



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 19, 2011

Ms. Laura Garza Jimenez
County Attorney
Nueces County
901 Leopard Street, Room 207
Corpus Christi, Texas 78401

OR2011-07055

Dear Ms. Jimenez:

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# 419222.

The Nueces County Sheriff's Department (the "department") received a request for all records, offense reports, video and audio recordings, photographs, officer, guard, inmate and other witness statements, and all other relevant information pertaining to the requestor's incarceration, specifically those arising out of the physical assault and bodily injury that occurred against the requestor while incarcerated in the Nueces County Jail. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note a portion of the documents at issue are the requestor's medical records, access to which is governed by the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. Section 159.002 of the MPA provides in part the following:

(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). Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004; Open Records Decision No. 598 (1991). This office has determined 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 (1988), 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.” *See* Open Records Decision No. 546 (1990). 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). Pursuant to the MPA, medical records must be released upon the patient's 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, 159.005. Any subsequent release of medical records must be consistent with the purposes for which the governmental body obtained the records. *See id.* § 159.002(c); Open Records Decision No. 565 at 7 (1990). Upon review, we find the information we have marked constitutes the requestor's medical records, and thus may only be released in accordance with the MPA.

Next, we note the remaining information includes a document filed with a court. Section 552.022(a)(17) of the Government Code provides for required public disclosure of “information that is also contained in a public court record,” unless the information is expressly confidential under other law. Gov't Code § 552.022(a)(17). We have marked the document that is subject to section 552.022(a)(17). Although you seek to withhold this document under sections 552.103 and 552.108 of the Government Code, these sections are discretionary exceptions that protect a governmental body's interest and are, 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 Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 542 at 4 (1990) (statutory predecessor to section 552.103 subject to waiver), 177 at 3 (1977) (statutory predecessor to section 552.108 subject to waiver). As such, the court document at issue may not be withheld under sections 552.103 and 552.108 of the Government Code. While you also raise section 552.101 of the Government Code in conjunction with common-law privacy for the court-filed document, information that has been filed with a court is not protected by common-law privacy. *See Star-Telegram v. Walker*, 834 S.W.2d 54 (Tex. 1992) (common-law privacy not applicable to court-filed document). In addition, you also raise

section 552.101 in conjunction with section 411.083 of the Government Code, which is “other law” for purposes of section 552.022. Thus, we will consider its applicability under section 552.101 for the court-filed document at issue. We also will consider your claim under sections 552.101, 552.103, and 552.108 for the information that is not subject to section 552.022(a)(17).

We will first address your arguments for the remaining information not subject to section 552.022(a)(17) of the Government Code. Section 552.108(a)(1) of the Government Code excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime[.]” A governmental body claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See* Gov’t Code §§ 552.108(a)(1), 552.301(e)(1)(A). We note that the remaining information includes a statutory warning. Because a copy of this document, which we have marked, has been provided to the arrestee, we find that its release will not interfere with the detection, investigation, or prosecution of crime. *See id.* § 552.108(a)(1). Therefore, the department may not withhold the statutory warning under section 552.108(a)(1). You state, and provide an affidavit from the department’s Chief Deputy representing, that the submitted information relates to a pending criminal investigation, and that release of such information would interfere with the detection, investigation, or prosecution of this case. Based upon this representation and our review, we conclude that the release of the remaining information would interfere with the detection, investigation, or prosecution of crime, and agree that section 552.108 is applicable. *See Houston Chronicle Publ’g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975) (court delineates law enforcement interests that are present in active cases), *writ ref’d n.r.e.*, 536 S.W.2d 559 (Tex. 1976).

Section 552.108 of the Government Code does not except from disclosure basic information about an arrested person, an arrest, or a crime. Gov’t Code § 552.108(c). Basic information refers to the information held to be public in *Houston Chronicle*. This information includes, but is not limited to, the details of the arrest, the physical condition of the arrested person, and a detailed description of the offense. *See* Open Records Decision No. 127 (1976) (summarizing types of information deemed public by *Houston Chronicle*). We note that basic information includes the arrestee’s social security number.¹ *Id.* Accordingly, with the

¹Section 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. Gov’t Code § 552.147(b).

exception of the statutory warning and basic information, the department may withhold the remaining information pursuant to section 552.108(a)(1) of the Government Code.²

You claim the statutory warning is excepted under section 552.103 of the Government Code. Section 552.103 provides in relevant 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 purpose of section 552.103 is to protect the litigation interests of governmental bodies that are parties to the litigation at issue. *See id.* § 552.103(a); Open Records Decision No. 638 at 2 (1996) (section 552.103 only protects the litigation interests of the governmental body claiming the exception). A governmental body has the burden of providing relevant facts and documents to show section 552.103(a) 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).

We note the purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information that is related to litigation through discovery procedures. *See* ORD 551 at 4-5. Thus, information that has either been obtained from or provided to the opposing party in the litigation is not excepted from

²As our ruling is dispositive for the information subject to section 552.108(a)(1), we do not address your remaining claim against disclosure for this information, except to note that basic information held to be public in *Houston Chronicle* is generally not excepted from public disclosure under section 552.103 of the Government Code. Open Records Decision No. 597 (1991).

disclosure under section 552.103(a), and it must be disclosed. As discussed above, the statutory warning was provided to the arrested individual. Therefore, the statutory warning may not be withheld under section 552.103 of the Government Code. As you raise no further exceptions to its disclosure, the statutory warning must be released to this requestor.

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. This section also encompasses section 411.083 of the Government Code, which pertains to criminal history record information ("CHRI") generated by the National Crime Information Center or by the Texas Crime Information Center. Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that state agencies obtain from the federal government or other states. *See* Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *See id.* Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety ("DPS") maintains, except DPS may disseminate this information in accordance with chapter 411, subchapter F of the Government Code. *See* Gov't Code § 411.083. Upon review, we find none of the information subject to section 552.022(a)(17) or the basic information contains confidential CHRI. Accordingly, the department may not withhold any portion of the court-filed document or the basic information under section 552.101 in conjunction with section 411.083.

We note the court document contains fingerprints subject to section 560.003 of the Government Code.³ Because this section is "other law" for purposes of section 552.022, we address this argument under section 552.101 for the court filed document at issue. Section 560.003 of the Government Code, which is also encompassed by section 552.101 of the Government Code, provides that "[a] biometric identifier in the possession of a governmental body is exempt from disclosure under [the Act]." Gov't Code § 560.003; *see id.* § 560.001(1) ("biometric identifier" means retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry). Section 560.002 of the Government Code 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). You do not inform us, and the submitted information does not indicate, that section 560.002 permits the disclosure of the submitted fingerprint information in this instance. Therefore, the department must withhold the fingerprints we have marked under section 552.101 in conjunction with section 560.003 of the Government Code when releasing the court filed document to the requestor.

³The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

In summary, the department must only release the requestor's medical records in accordance with the MPA. The department must release the court-filed document we have marked pursuant to section 552.022(a)(17) of the Government Code, but must withhold the marked fingerprints under section 552.101 in conjunction with section 560.003 of the Government Code. With the exception of the statutory warning and basic information, the department may withhold the remaining information under section 552.108(a)(1) of the Government Code.⁴

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,



Kirsten Brew
Assistant Attorney General
Open Records Division

KB/dls

Ref: ID# 419222

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁴We note the information being released contains confidential information to which the requestor has a right of access. Thus, if the department receives another request for this particular information from a different requestor, then the department should again seek a decision from this office.