



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 15, 2010

Ms. Martha W. Warner
District Attorney
156th Judicial District of Texas
111 South Saint Mary's Street, Suite 203
Beeville, Texas 78102

OR2010-17219

Dear Ms. Warner:

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# 400039.

The Live Oak County Sheriff's Department (the "sheriff") received a request for eighteen categories of information related to the investigation of two sexual assault cases, complaints against certain named Live Oak County employees, and policies and protocols for operating the Live Oak County jail. You claim the requested information is excepted from disclosure under sections 552.103, 552.108, 552.1175, and 552.147 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted representative samples of information.²

Initially, we note the submitted information contains medical records subject to the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. Section 552.101 of

¹Although you raise section 405(c)(2)(C)(viii)(I) of title 42 of the United States Code to withhold social security numbers, we note the proper exception to raise for this information is section 552.147 of the Government Code. We also note you have raised section 552.131 of the Government Code. However, as you make no arguments to support this exception, we assume you have withdrawn your claim under this section. *See Gov't Code §§ 552.301, .302.*

²We assume the "representative samples" of records submitted to this office is truly representative of the requested records as a whole. *See Open Records Decision Nos. 499 (1988), 497 (1988).* This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than those submitted to this office.

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. This exception encompasses information other statutes make confidential, such as the MPA. *See* Occ. Code §§ 151.001–165.160. Section 159.002 of the MPA provides, in 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.

Id. § 159.002(a)–(c). 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). We also have determined that when a file is created as the result of a hospital stay, all of the documents in the file relating to the 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). Further, medical records must be released upon the patient's signed, written consent, provided 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. Occ. Code §§ 159.004(5), .005.

Although you claim the medical records are excepted under sections 552.103 and 552.108 of the Government Code, the MPA's specific right of access provision prevails over the Act's general exceptions to disclosure. *See* Open Records Decision No. 451 at 4 (1986) (specific statutory right of access provisions overcome general exceptions to disclosure under statutory predecessor to Act). As an attorney for the inmate whose medical records are at issue, the requestor may have a right of access in this instance to these medical records. However, we are unable to determine whether the requestor has acquired the proper consent to receive the submitted medical records. Consequently, we have marked the submitted information that constitutes medical records which must be released upon the sheriff's receipt of a proper authorization under the MPA. In the absence of a proper authorization,

the marked medical records must be withheld pursuant to the MPA. *See* Open Records Decision No. 598.

Next, we turn to your assertion of section 552.103 of the Government Code for the 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 is pending or reasonably anticipated on the date the sheriff 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).

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision 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 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").

The requestor in this case is an attorney hired by a former Live Oak County inmate to pursue a claim of sexual assault against the sheriff. You have provided a letter from the attorney to the sheriff in which the attorney requests the preservation of evidence related to this matter for "any lawsuit which may be filed . . . on behalf of [his client]." The attorney further states

he will seek appropriate remedies “at any trial which may occur.” Based on these representations and our review, we find the sheriff reasonably anticipated litigation on the date the request for information was received. We also find the information at issue relates to that anticipated litigation for purposes of section 552.103(a).

We note, however, the remaining information contains a set of “Inmate Rules,” which states on its face is provided to all inmates at the jail. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. *See* ORD 551 at 4-5. Consequently, if the opposing party has previously seen or had access to the information, through discovery or otherwise, there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Therefore, because the “Inmate Rules” have previously been seen by the requestor’s client, they may not be withheld under section 552.103. With the exception of the “Inmate Rules,” the sheriff may withhold the remaining information under section 552.103(a) of the Government Code.³

As to the “Inmate Rules,” we will address your assertion of section 552.108(b)(1) of the Government Code. Section 552.108(b)(1) of the Government Code excepts from disclosure the internal records and notations of law enforcement agencies and prosecutors when their release would interfere with law enforcement and crime prevention. Gov’t Code § 552.108(b)(1); *see also* Open Records Decision No. 531 at 2 (1989) (quoting *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977)). Section 552.108(b)(1) is intended to protect “information which, if released, would permit private citizens to anticipate weaknesses in a police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate the laws of this State.” *See City of Fort Worth v. Cornyn*, 86 S.W.3d 320 at 327 (Tex. App.—Austin 2002, no writ). To demonstrate the applicability of this exception, a governmental body must meet its burden of explaining how and why release of the requested information would interfere with law enforcement and crime prevention. Open Records Decision No. 562 at 10 (1990). This office has concluded that section 552.108(b) excepts from public disclosure information relating to the security or operation of a law enforcement agency. *See, e.g.*, Open Records Decision Nos. 531 (release of detailed use of force guidelines would unduly interfere with law enforcement), 252 (1980) (section 552.108 of the Government Code is designed to protect investigative techniques and procedures used in law enforcement), 143 (1976) (disclosure of specific operations or specialized equipment directly related to investigation or detection of crime may be excepted). Section 552.108(b)(1) is not applicable, however, to generally known policies and procedures. *See, e.g.*, Open Records Decision Nos. 531 at 2-3 (Penal Code provisions, common law rules, and constitutional limitations on use of force not protected), 252 at 3 (governmental body failed to indicate why investigative procedures and techniques requested

³As our ruling is dispositive, we do not address your other arguments against disclosure of this information.

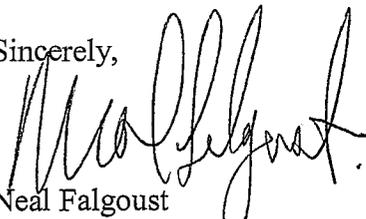
were any different from those commonly known). You state the information at issue refers to inmate access and control, the searching of prisoners, inmate and officer movement, and inmate disciplinary procedures. You also state release of this information would undermine the security of the law enforcement agency. However, as previously noted, the "Inmate Rules" are provided to all inmates. Because this document is provided to all inmates, we find the sheriff has failed to demonstrate how release of this information would generally undermine police efforts. Accordingly, the "Inmate Rules" may not be withheld under section 552.108(b)(1).

In summary, the medical records we have marked must be withheld under section 159.002(b) of the MPA, unless the sheriff receives the required written consent for release under sections 159.004 and 159.005. With the exception of the "Inmate Rules," 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,



Neal Falgoust
Assistant Attorney General
Open Records Division

NF/dls

Ref: ID# 400039

Enc. Submitted documents

c: Requestor
(w/o enclosures)