



ATTORNEY GENERAL OF TEXAS
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OR2010-02587

Dear Mr. Mu 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# 370955.

The Texas Department of Criminal Justice (the "department") received a request for sixteen categories of information, including information pertaining to two specified incidents and a named department inmate. The department's Office of the General Counsel (the "OGC") and the department's Office of the Inspector General (the "OIG") have submitted separate briefs to this office.¹ The OGC states that it will release a portion of the requested information and claims that the remaining information it has submitted to this office for

¹We note that the OGC asked for and received clarification regarding this request. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information); *see also* Open Records Decision No. 663 (1999) (discussing tolling of deadlines during period in which governmental body is awaiting clarification).

review is excepted from disclosure under sections 552.101, 552.103, 552.108, 552.111, and 552.134 of the Government Code.² The OIG states that it will release 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) and will withhold social security numbers pursuant to section 552.147(b) of the Government Code.³ The OIG also indicates it has no information responsive to portions of the request.⁴ 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. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note that some of the requested information was the subject of a previous request received by the department, as a result of which this office issued Open Records Letter No. 2010-02009 (2010). In that ruling, we determined the department must withhold certain information under sections 552.101 and 552.134 of the Government Code, and may withhold certain information under section 552.103 of the Government Code. We also determined the department must release the custodial death report and any attached summary of how the death occurred pursuant to article 49.18(b) of the Code of Criminal Procedure and must release the remaining information to the requestor. However, we note the requestor in the previous request was the attorney representing the family of the deceased inmate; therefore, he had a potential right of access to the deceased inmate's medical records and emergency medical service ("EMS") records. However, we note the present request involves a different requestor. Thus, we find that the circumstances have changed, and the department may not continue to rely on Open Records Letter No. 2010-02009 as a previous determination for the deceased inmate's medical and EMS records. *See* Open Records Decision No. 673 (2001).

We also note section 552.007 of the Government Code provides that if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly

²Although the OGC initially raised sections 552.102, 552.104, 552.107, 552.110, 552.116, 552.122, 552.130, 552.1325, 552.136, and 552.137 of the Government Code as exceptions to disclosure, the OGC informs this office that these exceptions have been withdrawn.

³Open Records Letter No. 2005-01067 (2005) 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 employees 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. Further, we note 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.

⁴The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983).

prohibited by law or the information is confidential by law. *See* Gov't Code § 552.007; Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). Accordingly, pursuant to section 552.007, the department may not now withhold the previously released information unless its release is expressly prohibited by law or the information is confidential by law. The OGC seeks to withhold portions of its information, including information that was previously ordered to be released under Open Records Letter No. 2010-02009, under section 552.103. Section 552.103 is a discretionary exception to disclosure that protects a 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 Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the department may not now withhold any information that was previously ordered to be released pursuant to Open Records Letter No. 2010-02009 under section 552.103.

With respect to the remaining identical information that was the subject of the previous ruling, as we have no indication that the laws, facts and circumstances have changed with regards to that information since the issuance of the previous ruling, the department must continue to rely on Open Records Letter No. 2010-02009 as a previous determination and withhold or release the remaining identical information at issue in accordance with that ruling. To the extent the information was not the subject of the previous ruling, we will address the submitted arguments against disclosure of this information, as well as the information for which the circumstances on which the prior ruling was based have changed.

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 statute. 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. 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). 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) reasons or purposes for the release, and (3) the person to whom the information is to be released. *See id.* §§ 159.004, .005. We note the requestor represents one of the individuals whose medical information is at issue. We have marked medical records that the department may only release in accordance with the MPA.

Section 552.134 of the Government Code relates to information about inmates of the department and provides in relevant part:

(a) Except as provided by Subsection (b) or by Section 552.029, information obtained or maintained by the [department] is excepted from the requirements of Section 552.021 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 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:

(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). The OIG claims the entirety of its remaining information and the OGC claims the remaining information it has marked consists of information about department inmates. Upon review, we agree that section 552.134 of the Government Code is applicable to some of the remaining information. However, we find the OIG has failed to establish how portions of its remaining information relate to department inmates; thus, the OIG may not withhold this information under section 552.134 of the Government Code.

Further, we note that most of the information subject to section 552.134 pertains to the death of an inmate. Therefore, basic information about the death of the inmate must be released pursuant to section 552.029. *Id.* For purposes of section 552.029(8), basic information 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 the information that must be released under section 552.029, the department must withhold the information the OGC has marked, as well as the OIG's remaining information that relates to department inmates under section 552.134 of the Government Code.⁵

We next address the OIG's and OGC's arguments under section 552.103 to withhold their remaining information. 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). The 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 when 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 governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

⁵As our ruling is dispositive for this information, we need not address the OIG's or OGC's remaining arguments against disclosure of this information, except to note that basic information under section 552.029(8) may generally not be withheld under section 552.103 or section 552.108. *See* Open Records Decision No. 597 (1991); Gov't Code § 552.108(c).

In order 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. *See* ORD 452 at 4. 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. Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that 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). 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 Texas Civil Practice & 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.

The OGC and OIG state, and both provide documentation showing, that prior to the date the present request was received, the department received a notice of claim letter from the requestor, who represents one of the individuals involved in the incident at issue. They both state that this letter is in compliance with the TTCA. Based on your representations and our review, we find litigation was reasonably anticipated on the date the department received the request for information. The OGC and OIG both state, and the information at issue reflects, the submitted information relates to the anticipated litigation. Therefore, we find the OIG's remaining information and the remaining information the OGC has marked pertains to litigation that was reasonably anticipated when the request for information was received. Thus, to the extent this information was not ruled upon in Open Records Letter No. 2010-2009, the department may withhold this information under section 552.103 of the Government Code.⁶

However, we note that 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. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Further, the applicability of section 552.103(a) ends once the litigation has been concluded or is no longer reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

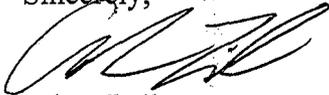
⁶As our ruling is dispositive, we need not address the OIG's or OGC's remaining arguments against disclosure.

In summary, with the exception of the information for which the circumstances on which the prior ruling was based have changed, the department must continue to rely on Open Records Letter No. 2010-02009 as a previous determination and withhold or release the identical information at issue in accordance with that ruling. The department may only release the medical records we have marked in accordance with the MPA. With the exception of basic information that must be released under section 552.029(8), the department must withhold the information the OGC has marked, as well as the OIG's remaining information that relates to department inmates under section 552.134 of the Government Code. The department may withhold the OIG's and OGC's remaining information that was not ruled upon in Open Records Letter No. 2010-2009 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,



Adam Leiber
Assistant Attorney General
Open Records Division

ACL/eeg

Ref: ID# 370955

Enc. Submitted documents

c: Requestor
(w/o enclosures)