



ATTORNEY GENERAL OF TEXAS
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OR2010-02009

Dear Ms. Fleming and Mr. West:

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# 369824 (OIG ORR# 2009-03397).

The Texas Department of Criminal Justice (the “department”) received a request for twelve categories of information pertaining to a deceased inmate and the repair of electrical lines at a specified unit. The department’s Office of the General Counsel (the “OGC”) and the Office of the Inspector General (the “OIG”) have submitted separate briefs, as well as separate documents that each seeks to withhold from disclosure. The OIG states that it is releasing some of the requested information to the requestor with redactions pursuant to the previous determination issued by this office in Open Records Letter No. 2005-01067 (2005).¹ The OIG also states that it is withholding social security numbers under section 552.147 of

¹Open Records Letter No. 2005-01067 serves as a previous determination that the present and former home addresses and telephone numbers, social security numbers, and family member information of current or former members 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.

the Government Code.² The OIG claims that the remaining information it has submitted is excepted from disclosure under sections 552.101, 552.103, 552.108, 552.130, and 552.134 of the Government Code. The OGC states that it will release some of the requested information to the requestor. The OGC claims that the information it has submitted is excepted from disclosure under sections 552.101, 552.103, 552.108, 552.130, and 552.134 of the Government Code. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note that some of the information submitted by the OIG is not responsive to the instant request, as it was created after the date the department received the request for information. This decision does not address the public availability of the non-responsive information, and that information need not be released in response to the present request.

Next, we must address the OGC's obligations under section 552.301 of the Government Code, which prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Within fifteen days of receiving the request, the governmental body must submit to this office (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. Gov't Code § 552.301(e). You explain that the department received the request for information on November 18, 2009; however, the OGC did not submit a portion of the specific information requested until January 8, 2010. Therefore, the OGC failed to comply with section 552.301(e) for this information.³

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *City of Dallas v. Abbott*, 279 S.W.3d 806, 811 (Tex. App.—Amarillo 2007, pet. granted); *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); *see also* Open Records Decision No. 630 (1994). A compelling reason exists when third-party interests are at stake or when information is confidential by law. Open Records Decision No. 150 (1977). Although the OGC raises sections 552.103 and 552.108 of the Government

²We note that 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. Gov't Code § 552.147(b).

³We note that a portion of the information untimely submitted by the OGC was timely submitted by the OIG. Accordingly, we will determine whether the OIG's arguments allow for this information to be withheld.

Code for the information at issue, these sections are discretionary exceptions to disclosure that protect a governmental body's interests and which may be waived. *See 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. 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions), 177 (1977) (statutory predecessor to section 552.108 subject to waiver). Accordingly, the OGC's claims under sections 552.103 and 552.108 do not provide compelling reasons for non-disclosure of this information, and the OGC may not withhold any of the information at issue under these sections. However, because sections 552.101 and 552.134 can provide a compelling reason to overcome the presumption of openness, we will address the OGC's arguments under these exceptions for the untimely submitted information. We will also address these arguments for the timely submitted information.

Next, we note that the OIG's documents include a custodial death report. Article 49.18(b) of the Code of Criminal Procedure provides that with the exception of any portion of the custodial death report that the Office of the Attorney General ("OAG") determines is privileged, the OAG shall make the report public. *See* Crim. Proc. Code art. 49.18(b). The format of the report was revised in May 2006 and now consists of four pages and an attached summary of how the death occurred. The OAG has determined that the four-page report and summary must be released to the public but any other documents submitted with the revised report are confidential under article 49.18(b). Therefore, the custodial death report we have marked, along with any attached summary of how the death occurred, must be released pursuant to article 49.18(b) of the Code of Criminal Procedure.

Next, we note that the OGC's submitted information contains a copy of a Texas Peace Officer's Accident Report Form ST-3 that appears to have been completed pursuant to chapter 550 of the Transportation Code. *See* Transp. Code § 550.064 (officer's accident report). Section 550.065(b) states that except as provided by subsection (c), accident reports are privileged and confidential. Section 550.065(c)(4) provides for the release of accident reports to a person who provides two of the following three pieces of information: (1) date of the accident; (2) name of any person involved in the accident; and (3) specific location of the accident. Transp. Code § 550.065(c)(4). Under this provision, the Department of Public Safety or another governmental entity is required to release a copy of an accident report to a person who provides the agency with two or more pieces of information specified by the statute. *Id.* In this instance, the requestor has not provided the department with at least two of the three items of information specified by section 550.065(c)(4). Therefore, the OGC must withhold the submitted ST-3 accident report form, which we have marked, under section 552.101 in conjunction with section 550.065(b) of the Transportation 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 other statutes make 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). We note that the MPA defines a "patient" as "a person who, to receive medical care, consults with or is seen by a physician." Occ. Code § 159.001. Based on this definition, a deceased person is not a "patient" under section 159.002 of the MPA. Thus, the MPA is applicable only to records relating to a person who was alive at the time of the diagnosis, evaluation, or treatment to which the records pertain. Medical records must be released on receipt of signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) the reasons or purposes for the release, and (3) the person to whom the information is to be released. *See id.* §§ 159.004, .005. The medical records of a deceased patient may only be released on the signed written consent of the decedent's personal representative. *See id.* § 159.005(a)(5). 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 medical records in the OIG's documents that must be withheld under section 159.002(b) of the MPA, unless the OIG receives written consent for release of those records that complies with section 159.005(a)(5) of the MPA.

Section 552.101 of the Government Code also encompasses section 773.091 of the Health and Safety Code, which is applicable to records of the provision of emergency medical services ("EMS"). Section 773.091 provides in part:

(b) Records of the identity, evaluation or treatment of a patient by emergency medical services personnel or by a physician providing medical supervision that are created by the emergency medical services personnel or physician or maintained by an emergency medical services provider are confidential and privileged and may not be disclosed except as provided by this chapter.

(c) Any person who receives information from confidential communications or records as described by this chapter, other than a person listed in Section 773.092 who is acting on the survivor's behalf, may not disclose the

information except to the extent that disclosure is consistent with the authorized purposes for which the information was obtained.

Health & Safety Code § 773.091(b)-(c). Section 773.091 further provides, however, that

[t]he privilege of confidentiality under this section does not extend to information regarding the presence, nature of injury or illness, age, sex, occupation, and city of residence of a patient who is receiving emergency medical services.

Id. § 773.091(g). We have marked information in the OIG's documents that constitutes confidential EMS records. We note that records that are confidential under section 773.091 may be disclosed to "any person who bears a written consent of the patient or other persons authorized to act on the patient's behalf for the release of confidential information." *Id.* §§ 773.092(e)(4), .093. Among the individuals authorized to act on the patient's behalf in providing written consent is a "personal representative" if the patient is deceased. *Id.* Section 773.093 provides that a consent for release of EMS records must specify: (1) the information or records to be covered by the release; (2) the reasons or purpose for the release; and (3) the person to whom the information is to be released. Thus, if the OIG receives proper consent, then the marked EMS records must be released in their entirety in accordance with chapter 773 of the Health and Safety Code. If the OIG does not receive proper consent, then with the exception of the information subject to section 773.091(g), which is not confidential, the marked EMS records must be withheld under section 552.101 of the Government Code in conjunction with section 773.091(b) of the Health and Safety Code.

Next, the OGC raises section 552.101 in conjunction with section 418.181 of the Government Code. Sections 418.176 through 418.182 were added to chapter 418 of the Government Code as part of the Texas Homeland Security Act (the "HSA"). These provisions make certain information related to terrorism confidential. Section 418.181 provides

Those documents or portions of documents in the possession of a governmental entity are confidential if they identify the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism.

Gov't Code § 418.181; *see also id.* § 421.001 (defining critical infrastructure to include "all public or private assets, systems, and functions vital to the security, governance, public health and safety, and functions vital to the state or the nation"). The fact that information may relate to a governmental body's security measures does not make the information *per se* confidential under the HSA. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection). Furthermore, the mere recitation of a statute's key terms is not sufficient to demonstrate the applicability of the claimed provision. As with any exception to disclosure, a claim under section 418.181 must be accompanied by an adequate explanation of how the responsive records fall within the

scope of the claimed provision. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

The OGC states a portion of the submitted documents relate to the infrastructure of a specified prison. We understand you to assert that the prison constitutes critical infrastructure for purposes of section 418.181. *See generally id.* § 421.001 (defining "critical infrastructure" to include all public or private assets, systems, and functions vital to security, governance, public health and safety, economy, or morale of state or nation). You state release of the information at issue would reveal vulnerabilities of the prison infrastructure to acts of terrorism. Upon review of the submitted information, we find that a portion of the submitted information would identify details of particular vulnerabilities of critical infrastructure to an act of terrorism. Therefore, the OGC must withhold the information we have marked under section 552.101 in conjunction with section 418.181 of the Government Code. However, upon review of your arguments and the remaining information at issue, we conclude that the OGC has failed to establish that releasing the remaining information at issue would reveal the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism. Therefore, no portion of the remaining information at issue may be withheld under section 552.101 in conjunction with section 418.181 of the Government Code.

Both the OIG and the OGC claim section 552.134, which is applicable to information relating to inmates of the department. Section 552.134(a) states that

[e]xcept as provided by Subsection (b) or by Section 552.029 [of the Government Code], information obtained or maintained by the [department] 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.

Id. § 552.134(a). Section 552.029 of the Government Code provides in part 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:

(1) the inmate's name, identification number, age, birthplace, department photograph, physical description, or general state of health or the nature of an injury to or critical illness suffered by the inmate;

...

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

We conclude that section 552.134(a) is applicable to portions of the remaining submitted information. We find that the remaining information the OGC has marked in its timely submitted documents relates to department inmates. Therefore, section 552.134 is applicable to this information. Further, we agree that a portion of the OIG's information, which we have marked, relates to department inmates. Therefore, section 552.134 is applicable to the information we have marked in the OIG's documents. However, the OIG has failed to establish how its remaining information relates to department inmates; thus, the OIG may not withhold any of their remaining information under section 552.134 of the Government Code.

We note that most of the information subject to section 552.134 is related to the death of an inmate in custody. Basic information about this incident is subject to disclosure under section 552.029(8). Basic information under section 552.029(8) includes the time and place of the incident, the names of inmates and of department employees who were involved, a brief narrative of the incident, a brief description of any injuries sustained by anyone involved, and information regarding any criminal charges or disciplinary actions that were filed as a result of the incident. Accordingly, with the exception of basic information, which must be released, the OGC must withhold the information it has marked in the timely submitted documents under section 552.134 of the Government Code and the OIG must withhold the information we have marked in its documents under section 552.134 of the Government Code.⁴

Next, the OGC claims that the information it has marked in its timely submitted information, and the OIG claims that its remaining information is subject to section 552.103 of the Government Code, which 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

⁴As our ruling under section 552.134 is dispositive, we need not address your remaining arguments against disclosure for this information, except to note that basic information may generally not be withheld under sections 552.103 or 552.108. *See* Open Records Decision No. 597 (1991); Gov't Code § 552.108(c).

on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Id. § 552.103(a), (c). The governmental body claiming this exception bears the burden of providing relevant facts and documents to demonstrate the applicability of the exception. 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 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). 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.* Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. *See* Open Records Decision Nos. 555 (1990), 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Further, the fact a potential opposing party has hired an attorney who makes a request for information does not establish litigation is reasonably anticipated. *See* Open Records Decision No. 361 (1983).

In this instance, the requestor is an attorney representing the family of the deceased inmate. The department submitted correspondence in which the requestor states that he intends to file suit on behalf of the family for damages for the inmate's death. Based on your representations and our review, and the totality of the circumstances, we agree that the OIG and OGC reasonably anticipated litigation on the date the department received the request. We also agree that the remaining information, which relates to the death of the inmate, relates to the anticipated litigation. Accordingly, we conclude that the OGC may withhold the information it has marked in the timely information and the OIG may withhold its remaining submitted information under section 552.103 of the Government Code.⁵

In summary, the custodial death report we have marked, along with any attached summary of how the death occurred, must be released pursuant to article 49.18(b) of the Code of Criminal Procedure. The OGC must withhold the ST-3 form we have marked under section 552.101 of the Government Code in conjunction with section 550.065(b) of the Transportation Code. The OIG must withhold the marked medical records under section 159.002(b) of the MPA, unless the OIG receives written consent for release of those records that complies with section 159.005(a)(5) of the MPA. If the OIG does not receive

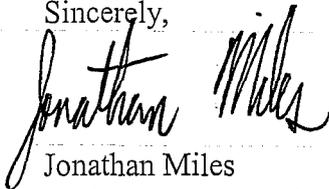
⁵As our ruling is dispositive, we need not address the OGC's remaining exceptions for this information.

proper consent, then with the exception of the information subject to section 773.091(g), which is not confidential, the marked EMS records must be withheld under section 552.101 of the Government Code in conjunction with section 773.091(b) of the Health and Safety Code. The OGC must withhold the information we have marked under section 552.101 in conjunction with section 418.181 of the Government Code. With the exception of basic information, the OGC must withhold the information it has marked in its timely submitted information, and the OIG must withhold the information we have marked in the OIG's documents under 552.134 of the Government Code. The OGC may withhold the information it has marked in its timely information under section 552.103 of the Government Code, and the OIG may withhold its remaining submitted information under section 552.103 of the Government Code. The remaining information must be released.

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,



Jonathan Miles
Assistant Attorney General
Open Records Division

JM/cc

Ref: ID# 369824

Enc. Submitted documents

c: Requestor
(w/o enclosures)
