



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 27, 2011

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

OR2011-13979

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# 431171.

The Nueces County Jail and the Nueces County Sheriff's Department (collectively, the "county") received two requests from the same requestor for information pertaining to a named inmate and his death. You claim that the requested 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.

Initially, we note that some of the submitted information, which we have marked, consists of completed reports and investigations made by or for the county, which are 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), a completed report or investigation is expressly public unless it is either excepted under 552.108 of the Government Code or is expressly confidential under other law. Although you raise section 552.103 of the Government Code, 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 No. 665 at 2 n.5 (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 county may not withhold the information subject to section 552.022, which we have marked, under section 552.103 of the Government Code. However, because section 552.101 of the Government Code is considered “other law” for purposes of section 552.022(a)(1), we will address your arguments under this exception for the information subject to section 552.022, as well as the remaining information. Further, we note portions of the information subject to section 552.022 may be excepted from disclosure pursuant to sections 552.102, 552.117, 552.1175, and 552.130 of the Government Code.¹ Because these sections are also “other law” for purposes of section 552.022, we will address their applicability to the information subject to section 552.022. We will also address your argument under section 552.103 for the information that is not subject to section 552.022(a)(1).

Next, we note the submitted information includes sexual offender registration 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 exception encompasses information other statutes make confidential, including article 62.005(b) of the Code of Criminal Procedure. Article 62.051 of the Code of Criminal Procedure requires a sex offender registrant to provide the following information to the Texas Department of Public Safety (“DPS”) sex offender registration database: the person’s full name; each alias; date of birth; sex; race; height; weight; eye color; hair color; social security number; driver’s license number; shoe size; home address; a recent color photograph, or if possible, an electronic image of the person; a complete set of fingerprints; the type of offense the person was convicted of; the age of the victim; the date of conviction; the punishment received; an indication as to whether the person is discharged, paroled, or released on juvenile probation, community supervision, or mandatory supervision; an indication of each license, as defined by article 62.005(g), that is held or sought by the person; an indication as to whether the person is or will be employed, carrying on a vocation, or a student at a particular public or private institution of higher education in this state or another state, and the name and address of that institution; and any other information required by DPS. *See* Crim. Proc. Code art. 62.051(c). This information is public information with the exception of the person’s social security number, driver’s license number, telephone number, all information required by DPS outside of the enumerated categories of information, and any information that would identify the victim of the offense for which the person is subject to registration. *See id.* art. 62.005(b). Thus, the county must withhold or release the information we have marked that is subject to article 62.005 of the Code of Criminal Procedure in accordance with article 62.005(b). *See* Open Records Decision Nos. 613 at 4 (1993) (exceptions in Act cannot impinge on statutory right of access

¹The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

to information), 451 (1986) (specific statutory right of access provisions overcome general exceptions to disclosure under the Act).

Section 552.101 also encompasses section 560.003 of the Government Code, which provides “[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). Accordingly, a person, or the person’s authorized representative, has a right of access under section 560.002(1)(A) to that person’s biometric information. The submitted information contains the fingerprints of the deceased inmate at issue, which we have marked. In this instance, as an attorney representing the family of the deceased inmate, the requestor has a right of access to the fingerprints at issue. *See id.* § 560.002(1). Although you seek to withhold the fingerprints under section 552.103 of the Government Code, the exceptions to disclosure found in the Act are generally not applicable to information that other statutes make public. *See Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989)*. Thus, the marked fingerprints must be released to the requestor pursuant to section 560.002(1)(A). *See Open Records Decision No. 481 at 4 (1987)* (privacy theories not implicated when individual requests information concerning himself).

You also raise section 552.101 of the Government Code in conjunction with chapter 241 of the Health & Safety Code. Chapter 241 is also known as the Texas Hospital Licensing Law. *See Health & Safety Code § 241.001*. We note sections 241.152 and 241.153 of the Health and Safety Code govern the disclosure of health care information *by a hospital or by an agent or an employee of a hospital*. *See id.* §§ 241.152 (written authorization for disclosure of health care information), .153 (disclosure without written authorization). You have not demonstrated, however, and it is not otherwise clear to this office, how or why any information held by the county would be subject to section 241.152, section 241.153, or any other provision of chapter 241 of the Health and Safety Code. We therefore conclude you may not withhold any of the remaining the information under section 552.101 on that basis.

Section 552.101 also encompasses chapter 611 of the Health and Safety Code. Section 611.002 provides in part:

(a) Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.

(b) Confidential communications or records may not be disclosed except as provided by Section 611.004 or 611.0045.

Id. § 611.002(a)-(b); *see also id.* § 611.001 (defining “patient” and “professional”). Sections 611.004 and 611.0045 of the Health and Safety Code provide for access to information that section 611.002 makes confidential only by certain individuals. *See id.* §§ 611.004, .0045. A portion of the remaining information, which we have marked, constitutes mental health records of the deceased inmate. Therefore, the marked records are generally confidential under section 611.002. However, sections 611.004 and 611.0045 of the Health and Safety Code permit disclosure of mental health records to the patient’s personal representative if the patient is deceased. *Id.* §§ 611.004, .0045; Open Records Decision No. 565 (1990). As noted, a statutory right of access overcomes general exceptions to disclosure under the Act, including your claim under section 552.103. *See* ORDs 613, 451. Therefore, the county may only release the marked mental health records in accordance with sections 611.004 and 611.0045.² However, none of the remaining information you have marked constitutes mental health records subject to chapter 611 and may not be withheld under section 552.101 on that basis.

Section 552.101 also encompasses section 773.091 of the Health and Safety Code, which is applicable to records of the provision of emergency medical services (“EMS”). Section 773.091 is also encompassed by section 552.101 of the Government Code, and provides in part:

(a) A communication between certified emergency medical services personnel or a physician providing medical supervision and a patient that is made in the course of providing emergency medical services to the patient is confidential and privileged and may not be disclosed except as provided by this chapter.

(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.

(c) Any person who receives information from confidential communications or records as described by this chapter, other than a person listed in Section 773.092 who is acting on the survivor’s behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was obtained.

Id. § 773.091(a)-(c). Although you contend that section 773.091 is applicable to some of the remaining information, none of the remaining information consists of or was obtained from

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

EMS records. Consequently, the county may not withhold any of the remaining information under section 552.101 in conjunction with section 773.091.

You assert some of the remaining information, which you have marked, is confidential under section 552.101 of the Government Code in conjunction with section 159.002 of the Occupations Code. Section 552.101 also encompasses medical records made confidential under the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. Occ. Code §§ 151.001-165.160. Section 159.002 of the MPA provides, in pertinent 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 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 (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). Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See* Occ. Code §§ 159.002, .004; Open Records Decision No. 598 (1991). Upon review, we find the information we have marked constitutes confidential medical records under the MPA.

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. Occ. Code §§ 159.004, .005. When a patient is deceased, as is the case here, medical records pertaining to the deceased patient may only be released on the signed written consent of the decedent's personal representative. *See id.* § 159.005(a)(5). The medical records of a deceased patient may only be released on the signed written consent of the

decedent's personal representative. *See id.* § 159.005(a)(5). 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); ORD 565 at 7. Although you claim some of the medical records at issue 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* ORD 451 at 4. Therefore, the medical records we have marked must be withheld under section 552.101 of the Government Code in conjunction with the MPA, unless the county receives signed written consent for release of those records that complies with sections 159.004 and 159.005 of the MPA.³ However, none of the remaining information you have marked consists of medical records subject to the MPA and may not be withheld on that basis.

We will now address the applicability of sections 552.101, 552.102, 552.117, 552.1175, and 552.130 of the Government Code to the information subject to section 552.022(a)(1) of the Government Code. Section 552.101 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. We note 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). Accordingly, the county must withhold the CHRI we have marked in the information subject to section 552.022 under section 552.101 in conjunction with chapter 411 and federal law. However, none of the remaining information you have marked is CHRI for purposes of chapter 411, and it may not be withheld under section 552.101 on that basis.

³As our ruling is dispositive for the marked medical records, we need not address your remaining arguments against disclosure of this information.

Section 552.101 also encompasses the doctrine of common-law privacy. Common-law privacy 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). The type of information considered intimate or embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. This office has found that some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. See Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps).

Upon review, we find that portions of the remaining information subject to section 552.022 are highly intimate or embarrassing and not of legitimate public concern. Therefore, the county must withhold the information we have marked in the documents at issue and indicated in the video recordings pursuant to section 552.101 of the Government Code in conjunction with common-law privacy.

We note the remaining information subject to section 552.022 includes information that is excepted from disclosure under section 552.102(a) of the Government Code. Section 552.102(a) excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” Gov’t Code § 552.102(a). The Texas Supreme Court recently held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, No. 08-0172, 2010 WL 4910163 (Tex. Dec. 3, 2010). Having carefully reviewed the information at issue, the county must withhold the employee birth dates we have marked under section 552.102(a) of the Government Code. The county must also withhold the employee birth dates in the audio versions of the employee interviews pursuant to section 552.102(a).

Section 552.117(a)(1) of the Government Code excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who request this information be kept confidential under section 552.024 of the Government Code. See Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 2 (to be codified as an amendment to Gov’t Code § 552.117(a)); Open Records Decision No. 622 (1994). Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. See Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date of the

governmental body's receipt of the request for the information. We have marked the personal information of county employees in the remaining information subject to section 552.022. If the employees whose personal information is at issue made timely elections under section 552.024, the county must withhold the information we have marked under section 552.117(a)(1). If any of the employees did not make a timely election under section 552.024, the information pertaining to that employee may not be withheld under section 552.117(a)(1).

We note portions of the remaining information subject to section 552.022 may be subject to section 552.1175 of the Government Code. This section protects information relating to a county jailer, as defined by section 1701.001 of the Occupations Code. Section 552.1175(b) provides as follows:

(b) Information that relates to the home address, home telephone number, emergency contact information, or social security number of an individual to whom this section applies, or that reveals whether the individual has family members is confidential and may not be disclosed to the public under this chapter if the individual to whom the information relates:

(1) chooses to restrict public access to the information; and

(2) notifies the governmental body of the individual's choice on a form provided by the governmental body, accompanied by evidence of the individual's status.

Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 3 (to be codified as an amendment to Gov't Code § 552.1175(b)). Some of the submitted offense reports contain the personal information of county employees who may be county jailers. This information is not held by the county in an employment context but, rather, in a law enforcement context. Therefore, if the information we have marked in the submitted offense reports pertains to county jailers, and the county jailers at issue choose to restrict public access to their information in accordance with section 552.1175(b), then the county must withhold the marked information pursuant to section 552.1175.

We note the remaining information subject to section 552.022 also includes a Texas driver's license number. Section 552.130 of the Government Code excepts from disclosure information relating to a motor vehicle operator's or driver's license or permit issued by an agency of this state or another state or country. *See* Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 4 (to be codified as an amendment to Gov't Code § 552.130). The county must withhold the driver's license number we have marked under section 552.130 of the Government Code.

We will now address your argument under section 552.103 of the Government Code for the remaining information that is not subject to section 552.022 of the Government Code, which we have marked. 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 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 that 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 governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *Id.* In Open Records Decision No. 638 (1996), this office stated that a governmental body has met its burden of showing that litigation is reasonably anticipated when it received a notice of claim letter and the governmental body represents that the notice of claim letter is in compliance with the requirements of the Texas Tort Claims Act ("TTCA"), Civ. Prac. & Rem. Code, ch. 101, or an applicable municipal ordinance.

You state, and provide documentation showing, that simultaneous with the first request, the county received a notice of claim letter from the requestor stating his clients assert a claim for damages relating to the named inmate's death in custody. You represent, and the letter states, that the notice of claim letter meets the requirements of the TTCA. Based on your

representations and our review of the submitted documents, we conclude the county reasonably anticipated litigation on the dates it received the present requests for information. You state the information at issue is related to the anticipated litigation because it pertains to the named inmate and his death. Upon review, we find the remaining information, which we have marked, relates to the anticipated litigation. Accordingly, the county may generally withhold the information we have marked pursuant to section 552.103 of the Government Code.

We note once the information at issue has been obtained by all parties to the anticipated litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to the information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Accordingly, the county may only withhold the marked information that the potential opposing parties to the litigation have not seen or had access to under section 552.103 of the Government Code. We note that the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, the county must withhold or release the information we have marked that is subject to article 62.005 of the Code of Criminal Procedure in accordance with article 62.005(b). The marked fingerprints must be released to the requestor pursuant to section 560.002(1)(A) of the Government Code. The county may only release the marked mental health records in accordance with sections 611.004 and 611.0045 of the Health and Safety Code. The medical records we have marked must be withheld under section 552.101 of the Government Code in conjunction with the MPA, unless the county receives signed written consent for release of those records that complies with sections 159.004 and 159.005 of the MPA. The county must withhold the CHRI we have marked under section 552.101 in conjunction with chapter 411 and federal law. The county must withhold the information we have marked and indicated pursuant to section 552.101 in conjunction with common-law privacy. The county must withhold employee birth dates we have marked, as well as the employee birth dates within the audio recordings of employee interviews, under section 552.102(a) of the Government Code. If the employees whose personal information is at issue made timely elections under section 552.024 of the Government Code, the county must withhold the information we have marked under section 552.117(a)(1) of the Government Code. If the information we have marked in the submitted offense reports pertains to county jailers, and the county jailers at issue choose to restrict public access to their information in accordance with section 552.1175(b) of the Government Code, then the county must withhold the marked information pursuant to section 552.1175. The county must withhold the driver's license number we have marked under section 552.130 of the Government Code. The county may withhold the information we have marked under section 552.103 of the Government Code. The remaining information, which is subject to section 552.022(a)(1) of the Government Code, 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,

A handwritten signature in cursive script, appearing to read "Jennifer Luttrall".

Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/dls

Ref: ID# 431171

Enc. Submitted documents

c: Requestor
(w/o enclosures)