



**ATTORNEY GENERAL OF TEXAS**  
**GREG ABBOTT**

September 8, 2005

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OR2005-08187

Dear Mr. West and Ms. Smith:

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# 231764.

The Texas Department of Criminal Justice (the "department") received a request for "all documents" pertaining to the death of an inmate. The department's Office of the Inspector General (the "OIG") indicates that some of the requested information will be redacted pursuant to a previous determination issued by this office.<sup>1</sup> The OIG also states that some

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<sup>1</sup>Open Records Letter No. 2005-01067 (2005) serves as a previous determination for the department that the present and former home addresses and telephone numbers, social security numbers, and family member information of current or former employees of the department, regardless of whether the current or former employee complies with section 552.1175 of the Government Code, are excepted from disclosure under section 552.117(a)(3) of the Government Code.

of the requested information has been released, but claims that the information it has submitted is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. The department asserts that the information it has submitted, as well as the information submitted by the OIG, is excepted under sections 552.101, 552.103, and 552.134 of the Government Code. We have considered the submitted arguments and reviewed the submitted information.<sup>2</sup>

Initially the OIG advises that some of the requested information is subject to a previous ruling from this office. In Open Records Letter No. 2005-05374 (2005), this office considered a similar request that the OIG received from a different requestor. Because the OIG indicates that the facts and circumstances surrounding our prior ruling have not changed, the OIG may continue to comply with our prior ruling for the requested information subject to that ruling. *See* Open Records Decision No. 673 at 6-7 (2001) (criteria of previous determination regarding specific information previously ruled on).

Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This section encompasses information protected by other statutes. The department claims that some of the submitted information consists of medical records, access to which is governed by the Medical Practice Act (“MPA”). Occ. Code §§ 151.001-165.160. Section 159.002 of the MPA provides in part as follows:

(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.

*Id.* § 159.002(b), (c). Some of the submitted records are subject to the MPA. These 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). The

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<sup>2</sup>We assume that the sample of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 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.

consent in that instance must specify (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. *See id.* §§ 159.004, .005. 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). The department has 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).

The department argues that the submitted fingerprints are excepted from disclosure under section 552.101 in conjunction with chapter 560 of the Government Code. Sections 560.001, 560.002, and 560.003 of the Government Code provide as follows:

Sec. 560.001. DEFINITIONS. In this chapter:

- (1) "Biometric identifier" means a retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry.
- (2) "Governmental body" has the meaning assigned by Section 552.003 [of the Government Code], except that the term includes each entity within or created by the judicial branch of state government.

Sec. 560.002. DISCLOSURE OF BIOMETRIC IDENTIFIER. A governmental body that possesses a biometric identifier of an individual:

- (1) may not sell, lease, or otherwise disclose the biometric identifier to another person unless:
  - (A) the individual consents to the disclosure;
  - (B) the disclosure is required or permitted by a federal statute or by a state statute other than Chapter 552 [of the Government Code]; or
  - (c) the disclosure is made by or to a law enforcement agency for a law enforcement purpose; and
- (2) shall store, transmit, and protect from disclosure the biometric identifier using reasonable care and in a manner that is the same as or more protective than the manner in which the governmental body stores, transmits, and protects its other confidential information.

Sec. 560.003. APPLICATION OF CHAPTER 552. A biometric identifier in the possession of a governmental body is exempt from disclosure under Chapter 552.

Gov't Code § 560.001-.003. The submitted fingerprint information is confidential under section 560.003. However, the requestor is an attorney representing the parents of the deceased individual. Therefore, the requestor has a special right of access to the fingerprints. *See id.* § 560.002(1).

We turn now the department's claim regarding section 552.134 of the Government Code for the remaining information submitted by the department and the OIG. Section 552.134(a) relates to inmates of the department and provides in relevant part the following:

(a) Except as provided by Subsection (b) or by Section 552.029 [of the Government Code], information obtained or maintained by the Texas Department of Criminal Justice is excepted from [required public disclosure] if it is information about an inmate who is confined in a facility operated by or under a contract with the department.

Gov't Code § 552.134(a). Section 552.029 of the Government Code provides that, notwithstanding section 552.134, eight specified categories of "information about an inmate who is confined in a facility operated by or under a contract with [the department are] subject to required disclosure[.]" These eight categories of information include basic information regarding the death of an inmate in custody, an alleged crime involving an inmate, and an incident involving the use of force. *Id.* § 552.029.

Upon review, we agree that the submitted records constitute information about an inmate confined in a facility operated by the department. Thus, we agree that section 552.134 is applicable to the submitted information. However, the submitted documents relate to the death of an inmate in custody. Thus, while the department must generally withhold the remaining submitted information under section 552.134, the department must release basic information regarding the death of the inmate pursuant to section 552.029(8), unless this information is otherwise excepted from disclosure under the Act. Because you also raise section 552.103 of the Government Code as an exception against disclosure, we will address your section 552.103 claim for the information not excepted under section 552.134.

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), (c). 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).

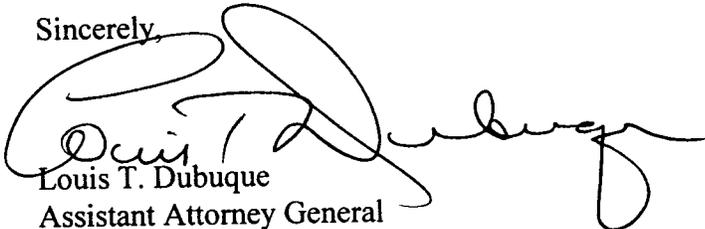
To establish that litigation is reasonably anticipated, a governmental body must provide this office “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” Open Records Decision No. 452 at 4 (1986). Whether litigation is reasonably anticipated must be determined 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 state that the department has received notice under the Tort Claims Act that the requestor intends to sue the department. The notice was submitted to the department along with the request for information. Therefore, we conclude that the department reasonably anticipated litigation on the date it received the request for information. We also find that the remaining information relates to the anticipated litigation for purposes of section 552.103. Accordingly, the department may withhold the remaining information under section 552.103.

Generally, 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. Further, 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, to the extent that the requested records consist of the same information that was at issue in Open Records letter No. 2005-05374, the department may continue to comply with our prior ruling. The department (1) may only release the marked medical records in accordance with the MPA, (2) must release the submitted fingerprint information under section 560.002 of the Government Code; and (3) may withhold basic information regarding the death of the inmate under section 552.103 of the Government Code. The remaining information must be withheld under section 552.134 of the Government Code.<sup>3</sup>

Sincerely,



Louis T. Dubuque  
Assistant Attorney General  
Open Records Division

LTD/jh

Ref: ID# 231764

Enc. Submitted documents

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<sup>3</sup>As our ruling on this issue is dispositive, we need not address your remaining arguments against disclosure.