



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

December 22, 2010

Mr. William W. Krueger, III  
McKamie Krueger, L.L.P.  
941 Proton Road  
San Antonio, Texas 78258

OR2010-19278

Dear Mr. Krueger:

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# 402942.

The Hood County Sheriff's Office (the "sheriff"), which you represent, received a request for twenty categories of information pertaining to the death of a named individual. You state the sheriff does not have any records regarding visits to the named individual by non-family members.<sup>1</sup> You claim the submitted information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, we note the submitted documents include a custodial death report. Article 49.18(b) of the Code of Criminal Procedure provides that the attorney general shall make the custodial death report available to any interested person, with the exception of any portion of the report that the attorney general determines is privileged. *See* Code Crim. Proc. art. 49.18(b). The report was revised in May 2006 and now consists of four pages and an attached summary of how the death occurred. The attorney general has determined that the four-page report and summary must be released to the public but that any other documents submitted with the

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<sup>1</sup>The Act does not require a governmental body to release information that did not exist when a request for information was received, create responsive information, or obtain information that is not held by or on behalf of the governmental body. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dism'd); Open Records Decision No. 452 at 3 (1986).

revised report are confidential under article 49.18(b). Although you claim this report is excepted under section 552.103, information specifically made public by statute may not be withheld under the general exceptions to public disclosure in the Act. *See, e.g.*, Open Records Decision Nos. 544 (1990), 378 (1983), 161 (1977), 146 (1976). Therefore, the sheriff must release the submitted custodial death report, which we have marked, pursuant to article 49.18(b) of the Code of Criminal Procedure.

The submitted information also includes medical records. 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 the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. *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). 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 have also found that when a file is created as the result of a hospital stay, all the documents in the file relating to diagnosis and treatment constitute physician-patient communications or "[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician." Open Records Decision No. 546 (1990).

Upon review, we have marked the medical records in the submitted information, access to which is governed by the MPA. In this case, you acknowledge the requestor is the attorney for the deceased individual's spouse and son. Medical records must be released on 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. When a patient is deceased, as is the case here, medical records pertaining to the deceased patient may only be released upon the signed consent of the deceased's personal representative. *See id.* § 159.005(a)(5). Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Although you claim the medical records are excepted under

section 552.103 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 Nos. 598 at 5 (1991) (statutory predecessor to MPA generally prevails over exceptions in statutory predecessor to the Act), 451 at 4 (1986) (specific statutory right of access provisions overcome general exceptions to disclosure under statutory predecessor to Act). Accordingly, the submitted medical records pertaining to the deceased inmate, which we have marked, may only be released in accordance with the MPA.

Next, portions of the submitted information are subject to section 552.022 of the Government Code, which provides in pertinent 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; [and]

(17) information that is also contained in a public court record[.]

Gov't Code § 552.022(a)(1), (17). The submitted information includes reports completed by the sheriff subject to section 552.022(a)(1) and documents that have been signed by a judge or magistrate that constitute public court records subject to section 552.022(a)(17). The sheriff may only withhold the completed reports if they are excepted from disclosure under section 552.108 of the Government Code or expressly made confidential under "other law." The sheriff may only withhold the court documents if they are confidential under "other law." You claim the information subject to section 552.022 is excepted from disclosure under section 552.103 of the Government Code. However, this section is a discretionary exception that protects a governmental body's interests and is, therefore, not "other law" for purposes of section 552.022. *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 No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the sheriff may not withhold the information subject to section 552.022, which we have marked, under section 552.103 of the Government Code. However, portions of this information are subject to section 552.101 of the Government Code, which is "other law" for purposes of section 552.022. Thus, we will consider the applicability of section 552.101 to this information.

Section 552.101 of the Government Code also encompasses laws that make criminal history record information ("CHRI") confidential. CHRI generated by the National Crime Information Center or by the Texas Crime Information Center is confidential under federal and state law. Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. Open Records Decision No. 565 at 7 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* Section 411.083 of the Government Code deems confidential CHRI the Department of Public Safety ("DPS") maintains, except DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See* Gov't Code § 411.083. Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090-.127. Similarly, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F. Section 411.083 does not apply to active warrant information or other information relating to one's current involvement with the criminal justice system. *See id.* § 411.081(b) (police department allowed to disclose information pertaining to person's current involvement in the criminal justice system). The sheriff must withhold the CHRI we have marked in the information subject to section 552.022 under section 552.101 of the Government Code in conjunction with federal law and chapter 411 of the Government Code.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information that (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). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. This office has found some kinds of medical information or information indicating disabilities or specific illnesses to be excepted from required public disclosure under common-law privacy. *See* Open Records Decision No. 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Upon review, we have marked information that identifies a specific illness pertaining to a living individual that is of no legitimate public interest. The sheriff must withhold this marked information under section 552.101 of the Government Code in conjunction with common-law privacy.

We next turn to the information not subject to section 552.022. Section 552.103 of the Government Code provides in part 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). The sheriff 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 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 sheriff must meet both prongs of this test for information to be excepted under 552.103(a). 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"). This office has also found litigation was reasonably anticipated where the opposing party threatened to sue on several occasions and hired an attorney. *See* Open Records Decision No. 288 (1981). 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).

You state, and provide documentation reflecting, that concurrent with the sheriff's receipt of the request for information, the sheriff received a letter from the requestor containing a specific threat to sue the sheriff. You also state, and the letter reflects, that this lawsuit would pertain to the sheriff's potential liability in the death of the named individual while in the sheriff's custody. Thus, we agree the sheriff reasonably anticipated litigation on the date it received the request for information. Upon review, we agree the submitted

information relates to this anticipated lawsuit. Accordingly, the sheriff may withhold the remaining information at issue under section 552.103 of the Government Code.

We note, however, once information has been obtained by all parties to the anticipated litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the potential opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, the sheriff must release the marked custodial death report pursuant to article 49.18(b) of the Code of Criminal Procedure. The marked medical records may only be released in accordance with the MPA. The sheriff must withhold the information we marked under section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code and common-law privacy. The sheriff must release the remaining information we marked pursuant to section 552.022 of the Government Code. The sheriff may withhold the remaining submitted information 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](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,



Bob Davis  
Assistant Attorney General  
Open Records Division

RSD/tf

Ref: ID# 402942

Enc. Submitted documents

c: Requestor  
(w/o enclosures)