



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

December 22, 2005

Ms. Ashley D. Fourt  
Assistant District Attorney  
Tarrant County Criminal District Attorney's Office  
401 West Belknap  
Fort Worth, Texas 76196-0201

OR2005-11559

Dear Ms. Fourt:

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# 238688.

The Tarrant County Medical Examiner's Office (the "medical examiner") received a request for information relating to an incident involving two named individuals. Both the medical examiner and the Tarrant County Criminal District Attorney's Office (the "district attorney") claim that the requested information is excepted from disclosure under sections 552.101, 552.103, and 552.108 of the Government Code. We have considered the exceptions you claim and have reviewed the information you submitted.

Initially, we must address a procedural issue. Section 552.301 of the Government Code prescribes procedures that must be followed in asking this office to decide whether requested information is excepted from public disclosure. Under section 552.301(b), a governmental body must ask for the attorney general's decision and state the exceptions to disclosure that it claims not later than the tenth business day after the date of its receipt of the written request for information. *See* Gov't Code § 552.301(b). Section 552.302 provides that if a governmental body does not request an attorney general decision as prescribed by section 552.301, the requested information is presumed to be subject to required public disclosure and must be released, unless there is a compelling reason to withhold the information. *See id.* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App. – Austin 1990, no writ).

You have not informed us of the date of the medical examiner's receipt of this request for information. Likewise, the submitted copy of the request does not reflect the date of its receipt. Under these circumstances, we are unable to conclude that this decision was requested within ten business days after the date of the medical examiner's receipt of the request for information, as required by section 552.301(b). The submitted information is therefore presumed to be public under section 552.302, unless there is a compelling reason to withhold any of the information.

The statutory presumption that information is public can generally be overcome when the information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982). Sections 552.103 and 552.108 of the Government Code are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived. *See* Gov't Code § 552.007; *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App. – Dallas 1999, no pet.) (governmental body may waive Gov't Code § 552.103); Open Records Decision Nos. 665 at 2 n.5 (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 177 at 3 (1977) (statutory predecessor to Gov't Code § 552.108 subject to waiver). In failing to comply with section 552.301, the medical examiner waived his claims under sections 552.103 and 552.108. Therefore, the submitted information may not be withheld on the basis of the medical examiner's claims under these exceptions. However, the interests of a third party under section 552.103 or section 552.108 can provide a compelling reason for non-disclosure under section 552.302. *See* Open Records Decision Nos. 586 (1991) (statutory predecessor to Gov't Code § 552.108), 469 at 2 (1987) (predecessor to Gov't Code § 552.103). Therefore, we will consider whether the medical examiner may withhold the submitted information on the basis of the district attorney's claims under sections 552.103 and 552.108. Additionally, we will address section 552.101 of the Government Code, as the applicability of this exception also can provide a compelling reason for non-disclosure.

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.
- (b) For purposes of this section, the state or a political subdivision is considered to be a party to litigation of a criminal nature until the applicable statute of limitations has expired or until the defendant has exhausted all appellate and postconviction remedies in state and federal court.

(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 that raises section 552.103 has the burden of providing relevant facts and documents sufficient to establish the applicability of this exception to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate that (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) the information at issue is related to the pending or anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App. – Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App. – Houston [1<sup>st</sup> Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See Open Records Decision No. 551 at 4 (1990).*

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See Open Records Decision No. 452 at 4 (1986).* To establish that litigation is reasonably anticipated, a governmental body must provide this office with “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” *Id.* In this instance, you state that the submitted information relates to a criminal prosecution that concluded in a conviction and a prison sentence. You also state that the defendant has not exhausted all of his federal and state postconviction remedies. You do not inform us, however, that any proceeding for such a remedy was pending when the present request for information was received. Likewise, you do not assert that such a proceeding was reasonably anticipated on the date of receipt of the request. Therefore, as there has been no demonstration that any postconviction litigation was pending or reasonably anticipated when the medical examiner received this request for information, the medical examiner may not withhold any of the submitted information on behalf of the district attorney under section 552.103 of the Government Code.

Section 552.108 of the Government Code excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]” Gov't Code § 552.108(a)(1). Under section 552.108, you assert that “[s]ince the Defendant has not availed himself [of] all of his post convictions [sic] remedies, [the district attorney] believes that release of the information sought would interfere in its prosecution of this crime.” We note, however, that the submitted information relates to a case that concluded in a conviction. You do not inform us that the defendant was pursuing any post-conviction remedy when the medical examiner received this request for information. Consequently, we find that you have not established that the submitted information relates to an ongoing prosecution for the purposes

of section 552.108(a)(1). *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.--Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases). We therefore conclude that the medical examiner may not withhold any of the submitted information on behalf of the district attorney under section 552.108 of the Government Code.

Next, we address section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information that another statute makes confidential. Medical records are confidential under the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. Section 159.002 of the MPA provides in part:

(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). This office has determined that in governing access to a specific subset of information, the MPA prevails over the more general provisions of the Act. *See Open Records Decision No. 598 (1991)*. Medical records must be released on 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. *See Occ. Code §§ 159.004, .005*. Any subsequent release of medical records must be consistent with the purposes for which the governmental body obtained the records. *See Occ. Code § 159.002(c); Open Records Decision No. 565 at 7 (1990)*. We have marked the submitted information that is confidential under the MPA. That information must not be released unless the medical examiner has authorization under the MPA to do so. *See Open Records Decision No. 598 (1991)*.

Section 552.101 of the Government Code also encompasses the common law right to privacy. Common law privacy protects information that is highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and of no legitimate public interest. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Common law privacy protects the specific types of information that are held to be intimate or embarrassing in *Industrial Foundation*. *See* 540 S.W.2d at 683 (information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted

suicide, and injuries to sexual organs). This office has determined that other types of information also are private under section 552.101. *See* Open Records Decision No. 659 at 4-5 (1999) (listing information attorney general has held to be private).

Generally, only the highly intimate or embarrassing details of a particular incident are protected by common law privacy under section 552.101. However, when the information at issue relates to a sexual assault, and the requestor knows the identity of the victim, all of the information must be withheld under section 552.101 to protect the victim's right to privacy. *See* Open Records Decision Nos. 393 (1983), 329 (1982); *see also Morales v. Ellen*, 840 S.W.2d 519 (Tex. App. – El Paso 1982, writ denied) (identity of witnesses to and victims of sexual harassment was highly intimate or embarrassing information in which public had no legitimate interest). In this instance, the remaining information relates to a case of alleged sexual assault. The requestor indicates that he represents the defendant in the case. We note, however, that the remaining information uses a pseudonym to identify the sexual assault victim. Likewise, the requestor identifies the victim by pseudonym rather than providing her real name. Furthermore, you do not inform us, and the submitted information does not provide us with any other basis to believe, that either the requestor or the defendant knows the victim's true identity. Under these circumstances, we conclude that there is no need to withhold any of the remaining information under section 552.101 for the purpose of protecting the victim's privacy interests. We note that a small amount of the remaining information appears to implicate the defendant's privacy interests. However, as the defendant's attorney, the requestor has a special right of access to the defendant's private information.<sup>1</sup> *See* Gov't Code § 552.023(a); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning himself). We therefore conclude that none of the remaining information is excepted from disclosure under section 552.101 in conjunction with common law privacy.

In summary, the marked information is confidential under section 552.101 of the Government Code in conjunction with the MPA, and the medical examiner must not release that information unless he has authorization under the MPA to do so. The rest of the submitted information must be released.

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

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<sup>1</sup>Should the medical examiner receive another request for this same information from a person who would not have a right of access to the defendant's private information, the medical examiner should resubmit this same information and request another decision. *See* Gov't Code §§ 552.301(a), .302.

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).

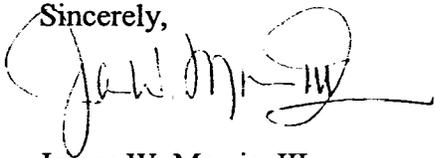
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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); *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 Office of the Attorney General 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,

A handwritten signature in black ink, appearing to read "James W. Morris, III". The signature is fluid and cursive, with a large initial "J" and "M".

James W. Morris, III  
Assistant Attorney General  
Open Records Division

JWM/segh

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Enc: Submitted documents

c: Mr. Walter M. Reaves, Jr.  
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(w/o enclosures)