



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 29, 2011

Mr. Paul Mazer
Associate Counsel
Community Education Centers
35 Fairfield Place
West Caldwell, New Jersey 07006

OR2011-09239

Dear Mr. Mazer:

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# 422553.

The Parker County Jail (the "jail"), which you represent, received a request for information related to a specified incident involving a named individual. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, and 552.119 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

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 Office of 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 revised report are confidential under article 49.18(b). Although you claim this information is protected by sections 552.101 and 552.103 of the Government Code, the exceptions to disclosure found in the Act do not generally apply to information that other statutes make public. *See Collins v. Tex Mall, L.P.*, 297 S.W.3d 409, 415 (Tex. App.—Fort

¹We assume that the "representative sample" 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 that those records contain substantially different types of information than that submitted to this office.

Worth 2009, no pet.) (statutory provision controls and preempts common law only when statute directly conflicts with common law principle); *CenterPoint Energy Houston Elec. LLC v. Harris County Toll Rd.*, 436 F.3d 541, 544 (5th Cir. 2006) (common law controls only where there is no conflicting or controlling statutory law); *see also* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Thus, the jail must release the submitted custodial death report, which we have marked, pursuant to article 49.18(b) of the Code of Criminal Procedure.

Next, we note portions of the remaining submitted information, which we have marked, consist of completed reports subject to section 552.022(a)(1) of the Government Code. Section 552.022(a)(1) provides for the required public disclosure of “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). Pursuant to section 552.022(a)(1), completed investigations, reports, and evaluations are expressly public unless they are either excepted under 552.108 of the Government Code or are expressly confidential under other law. Although you raise section 552.103 of the Government Code for this information, section 552.103 is a discretionary exception to disclosure 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 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 jail may not withhold the information at issue under section 552.103 of the Government Code. Because section 552.101 of the Government Code can provide a compelling reason to withhold information, we will consider your arguments under this section for the information subject to section 552.022. Additionally, we will consider your arguments under sections 552.103 of the Government Code for the information not subject to section 552.022 of the Government 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 the common-law right of privacy, which protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* At 681-82. In this instance, the information at issue is related to an incident involving an individual who is now deceased. Because privacy is a personal right that lapses at death, a deceased individual has no right to privacy. *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 therefore

conclude the jail may not withhold any of the information at issue under section 552.101 of the Government Code in conjunction with common-law privacy.

You assert the information not subject to section 552.022 is excepted from disclosure under section 552.103 of the Government Code, which 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). 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).

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 establish litigation is reasonably anticipated, a governmental body must provide this office with "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." *Id.* This office has concluded a governmental body's receipt of a claim letter it represents to be in compliance with the notice requirements of the Texas Tort Claims Act (the "TTCA"), chapter 101 of the Civil Practice and Remedies Code, is sufficient to establish litigation is reasonably anticipated.

You assert the jail reasonably anticipates litigation pertaining to the remaining information at issue because on March 24, 2011, the requestor submitted a notice of claim letter. You provide our office with a copy of this notice of claim letter. You further assert the claim letter meets the requirements of the TTCA. Based on your representations and our review, we conclude the jail reasonably anticipated litigation when it received the request for

information. You assert the remaining information at issue relates to the litigation because it pertains to the incident that is the basis of the anticipated litigation against the jail. Thus, we agree the remaining information at issue relates to the anticipated litigation. Accordingly, the jail may withhold the information not subject to section 552.022 of the Government Code under section 552.103 of the Government Code.²

However, 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. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded or is no longer anticipated. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, the jail must release the custodial death report we have marked pursuant to article 49.18(b) of the Code of Criminal Procedure. The jail may withhold the information not subject to section 552.022 of the Government Code under section 552.103 of the Government Code. The remaining information 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.

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,



Vanessa Burgess
Assistant Attorney General
Open Records Division

VB/dls

²As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

Ref: ID# 422553

Enc. Submitted documents

c: Requestor
(w/o enclosures)