



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 6, 2007

Mr. James M. Frazier III
Assistant General Counsel
Office of General Counsel
Texas Department of Criminal Justice
P.O. Box 4004
Huntsville, Texas 77342-4004

OR2007-02548

Dear Mr. Frazier:

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# 272724.

The Texas Department of Criminal Justice (the "department") received a request for information related to a named inmate and a department employee. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.108, and 552.134 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that a portion of the submitted information constitutes medical records pertaining to the requestor's client, access to which is governed by the Medical Practice Act ("MPA"), subtitle B of title 3 of the Occupations Code. Section 159.002 of the MPA provides:

(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. Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See* Occ. Code §§ 159.002, .004; Open Records Decision No. 598 (1991). This office has concluded that the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). We have further found that when a file is created as the result of a hospital stay, all the documents in the file relating to diagnosis and treatment constitute physician-patient communications or “[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician.” Open Records Decision No. 546 (1990).

Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). The 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. Occ. Code §§ 159.004, .005. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). We have marked the submitted information that constitutes medical records of the requestor’s client.¹ These medical records are subject to the MPA. The department must release these medical records to the requestor upon receipt of the proper consent.

Next, we note that section 552.022 of the Government Code makes a portion of the remaining information expressly public. Section 552.022 provides in relevant part:

(a) Without limiting the amount or kind of information that is public information under this chapter, 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:

(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). After reviewing the submitted documents, we find that a portion of the information you seek to withhold under section 552.103 consists of completed evaluations of the department employee which are subject to section 552.022. The department may withhold these completed evaluations only to the extent other law makes

¹We note that the submitted information includes clinic notes regarding evaluation and treatment of the inmate in question. To the extent such clinic notes were created by department personnel acting under the supervision of a physician, they constitute medical records within the scope of the MPA. However, if these notes were not created under the supervision of a physician, they are not subject to the MPA.

them confidential or the reports are protected by section 552.108 of the Government Code. Section 552.103 is a discretionary exception to public 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 section 552.103); Open Records Decision Nos. 665 at 2 n.5 (discretionary exceptions generally), 542 at 4 (1990) (statutory predecessor to section 552.103 subject to waiver). As such, section 552.103 is not "other law" that makes information confidential for the purposes of section 552.022. Therefore, the department may not withhold the completed evaluations under that section. The submitted information also contains several completed reports which are also subject to section 552.022(a)(1) that you seek to withhold under sections 552.101, 552.108, and 552.134 of the Government Code. We will therefore consider the department's claims under sections 552.101, 552.108, and 552.134 of the Government Code for the completed reports along with your arguments under those sections for the remaining marked information, as information that is subject to section 552.022(a)(1) may be withheld under these exceptions.

Section 552.134 of the Government Code 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

[n]otwithstanding . . . Section 552.134, the following information about an inmate who is confined in a facility operated by or under a contract with the [department] is subject to required disclosure under Section 552.021:

. . .

(8) basic information regarding the death of an inmate in custody, an incident involving the use of force, or an alleged crime involving the inmate.

Id. § 552.029(8). Thus, the legislature explicitly made section 552.134 subject to section 552.029.

You state that the information you have marked concerns inmates confined in a facility operated by the department. Thus, we agree that section 552.134 is generally applicable to the information at issue. We note, however, that the information at issue relates to alleged

crimes involving inmates. Thus, while the department must generally withhold the records you have marked under section 552.134, the department must release basic information regarding the crimes involving inmates pursuant to section 552.029(8), unless this basic information is otherwise excepted from disclosure under the Act.²

Although not excepted from disclosure under section 552.134, some of the basic information is excepted from disclosure under section 552.101 of the Government Code in conjunction with common-law privacy.³ The doctrine of common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Information that tends to identify a victim of sexual assault is protected under common law privacy. *See* Open Records Decision No. 339 (1982); *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied) (identity of witnesses to and victims of sexual harassment was highly intimate or embarrassing information and public did not have a legitimate interest in such information). Here, the department informs us that the information at issue relates to investigations of alleged sexual assault. Further, we note that the requestor is the attorney for one of the inmates who is an alleged victim. Section 552.023 of the Government Code gives a person or the person's authorized representative a special right of access to information that is excepted from public disclosure under laws intended to protect that person's privacy interest as subject of the information. *See* Gov't Code § 552.023; *see also* Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when an individual asks governmental body to provide him with information concerning himself). Thus, here, the requestor has a special right of access to his client's identifying information, and the department may not withhold that information from him under section 552.101 in conjunction with common-law privacy. Accordingly, the department must release all of the basic information relating to the requestor's client. The department must withhold the identifying information of the other inmates who are alleged victims of sexual assault pursuant to section 552.101 of the Government Code in conjunction with common-law privacy. The remaining basic information must be released.⁴

²Basic information includes the time and place of the incident, names of inmates and department officials directly involved, a brief narrative of the incident, a brief description of any injuries sustained, and information regarding criminal charges or disciplinary actions filed as a result of the incident.

³Section 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 the common law right of privacy. Gov't Code § 552.101.

⁴As our ruling under sections 552.101 and 552.134 is dispositive for these records, we need not address your remaining arguments for this information.

Now we turn to your arguments regarding the remaining submitted information not subject to section 552.022 which you seek to withhold under section 552.103 of the Government Code. Section 552.103 provides in relevant part:

(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). 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. *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). A governmental body must meet both prongs of this test for information to be excepted under section 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. *Id.* In Open Records Decision No. 638 (1996), this office stated that, when a governmental body receives a notice of claim letter, it can meet its burden of showing that litigation is reasonably anticipated by representing 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. If a governmental body does not make this representation, the claim letter is a factor that this office will consider in determining whether a governmental body has established that litigation is reasonably anticipated based on the totality of the circumstances.

You contend that the remaining information relates to reasonably anticipated litigation regarding a liability claim involving the requestor's client. You inform us, and provide

documentation showing, that the department received a notice of representation and statement of claims letter regarding this liability claim along with this request for information. You have not represented that the claim letter meets the requirements of the TTCA. Therefore, we will only consider the claim letter as a factor in determining whether the department reasonably anticipated litigation over the incident in question. Based on your representations and our review of the submitted information, we agree that, based on the totality of the circumstances, litigation was reasonably anticipated on the date the request was received.

However, we find that you have not established how the submitted personnel file is related to the anticipated litigation. Accordingly, the department may not withhold the remaining information under section 552.103 of the Government Code.

We note that portions of the remaining submitted information are excepted from disclosure under section 552.117 of the Governmental Code. Section 552.117(a)(3) excepts from public disclosure the present and former home addresses and telephone numbers, social security numbers, and family member information of current or former department officials or employees, regardless of whether the employee made an election under section 552.024 or 552.1175. We have marked the types of information that the department must withhold pursuant to section 552.117(a)(3) of the Government Code.

Section 552.130 of the Government Code excepts from disclosure information that “relates to . . . a motor vehicle operator’s or driver’s license or permit issued by an agency of this state [or] a motor vehicle title or registration issued by an agency of this state.” Gov’t Code § 552.130. Pursuant to section 552.130, the department must withhold the Texas motor vehicle record information we have marked in the remaining submitted information

The remaining submitted information also contains military discharge information. Section 552.140 of the Government Code provides in relevant part:

- (a) This section applies only to a military veteran’s Department of Defense Form DD-214 or other military discharge record that is first recorded with or that otherwise first comes into the possession of a governmental body on or after September 1, 2003.

Gov’t Code § 552.140(a). Section 552.140 provides that a military veteran’s DD-214 form or other military discharge record that is first recorded with or that otherwise first comes into the possession of a governmental body on or after September 1, 2003 is confidential for a period of seventy-five years and may only be disclosed in accordance with section 552.140 or in accordance with a court order. *See id.* § 552.140(a), (b). You do not indicate when the department first came into possession of the submitted DD-214 forms. Therefore, if these forms came into the possession of the department on or after September 1, 2003, we conclude that the department must withhold this information, which we have marked, under

section 552.140 of the Government Code. Otherwise, the forms must be released, subject to the markings we have made under section 552.117 of the Government Code.

In summary, the submitted medical records may only be released in accordance with the MPA. The department must release all of the basic information relating to the requestor's client. The department must withhold the identifying information of the other inmates who are alleged victims of sexual assault pursuant to section 552.101 of the Government Code in conjunction with common-law privacy. The remaining basic information must be released pursuant to section 552.029(8) of the Government Code. With the exception of the basic information subject to section 552.029(8) of the Government Code, the department must withhold the information you have marked under section 552.134 of the Government Code. We have marked the information that must be withheld under sections 552.117, 552.130, and 552.140, if applicable, of the Government Code. The remaining information must be released to the requestor.⁵

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

⁵Some of the documents marked for release contain or consist of confidential information that is not subject to release to the general public. *See* Gov't Code § 552.352. However, the requestor in this instance has a special right of access to the information. Gov't Code § 552.023. Because some of the information is confidential with respect to the general public, if the department receives a future request for this information from an individual other than the individual whose information is at issue or the individual's personal representative, the department should again seek our decision.

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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/eb

Ref: ID# 272724

Enc. Submitted documents

c: Mr. Donald Crook, Jr.
Attorney at Law
5707 I-10 West
San Antonio, Texas 78201
(w/o enclosures)