



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 9, 2010

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

OR2010-03408

Dear Mr. Mu:

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# 372378.

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

Initially, we note that the department has not submitted the requested billing records. To the extent such information exists, we presume the department has released it. If the department has not, it must do so at this time. *See Gov't Code §§ 552.301, .302; see also* Open records Decision No. 664 (2000) (if governmental body concludes no exceptions apply to requested information, it must release information as soon as possible.)

Next, we note that the submitted information includes completed reports subject to section 552.022 of the Government Code. Section 552.022(a)(1) provides for required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body[,]" unless the information is expressly confidential under other law or excepted from disclosure under section 552.108 of the Government Code. Gov't Code § 552.022(a)(1). We have marked the information that is subject to section 552.022(a)(1). Although you claim that this information is excepted from disclosure under section 552.103 of the Government Code, this section is a discretionary exception that protects a governmental body's interests and may be waived. *See id.* § 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 Gov't Code § 552.103); 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 confidential for the purposes of section 552.022(a)(1). Therefore, the information that is subject to section 552.022(a)(1) may not be withheld under section 552.103. However, we will consider your arguments under sections 552.101 and 552.134 of the Government Code for this information, as these sections are "other law" for the purposes of section 552.022(a)(1). We will also consider these exceptions, as well your claims under section 552.103, for the information that is not subject to section 552.022(a)(1).

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, including medical records that 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). 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* Occ. Code §§ 159.004, .005. As an attorney for the inmate who is the subject of the present request, the requestor may have a right of access to the submitted medical records pertaining to her client. Although the submitted information includes a signed authorization to release patient information, you state the requestor has not presented a consent for release of medical records signed by a person "as described by the statute." We are unable to determine whether the requestor has authority to receive the submitted medical records. Consequently, we have marked the submitted information that constitutes medical records which must be released upon the department's receipt of a proper authorization under the MPA. In the absence of a proper authorization for release, the marked medical records must be withheld from the requestor pursuant to the MPA. *See* ORD 598.

Next, you inform us that the submitted documents contain a fingerprint of the requestor's client. The public availability of fingerprints is governed by chapter 560 of the Government

Code. *See* Gov't Code §§ 560.001(1) ("biometric identifier" means retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry), 560.003 (biometric identifier in possession of governmental body is exempt from disclosure under Act). Section 560.002 provides, however, that "[a] governmental body that possesses a biometric identifier of an individual . . . may not sell, lease, or otherwise disclose the biometric identifier to another person unless . . . the individual consents to the disclosure[.]" *Id.* § 560.002(1)(A). The requestor's client's fingerprint, which we have marked, must be released to the requestor pursuant to section 560.002(1)(A). *See* Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning herself). *See* Open Records Decision Nos. 613 at 4 (1993) (exceptions in Act cannot impinge on statutory right of access to information), 451 at 4 (1986) (specific statutory right of access provisions overcome general exceptions to disclosure under the Act).

Section 552.101 of the Government Code also encompasses section 611.002 of the Health and Safety Code, which governs the public availability of mental health records and provides in part:

(a) Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.

(b) Confidential communications or records may not be disclosed except as provided by Section 611.004 or 611.0045.

Health & Safety Code § 611.002(a)-(b); *see id.* § 611.001 (defining "patient" and "professional"). We have marked mental health records that pertain to the requestor's client. Sections 611.004 and 611.0045 of the Health and Safety Code provide for access to information that is made confidential by section 611.002 only by certain individuals. *See id.* §§ 611.004, .0045; Open Records Decision No. 565 (1990). The department must withhold the marked records under section 552.101 of the Government Code in conjunction with section 611.002, unless the requestor has a right of access under sections 611.004 and 611.0045.

You contend the remaining information is confidential under section 552.134 of the Government Code, which relates to information about inmates of the department. Section 552.134 provides in relevant part:

(a) Except as provided by Subsection (b) or by Section 552.029, information obtained or maintained by the Texas Department of Criminal Justice 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, however, that

[n]otwithstanding Section 508.313 or 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[:]

(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; [and]

...

(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. The remaining information pertains to an inmate confined in a facility operated by the department. Therefore, we agree this information is generally subject to section 552.134. However, some of the remaining information relates to an injury suffered by an inmate and includes other information subject to section 552.029(1). The remaining information also includes an incident report pertaining to an alleged crime involving inmates that is subject to section 552.029(8).¹ 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. With the exception of basic information which must be released, the department must withhold the remaining information in the incident report, as well as the remaining information not subject to section 552.029 under section 552.134.² Because you also raise section 552.103 of the Government Code as an exception against disclosure, we will address your argument under this section for the remaining information subject to section 552.029(1).

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.

¹We note that this information consists of one of the completed reports we have marked as subject to section 552.022(a)(1) of the Government Code.

²As our ruling is dispositive, we do not address your remaining arguments under section 552.101 of the Government Code in conjunction with common-law and constitutional privacy for this information.

...

(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.

Id. § 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).

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. 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.

You represent, and provide documentation showing, that simultaneous with the instant request, the department received a notice of claim letter from the requestor. You state 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. Further, we agree that the information at issue relates to the anticipated litigation. Therefore, we find the remaining information pertains to litigation that was reasonably anticipated on the date the request for information was received. Accordingly, the department may withhold this information under section 552.103 of the Government Code.

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

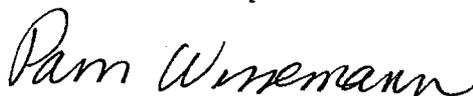
Decision No. 350 (1982).

In summary, the department must release or withhold the medical records we have marked in accordance with the MPA. The department must release the marked fingerprint under section 560.002 of the Government Code. The department must withhold the marked mental health records under section 552.101 of the Government Code in conjunction with section 611.002 of the Health and Safety Code unless the requestor has a right of access under sections 611.004 and 611.0045. With the exception of the information subject to section 552.029 of the Government Code, the department must withhold the remaining information under section 552.134 of the Government Code. The department may withhold the information subject to section 552.029(1) of the Government Code under section 552.103 of the Government Code. The remaining information must be released.³

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,



Pamela Wissemann
Assistant Attorney General
Open Records Division

PFW/cc

Ref: ID# 372378

Enc. Submitted documents

c: Requestor
(w/o enclosures)

³We note that because the requestor has a right of access to some of the information at issue, the department must again seek a decision from this office if it receives another request for the same information from a different requestor.