



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 31, 2011

Ms. Jenny Gravley
Taylor Olson Adkins Sralla Elam L.L.P.
6000 Western Place, Suite 200
Fort Worth, Texas 76107-4654

OR2011-12605

Dear Ms. Gravley:

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# 428620.

The Eules Fire Department EMS (the "department"), which you represent, received a request for a named individual's records.¹ You claim the submitted information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

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 encompasses information protected by other statutes, such as section 773.091 of the Health and Safety Code, which provides in relevant part as follows:

(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.

¹Although the requestor demands the individual's records pursuant to section 74.051(d) of the Civil Practice and Remedies Code, you state you are treating this demand for records as a request under the Act.

Health & Safety Code § 773.091(b). You acknowledge some of the submitted information constitutes emergency medical services (“EMS”) records maintained by an EMS provider documenting emergency medical services provided to a patient by EMS. Therefore, the information is generally confidential under section 773.091. We note records confidential under section 773.091 may be disclosed to “any person who bears a written consent of the patient or other persons authorized to act on the patient’s behalf for the release of confidential information.” *Id.* § 773.092(e)(4). Section 773.093 provides a consent for release of EMS records must specify (1) the information or records to be covered by the release; (2) the reasons or purpose for the release; and (3) the person to whom the information is to be released. *Id.* § 773.093. Although you raise section 552.103 of the Government Code, we note a specific statutory right of access provision prevails over general exceptions to disclosure under the Act. *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). In this instance, the requestor represents a parent of the deceased patient to whom the submitted EMS records pertain. You acknowledge the requestor has provided the department with a consent form signed by the patient’s parent for the release of records. We note this consent form specifies the information to be covered by the release, the purposes for the release, and the persons to whom the information is to be released. Therefore, the department must release the EMS records in their entirety in accordance with chapter 773 of the Health and Safety Code.

You raise section 552.103 of the Government Code for the remaining information. 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). A 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, 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 demonstrate litigation is reasonably anticipated, the governmental body must furnish concrete evidence litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* This office has concluded a governmental body's receipt of a claim letter that it represents to be in compliance with the notice requirements of the Texas Tort Claims Act ("TTCA"), chapter 101 of the Civil Practice and Remedies Code, or an applicable municipal ordinance, is sufficient to establish that litigation is reasonably anticipated. *See* Open Records Decision No. 638 at 4 (1996). If that representation is not made, the receipt of a claim letter is a factor we will consider in determining, from the totality of the circumstances presented, whether the governmental body has established litigation is reasonably anticipated. *Id.*

You contend the remaining information, which consists of a health insurance claim form, pertains to a pending health care liability claim made by the requestor against the department. The request for information also states the requestor is providing statutory notice of a claim under section 74.051 of the Civil Practice and Remedies Code. You state "the notice appears to be in compliance with the notice that is required prior to initiating a health care liability suit." Based on your arguments and our review of the submitted documents, we find the department reasonably anticipated litigation on the date the department received the instant request. Furthermore, we agree the remaining information pertains to the anticipated litigation for purposes of section 552.103. Accordingly, we conclude the department may generally withhold the information at issue under section 552.103.

However, we note the opposing party in the anticipated litigation may have seen or had access to the health insurance claim form. 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. Therefore, if the opposing party has seen or had access to information relating to litigation, through discovery or otherwise, then there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, the information the opposing party in the anticipated litigation has seen or had access to may not be withheld under section 552.103. Therefore, to the extent the opposing party has seen or had access to the health insurance claim form, the department must release it. If the opposing party has not seen or had access to the health insurance claim form, which we have marked, the department may withhold it under section 552.103 of the Government Code. We note the applicability of this exception ends once the related litigation concludes or is no longer

reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, the department must release the submitted EMS records in their entirety to this requestor in accordance with chapter 773 of the Health and Safety Code. To the extent the opposing party has not seen or had access to the health insurance claim form we have marked, the department may withhold it under section 552.103 of the Government Code. Otherwise, the department must release it.

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,



Mack T. Harrison
Assistant Attorney General
Open Records Division

MTH/em

Ref: ID# 428620

Enc. Submitted documents

c: Requestor
(w/o enclosures)