



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 27, 2010

Ms. Sheri Bryce Dye
Assistant District Attorney
Bexar County District Attorney's Office
300 Dolorosa, 4th Floor
San Antonio, Texas 78205

OR2010-14670

Dear Ms. Dye:

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# 394870.

The Bexar County Sheriff's Office and the Bexar County District Attorney's Office (collectively, the "county") received a request for information regarding the Bexar County Jail (the "jail") for 2009 and 2010, specifically including: (1) incident reports written by staff involving alleged assaults against or among mentally ill inmates; (2) housing unit logs for the Suicide Prevention and Mental Health units; (3) multidisciplinary mortality reviews relating to custodial deaths or inmate suicides; (4) incident reports of custodial deaths and inmate suicides; (5) internal e-mails regarding mentally ill inmates; and (6) complaints submitted by mental health advocates and relatives of mentally ill inmates. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

¹Although you also raise section 552.102 of the Government Code, and section 552.104 through section 552.147 of the Government Code as exceptions to disclosure of the submitted information, you have provided no arguments regarding the applicability of these sections. Thus, we assume you no longer assert these exceptions. See Gov't Code §§ 552.301(e), .302.

Initially, we note you have not submitted any multidisciplinary mortality reviews, internal e-mails, or complaints. Further, you have not indicated such information does not exist or that you wish to withhold any such information from disclosure. Therefore, to the extent this information existed on the date of the request, we assume you have released it to the requestor. If you have not released any such information, you must do so at this time. *See* Gov't Code §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (noting if governmental body concludes no exceptions apply to requested information, it must release information as soon as possible under circumstances).

Next, we note the requestor has agreed to the redaction of inmate names from the submitted information. Accordingly, inmate names are not responsive to the instant request. The county need not release non-responsive information in response to the request and this ruling will not address such information.

We note portions of the submitted information are subject to section 552.022 of the Government Code. Section 552.022 provides in 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). You have submitted completed facility incident, use of force, and incident reports that are subject to section 552.022(a)(1). Although you raise section 552.103 of the Government Code for this information, section 552.103 is a discretionary exception to disclosure that protects the 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 section 552.103); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 (1999) (governmental body may waive section 552.103). As such, section 552.103 is not other law that makes information confidential for the purposes of section 552.022. Therefore, the county may not withhold these completed reports under section 552.103. However, as section 552.101 constitutes other law for purposes of section 552.022, we will consider your claims under this exception. Additionally, we note portions of a completed report may be subject to section 552.117 of the Government Code, which also constitutes other law for purposes of section 552.022; thus, we will also consider the applicability of this

exception to the information at issue.² Further, we will consider your claim under section 552.103 for the portions of the submitted information not subject to section 552.022.

We first turn to your argument against release of the information not subject to section 552.022(a)(1) of the Government Code. Section 552.103 of the Government Code provides as follows:

(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 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).

You provide documentation showing that prior to the county's receipt of the request, a lawsuit styled *Jonathan Ramirez v. Bexar County*, Civil Action No.: SA-5:10-CV-00296, was filed and is currently pending in the United States District Court for the Western District of Texas, San Antonio Division. You further state the pending litigation pertains to the death of a former inmate and the submitted information is related to the pending litigation because it involves information regarding inmate deaths. Accordingly, we find litigation was pending when the county received this request for information and the information at issue relates to the pending litigation. Therefore, section 552.103 is generally applicable to this information.

²The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

We note once the information at issue has been obtained by all parties to the pending 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). Accordingly, the county may only withhold information the opposing party to the litigation has not seen or had access to under section 552.103 of the Government Code. We note the applicability of section 552.103(a) ends once the litigation concludes. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Now we address your arguments against release of the completed reports. You claim the completed reports subject to section 552.022(a)(1) of the Government Code contain information protected under the Medical Practice Act ("MPA"), subtitle B of title 3 of the Occupations Code. 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 protected by other statutes, such as the MPA, which governs release of medical records. *See* Occ. Code § 151.001. 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.

Id. § 159.002(b)-(c). Information subject to the MPA includes both medical records and information obtained from those medical records. *See id.* 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). Upon review, we find you have failed to demonstrate how any of the completed reports constitute a record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that was created or is maintained by a physician. Consequently, the county may not withhold any of the completed reports under section 552.101 in conjunction with the MPA.

You also raise section 552.101 of the Government Code in conjunction with section 773.091 of the Health and Safety Code for the completed reports. Section 773.091 provides in relevant part:

(a) A communication between certified emergency medical services personnel or a physician providing medical supervision and a patient that is made in the

course of providing emergency medical services to the patient is confidential and privileged and may not be disclosed except as provided by this chapter.

(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.

Health & Safety Code § 773.091(a)-(b). Upon review, we find none of the completed reports contain communications between certified emergency medical services personnel or a physician providing medical supervision and a patient that were made in the course of providing emergency medical services to the patient. *See id.* § 773.091(a). Further, the completed reports do not contain records of the identity, evaluation, or treatment of a patient by emergency medical services personnel or by a physician providing medical supervision that were created by the emergency medical services personnel or physician or maintained by an emergency medical services provider. *See id.* § 773.091(b). Accordingly, none of the completed reports are confidential under section 773.091, and the county may not withhold them under section 552.101 on that basis.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The types of information considered intimate or embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. We note privacy is a personal right that lapses at death, and thus common-law privacy is not applicable to information that relates only to a deceased individual. *See Moore v. Charles B. Pierce Film Enters. Inc.*, 589 S.W.2d 489 (Tex. Civ. App.—Texarkana 1979, writ ref'd n.r.e.); *Justice v. Belo Broadcasting Corp.*, 472 F. Supp. 145 (N.D. Tex. 1979); Attorney General Opinions JM-229 (1984); H-917 (1976); Open Records Decision No. 272 (1981).

We note that although the requestor does not seek the names of inmates, the completed reports contain other inmate identifying information. However, most of the facility incident reports pertain to deceased inmates. Because the common-law right to privacy lapses at death, the county may not withhold any information pertaining to the deceased inmates. However, we note some of the facility incident reports contain highly intimate or embarrassing information pertaining to a living inmate that is of no legitimate public interest. Accordingly, we find the county must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy. We note

we are unable to determine whether an inmate to whom some information pertains is deceased. We have marked information pertaining to this inmate that is highly intimate or embarrassing and of no legitimate public interest. To the extent this inmate is living, the county must withhold the information we marked under section 552.101 in conjunction with common-law privacy. To the extent this inmate is now deceased, the county may not withhold this marked information under section 552.101 on the basis of common-law privacy. None of the remaining information is highly intimate or embarrassing. Consequently, this information is not confidential under common-law privacy and may not be withheld under section 552.101 on that basis.

We note a completed report contains information subject to section 552.117 of the Government Code. Section 552.117(a)(2) excepts from public disclosure the home addresses, home telephone numbers, and social security number of a peace officer, as well as information that reveals whether the peace officer has family members, regardless of whether the peace officer complies with sections 552.024 and 552.1175 of the Government Code.³ Gov't Code § 552.117(a)(2). We note section 552.117 also encompasses a personal cellular telephone or pager number, unless the cellular or pager service is paid for by a governmental body. *See* Open Records Decision No. 506 at 5-7 (1988) (statutory predecessor to section 552.117 not applicable to cellular telephone numbers provided and paid for by governmental body and intended for official use). We have marked personal information pertaining to a peace officer the county must withhold under section 552.117(a)(2). However, the county may only withhold the marked cellular telephone number if the officer pays for the cellular telephone service with personal funds.

In summary, the county may withhold the information not subject to section 552.022(a)(1) of the Government Code under section 552.103 of the Government Code. The county must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, the county may only withhold some of the information, which we have noted, under section 552.101 of the Government Code in conjunction with common-law privacy if the inmate to whom the information pertains is living. The county must also withhold the personal information we marked under section 552.117(a)(2) of the Government Code; however, the peace officer's cellular telephone number may only be withheld if the officer pays for the cellular telephone service with personal funds. The remaining information in the completed reports 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.

³"Peace officer" is defined by article 2.12 of the Texas Code of Criminal Procedure.

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,



Ana Carolina Vieira
Assistant Attorney General
Open Records Division

ACV/eeg

Ref: ID# 394870

Enc. Submitted documents

c: Requestor
(w/o enclosures)