, we determine that the information at issue may not be withheld pursuant to section 552.101 of the Government Code in conjunction with HIPAA.

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.

A governmental body 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 on the date the governmental body received the request for information, 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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

In this case, you indicate that the city has requested that the OAG bring a civil nuisance abatement lawsuit against the Globe Inn Hotel pursuant to chapter 125 of Texas Civil Practice & Remedies Code. In addition, this office has received a letter from the Public Information Coordinator of the OAG on behalf of the Criminal Law Enforcement Division. The OAG's letter explains that "[a]fter a review in October 2003 of the information provided to the OAG by the Longview Police Department, the Assistant Attorney General reviewing the case determined that activities occurring at the Globetrotter Motel fell within the purview of the nuisance abatement statutes."<sup>2</sup> The letter further explains that the OAG reasonably anticipated litigation in this case prior to the city's receipt of the present request for information, and thus claims that the requested information should be excepted from disclosure under section 552.103 of the Government Code. Upon review of the OAG's arguments and the submitted information, we conclude that the information at issue relates to litigation that was reasonably anticipated on the date the city received the present request. Accordingly, we conclude that the city may withhold the submitted information in its entirety pursuant to section 552.103 of the Government Code. As we are able to make this determination, we need not address your remaining claimed exceptions to disclosure.

We note, however, 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). 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. Further, the applicability of section 552.103(a) ends once the litigation has been concluded or is no longer anticipated. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

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.*

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<sup>2</sup>We note that the Globetrotter Motel, located at 1300 E. Marshall Avenue in Longview, Texas, is also known as the Globe Inn.

§ 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,



David R. Saldivar  
Assistant Attorney General  
Open Records Division

DRS/seg

Ref: ID# 195986

Enc: Submitted documents

c: Ms. Marie Eschenfelder  
Longview News-Journal  
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(w/o enclosures)