



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 29, 2005

Ms. Sue Ann Gregory
Assistant Criminal District Attorney
Bexar County
Cadena-Reeves Justice Center
300 Dolorosa, Fifth Floor
San Antonio, Texas 78205-3030

OR2005-11638

Dear Ms. Gregory:

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# 239120.

The Bexar County Sheriff's Office (the "sheriff's office") received two requests for records, a videotape, and duty rosters regarding several named inmates, corrections and health care personnel, individuals who made specific grievances during specific dates, inmate deaths while in custody, abuse of Muslim inmates or inmates with Middle Eastern descent, and abuse of inmates suffering from mental health problems. You state that you have released the requested videotape. You also state that you do not have duty rosters for the health care personnel, nor the personnel records of a named nurse.¹ You claim that the submitted information is excepted from disclosure under sections 552.103, and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the

¹The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

submitted information.² We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that any person may submit comments stating why information should or should not be released).

You state that the submitted information includes custodial death reports. In 2003, the Office of the Attorney General ("OAG") revised the format of the custodial death report. The prior report consisted of five sections. In Open Records Decision No. 521 at 5 (1989), we concluded that under article 49.18(b) of the Code of Criminal Procedure, in conjunction with a directive issued by the OAG, section one of the prior version of the custodial death report was public information and required to be released, but sections two through five of the report, as well as attachments to the report, were confidential. *See* Code Crim. Proc. art. 49.18(b) (attorney general shall make report, with exception of any portion of report that attorney general determines is privileged, available to any interested person). Since the 2003 revision, the report consists of two pages and an attached summary of how the death occurred. The OAG has determined that the two-page report and summary must be released to the public but that any other documents submitted with the revised report are confidential under article 49.18 of the Code of Criminal Procedure. However, article 49.18(b) of the Code of Criminal Procedure does not make confidential all information held by a local law enforcement agency simply because the information is also included in extraneous documents attached to a custodial death report submitted to the OAG. If a governmental body receives a request for information otherwise generated or maintained by the law enforcement agency as part of its ordinary responsibilities, those documents may be withheld only if one of the Act's exceptions or another specific law protects them. ORD 521 at 7. In this instance, you have submitted both the old format and the revised form. Accordingly, where the custodial death report is in the old format, the sheriff's office must release section one. Where the custodial death report is in the revised form, the sheriff's office must release the two-page report and the summary of how the death occurred. We note that the requestor, in this instance, specifically confines the request to this limited release. Accordingly, sections two through five and any attached documents to the old format and any attached documents to the revised form are not responsive and need not be released.

Next, we note that some of the submitted information is subject to required public disclosure under section 552.022 of the Government Code, which provides in relevant part:

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:

²We assume that the representative 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.

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

Gov't Code § 552.022(a)(1). The submitted information contains completed evaluations and reports. Therefore, as prescribed by section 552.022, the sheriff's office must release this information, which we have marked, unless it is confidential under other law. You claim that this information is excepted by section 552.103 of the Government Code. However, section 552.103 is a discretionary exception to public disclosure that protects the governmental body's interests and may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation and does not itself make information confidential); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.103 does not qualify as other law that makes information confidential and the marked information may not be withheld on that basis. We note, however, that the information subject to section 552.022(a)(1) contains information that is confidential under section 552.101 of the Government Code.³ Accordingly, we will address this exception as it pertains to the information subject to section 552.101 of the Government Code.

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses the common-law right of privacy, which protects information that is 1) highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and 2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). The types of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included 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. *Id.* at 683. This office has also found that some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). We have reviewed the information subject to section 552.022(a)(1) and marked the information that the sheriff's office must withhold under section 552.101 in conjunction with common-law privacy.

³The Office of the Attorney General will raise a mandatory exception like section 552.101 on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Now we turn to your arguments for the remaining information. Section 552.103 of the Governmental 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.

Gov't Code § 552.103(a), (c). The sheriff's office 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, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. 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 sheriff's office must meet both prongs of this test for information to be excepted under 552.103(a).

You state and provide documentation showing that a lawsuit was filed against Bexar County and employees of the sheriff's office on July 26, 2005, in the United States District Court for the Western District of Texas. Based on your representations and our review of the remaining information, we conclude that litigation was pending when the sheriff's office received the request. You have also explained how the remaining submitted information relates to the pending litigation for the purposes of section 552.103. Therefore, the sheriff's office may withhold the remaining information pursuant to section 552.103 of the Government Code.⁴

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 all other parties in the anticipated litigation is not excepted

⁴Because our ruling is dispositive, we need not address your remaining arguments.

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 realistically anticipated. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, the sheriff's office must release section one of the custodial death report in the old format, and the two-page report and summary of the revised custodial death report. With the exception of the information we have marked that must be withheld under section 552.101 in conjunction with common-law privacy, the sheriff's office must release the information subject to section 552.022(a)(1) of the Government Code. The remaining information may be withheld 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, 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).

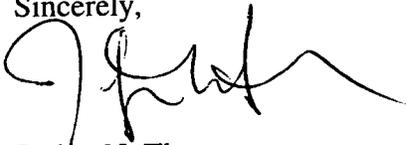
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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,



Jaclyn N. Thompson
Assistant Attorney General
Open Records Division

JNT/krl

Ref: ID# 239120

Enc. Submitted documents

c: Scott Medlock
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