



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 4, 2005

Ms. Myrna S. Reingold
Galveston County Legal Department
4127 Shearn Moody Plaza
123 Rosenberg
Galveston, Texas 77550-1454

OR2005-03846

Dear Ms. Reingold:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 223374.

The Galveston County Sheriff's Office (the "sheriff") received a request for information related to the death of a named individual while he was in the custody of the sheriff. You state that the sheriff has released some information to the requestor. You claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.103, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

As you note, the submitted information contains a custodial death report. In Open Records Decision No. 521, this office addressed the confidentiality of this version of a custodial death report and its attachments. Specifically, this office concluded that under article 49.18(b) of the Code of Criminal Procedure, in conjunction with a directive issued by the Office of the Attorney General (the "OAG"), Part I of a custodial death report filed with this office is public information, but Parts II through V of the report, including any attachments, are confidential. *See* Open Records Decision No. 521 at 4-5 (1989); *see also* Code Crim. Proc. art. 49.18(b) (OAG shall make report, with exception of any portion of report that OAG determines is privileged, available to any interested person). Article 49.18 requires that a custodial death report be filed "with the [OAG] no later than the 30th day after the date on which the person in custody or the incarcerated person died." Code Crim. Proc. art. 49.18(b). More than thirty days passed between the death of the inmate and the date when the sheriff

received this request. Thus, the sheriff must release the entirety of Part I of the submitted custodial death report at issue as information made public by statute. *See generally* Open Records Decision No. 525 (1989) (exceptions found in statutory predecessor to Act do not apply to information that is made public by other statutes). Parts II through V of the report at issue, including any attachments, are confidential and must not be released. You advise that the sheriff has released Part I of the report in accordance with Open records Decision No. 521.

Next, you note and we agree that some of the documents at issue are medical records, access to which is governed by the Medical Practice Act (the "MPA"), chapter 159 of the Occupations Code. Section 159.002 of the MPA provides the following:

(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.

Occ. Code § 159.002(b), (c). 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. *Id.* §§ 159.004, 159.005. Medical records pertaining to a deceased patient may only be released upon the signed consent of the deceased's personal representative. *See id.* § 159.005(a)(5). Any subsequent release of medical records must be consistent with the purposes for which the governmental body obtained the records. *See id.* § 159.002(c); Open Records Decision No. 565 at 7 (1990). We have marked the portion of the submitted information that constitutes medical records and that may only be released in accordance with the MPA. Open Records Decision No. 598 (1991).

We will now address the applicability of section 552.103 of the Government Code to the remaining submitted information. 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.

Gov't Code § 552.103. 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 was 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 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”), chapter 101 of the Civil Practice and Remedies Code, or an applicable municipal ordinance.

You state that the sheriff reasonably anticipates litigation related to the information at issue in the present request. In support of this contention, you state that the sheriff has received a notice of claim letter that is in compliance with the TTCA, and you have submitted a copy of the notice. Based on your arguments and our review of the submitted information, we agree that litigation against the sheriff is reasonably anticipated and that the information at issue relates to that litigation. Thus, we agree that section 552.103 is applicable to the information at issue.¹

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 potential 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

¹As our ruling for the remaining information is dispositive, we need not consider your remaining claimed exceptions against disclosure.

or is no longer anticipated. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Next, we address the applicability of section 552.130 of the Government Code to the driver's license number you state the sheriff redacted from the information it released. This section excepts from public disclosure information that relates to "a motor vehicle operator's or driver's license or permit issued by an agency of this state[.]" Gov't Code § 552.130(a)(1). We note that section 552.130 protects privacy interests. Privacy is a purely personal right that lapses at death. *See Moore v. Charles B. Pierce Film Enters. Inc.*, 589 S.W.2d 489 (Tex. Civ. App.—Texarkana 1979, writ ref'd n.r.e.); *Justice v. Belo Broadcasting Corp.*, 472 F. Supp. 145 (N.D. Tex. 1979); Attorney General Opinions JM-229 (1984); H-917 (1976); Open Records Decision No. 272 (1981). Thus, the deceased individual's Texas driver's license number is not excepted from disclosure under section 552.130.

In summary, Parts II through V of the custodial death report, including any attachments, are confidential pursuant to article 49.18(b) of the Code of Criminal Procedure. The marked medical records may only be released in accordance with the MPA. The sheriff may withhold the remaining information under section 552.103 of the Government Code.

Finally, we note that you ask this office to issue the sheriff a previous determination allowing the sheriff to release Texas motor vehicle record information of deceased individuals without the necessity of requesting an attorney general opinion. We decline to issue a previous determination to the city at this time. Further, we note that the Act requires that a governmental body ask this office for a decision only in instances in which it seeks to withhold information from public disclosure. *See* Gov't Code § 552.301(a). Accordingly, this letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us and may 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, upon receiving this ruling, the governmental body

will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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); *Tex. 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,



Cary Grace
Assistant Attorney General
Open Records Division

ECG/jev

Ref: ID# 223374

Enc. Submitted documents

c: Mr. Stephen Liss
Messa & Associates, P.C.
Attorneys at Law
123 South 22nd Street
Philadelphia, Pennsylvania 19103
(w/o enclosures)