



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 8, 2009

Ms. Molly Higgins Santos
Assistant County Attorney
Webb County Attorney's Office
P. O. Box 420268
Laredo, Texas 78042-0268

OR2009-17305

Dear Ms. Santos:

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# 363714.

Webb County (the "county") received a request for all photos and documents pertaining to a specified individual, and all photos and documents resulting from a specified autopsy. You claim that the submitted information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, we address the requestor's contention that the medical examiner did not comply with section 552.301 of the Government Code, which prescribes the procedures a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(d) provides:

(d) A governmental body that requests an attorney general decision must provide to the requestor, not later than the 10th business day after the date of its receipt of the written request for information:

(1) a written statement that the governmental body wishes to withhold the requested information and has asked for an attorney general

decision about whether the information is within an exception to public disclosure; and

(2) a copy of the governmental body's written communication to the attorney general asking for the decision or, if the governmental body's written communication to the attorney general discloses the requested information, a redacted copy of that written communication.

Id. § 552.301(d). The requestor claims that the request was sent and received on August 31, 2009 via facsimile transmission.¹ The county informs us and the request indicates that the request was initially sent to the Webb County Medical Examiner (the "medical examiner"). The county informs us that the medical examiner is not the designated public information officer for Webb County and has never been designated to receive Public Information Act requests. The county informs this office that the medical examiner forwarded the request to the county, and that it was received by the county on September 17, 2009. Thus, we conclude the county's ten business day deadline under section 552.301(d) was October 1, 2009. Based on the county's representation and our review, we conclude that the county complied with the procedural requirements of section 552.301.

Next, we note that a portion of the submitted information is subject to section 552.022(a)(1) of the Government Code. Section 552.022 provides in pertinent part that:

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). The submitted information contains a completed autopsy report, including autopsy photographs, other completed reports, and a completed investigation made by or for the county, which are expressly public under section 552.022(a)(1). Therefore, the report, including photographs, and investigation must be released unless they are confidential under other law or is excepted from disclosure under section 552.108. Although you claim that the submitted information is excepted from disclosure under section 552.103 of the Government Code, this section is a discretionary exception that a governmental body may waive. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental

¹See Gov't Code § 552.301(c) (for purposes of the Act, "a written request includes a request made in writing that is sent to the officer for public information, or the person designated by that officer, by electronic mail or facsimile transmission.")

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 is not "other law" that makes information expressly confidential for purposes of section 552.022. Thus, the autopsy report, including photographs, and completed investigation, which we have marked, may not be withheld under section 552.103 of the Government Code. As you raise no further exceptions against the disclosure of this information, the autopsy report and photographs must be released.² We note portions of the completed investigation contain information subject to sections 552.117, 552.1175, and 552.130 of the Government Code.³ Because sections 552.117, 552.1175, and 552.130 are "other law" for purposes of section 552.022, we will consider the applicability of these exceptions to the completed investigation.

Section 552.117(a)(1) excepts from public disclosure the home address and telephone number, social security number, and family member information of a current or former official or employee of a governmental body who requests that this information be kept confidential under section 552.024 of the Government Code. Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who did not timely request under section 552.024 that the information be kept confidential. Accordingly, to the extent that the employees to whom this information pertains timely elected confidentiality for this information under section 552.024, the county must withhold the information we have marked under section 552.117(a)(1).⁴

²We note that autopsy photographs are made confidential under section 11 of Article 25 of the Code of Criminal Procedure, unless the photograph is of the body of a person who died while in the custody of law enforcement. Code Crim. Proc. Art 49.25 § 11(2). In this instance, the photographs at issue are of a person who died while in the custody of law enforcement.

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

⁴Regardless of the applicability of section 552.117, section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

Section 552.117(a)(2) of the Government Code exempts from disclosure the home address, home telephone number, social security number, and the family member information of a peace officer, as defined by article 2.12 of the Code of Criminal Procedure, regardless of whether the officer requested confidentiality under section 552.024 or section 552.1175 of the Government Code. *See* Gov't Code § 552.117(a)(2). Accordingly, the county must withhold the information we have marked under section 552.117(a)(2).

Section 552.1175 provides in part:

(a) This section applies only to:

.....
(2) county jailers as defined by Section 1701.001, Occupations Code;
.....

(b) Information that relates to the home address, home telephone number, or social security number of an individual to whom this section applies, or that reveals whether the individual has family members is confidential and may not be disclosed to the public under this chapter if the individual to whom the information relates:

(1) chooses to restrict public access to the information; and

(2) notifies the governmental body of the individual's choice on a form provided by the governmental body, accompanied by evidence of the individual's status.

Id. § 552.1175(a)(2), (b)(1)-(2). To the extent the correctional officer is a county jailer as defined by section 1701.001 of the Occupations Code, section 552.1175 applies to him. We have marked the personal information of a correctional officer in the completed investigation. You do not inform this office, nor does any of the submitted information indicate, whether the correctional officer at issue elected to keep this information confidential in accordance with subsection 552.1175(b). Accordingly, to the extent section 552.1175 applies to the correctional officer, if the correctional officer elects to restrict access to his information in accordance with section 552.1175(b), then the county must withhold the information we have marked under section 552.1175. If section 552.1175 does not apply to the correctional officer or if no election is made, the county must release the information we have marked under section 552.1175.

Section 552.130 provides that information relating to a motor vehicle operator's license or driver's license issued by a Texas agency is excepted from public release. Gov't Code

§ 552.130(a)(1). Accordingly, the county must withhold the Texas driver's license numbers we have marked under section 552.130 of the Government Code.

We note the remaining information includes medical records. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses information made confidential by other statutes, including the Medical Practices Act (the "MPA"). Occ. Code §§ 151.001-165.160. Section 159.002 of the Occupations Code provides in relevant part:

(a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.

(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(a), (b), (c). This office has concluded 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). Information subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004; Open Records Decision No. 598 (1991). This office has concluded 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). This office has also determined when a file is created as the result of a hospital stay, all of the documents in the file that relate to diagnosis and treatment constitute either physician-patient communications or records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician. *See* Open Records Decision No. 546 (1990). When a patient is deceased, as is presently the case, medical records may be released only on the signed consent of the deceased's personal representative. *See* Occ. Code § 159.005(a)(5). The 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). We have marked the medical records that are subject to the MPA. The county must withhold this information under section 159.002 of the Occupations Code unless it receives the required written consent for release of the information under sections 159.004 and 159.005 of the Occupations Code.

You claim that the remaining information is excepted from public disclosure under section 552.103 of the Government Code, which provides in 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 that claims an exception to disclosure under section 552.103 has the burden of providing relevant facts and documentation 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 [1st 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 demonstrate that litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* 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. 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 state the county reasonably anticipates litigation related to the death of the individual specified in the request. You also state, and provide documentation showing, that prior to the county's receipt of the present request, the county received a notice of claim letter from the requestor, an attorney representing the family of the deceased individual specified in the request. The notice of claim letter alleges that the county is at fault for causing the death of the individual at issue and for related damages. You do not affirmatively represent to this office that the claim letter is in compliance with the Texas Tor Claims Act (the "TTCA"), Civ. Prac. & Rem. Code, ch. 101, or an applicable municipal ordinance; therefore, we will only consider the claim as a factor in determining whether the county reasonably anticipated litigation over the incident in question. Based on your representations, our review of the submitted information, and the totality of the circumstances, we agree that litigation was reasonably anticipated on the date the request was received. We also conclude that the remaining submitted information relates to the anticipated litigation for the purposes of section 552.103.

However, once the information at issue has been obtained by all parties to the anticipated litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to the information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to all parties to the anticipated litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has concluded or is no longer anticipated. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

In summary, the information we have marked under section 552.022 of the Government Code must be released with the following exceptions: the information we have marked under section 552.117(a)(1) must be withheld to the extent that the employees to whom this information pertains timely elected confidentiality for this information under section 552.024; the county must withhold the information we have marked under section 552.117(a)(2) of the Government Code; to the extent section 552.1175 applies to the correctional officer, if the correctional officer elects to restrict access to his information in accordance with section 552.1175(b), then the county must withhold the information we have marked under section 552.1175; and the county must withhold the information we have marked under section 552.130.⁵ The county must withhold the medical records we have marked under section 159.002 of the Occupations Code unless it receives the required

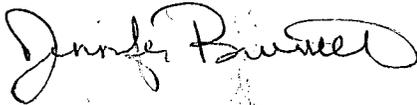
⁵We note that the requestor represents the family of the deceased individual at issue; thus, the city must again seek a decision from this office if it receives a request for this information from a different requestor. *See Nat'l Archives & Records Admin. v. Favish*, 124 S. Ct. 1570 (2004) (surviving family members can have privacy interest in information relating to their deceased relatives).

written consent for release of the information under sections 159.004 and 159.005 of the Occupations Code. The remaining information may be withheld under section 552.103 of the Government Code.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Jennifer Burnett
Assistant Attorney General
Open Records Division

JB/eeg

Ref: ID# 363714

Enc. Submitted documents

c: Requestor
(w/o enclosures)