



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

November 22, 2011

Mr. Gerard A. Calderon  
Assistant Criminal District Attorney  
Civil Section  
300 Dolorosa, Fifth Floor  
San Antonio, Texas 78205

OR2011-17296

Dear Mr. Calderon:

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# 437390.

The Bexar County Sheriff's Office (the "sheriff") received a request for information relating to thirteen named inmates of the Bexar County Adult Detention Center who died while in custody and for correspondence with the Bexar County District Attorney's office or the Office of the Attorney General (the "OAG") regarding which portions of inmate death records are subject to public disclosure or a new form or policy regarding public custodial death reports.<sup>1</sup> You state you have released some information to the requestor, including custodial death reports.<sup>2</sup> You state the county has not communicated with the OAG regarding public release of inmate death records and has no new form or policy regarding

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<sup>1</sup>You state the sheriff sought and received clarification from the requestor regarding the request. *See* Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used).

<sup>2</sup>Article 49.18(b) of the Code of Criminal Procedure provides that with the exception of any portion of the custodial death report the OAG determines is privileged, the OAG shall make the report public. Crim. Proc. Code art. 49.18(b).

public custodial death reports.<sup>3</sup> You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.108, 552.111, and 552.134 of the Government Code and privileged under rule 503 of the Texas Rules of Evidence.<sup>4</sup> We have considered the exception you claim and reviewed the submitted representative sample of information.<sup>5</sup>

Initially, we note Exhibit H is not responsive to the instant request for information because it was created after the date the request was received. This ruling does not address the public availability of non-responsive information, and the sheriff is not required to release non-responsive information in response to this request.

Next, we note a portion of the submitted information is subject to section 552.022 of the Government Code, which provides in part:

(a) [T]he 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 [s]ection 552.108[.]

Gov't Code § 552.022(a)(1). Exhibit I consists of a completed investigation subject to section 552.022(a)(1) and must be released unless it either is excepted under section 552.108 of the Government Code or is expressly confidential under other law. *See id.* Although you raise sections 552.103 and 552.111 of the Government Code for this information, these sections are discretionary in nature and thus may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 439, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 677 at 10 (2002) (attorney work product privilege under section 552.111 may be waived), 665 at 2 n.5

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<sup>3</sup>The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

<sup>4</sup>Although you raise section 552.101 of the Government Code in conjunction with rule 503 of the Texas Rules of Evidence, this office has concluded section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). We also note section 552.101 does not encompass rule 1.05 of the Texas Disciplinary Rules of Professional Conduct.

<sup>5</sup>We assume 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 those records contain substantially different types of information than that submitted to this office.

(2000) (discretionary exceptions generally). As such, sections 552.103 and 552.111 do not constitute other law that make information expressly confidential for the purposes of section 552.022. Therefore, the sheriff may not withhold the completed investigation under section 552.103 or section 552.111. Because sections 552.101 and 552.134 of the Government Code are “other law” for purposes of section 552.022, we will consider your claims under those exceptions. Additionally, we will consider your argument under section 552.108 because information subject to section 552.022(a)(1) may be withheld under that exception. We will also consider your arguments under sections 552.103 and 552.111 for the information not subject to section 552.022.

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. You raise section 552.101 in conjunction with the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”). At the direction of Congress, the Secretary of Health and Human Services (“HHS”) promulgated regulations setting privacy standards for medical records, which HHS issued as the Federal Standards for Privacy of Individually Identifiable Health Information. *See* HIPAA, 42 U.S.C. § 1320d-2 (Supp. IV 1998) (historical & statutory note); Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. Pts. 160, 164 (“Privacy Rule”); *see also* Attorney General Opinion JC-0508 at 2 (2002). These standards govern the releasability of protected health information by a covered entity. *See* 45 C.F.R. pts. 160, 164. Under these standards, a covered entity may not use or disclose protected health information, excepted as provided by parts 160 and 164 of the Code of Federal Regulations. *Id.* § 164.502(a).

This office has addressed the interplay of the Privacy Rule and the Act. *See* Open Records Decision No. 681 (2004). In that decision, we noted section 164.512 of title 45 of the Code of Federal Regulations provides a covered entity may use or disclose protected health information to the extent such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law. *See* 45 C.F.R. § 164.512(a)(1). We further noted the Act “is a mandate in Texas law that compels Texas governmental bodies to disclose information to the public.” *See* ORD 681 at 8; *see also* Gov’t Code §§ 552.002, .003, .021. We therefore held the disclosures under the Act come within section 164.512(a). Consequently, the Privacy Rule does not make information confidential for the purpose of section 552.101 of the Government Code. *See Abbott v Tex. Dep’t of Mental Health & Mental Retardation*, 212 S.W.3d 648 (Tex. App.—Austin 2006, no pet.); ORD 681 at 9; *see also* Open Records Decision No. 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). Because the Privacy Rule does not make confidential information that is subject to disclosure under the Act, the sheriff may not withhold any portion of the submitted information on that basis.

Section 552.101 also encompasses 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 states obtain from the federal government or other states. Open Records Decision No. 565 (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 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. Furthermore, 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 chapter 411, subchapter F. Upon review, we find a portion of Exhibit I, which we have marked, constitutes CHRI which the sheriff must withhold under section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code.

We note the remaining information in Exhibit I contains fingerprints. 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].” *Id.* § 560.003; *see also id.* §§ 560.001(1) (defining “biometric identifier” to include fingerprints), .002(1)(A) (governmental body may not sell, lease, or otherwise disclose individual’s biometric identifier to another person unless individual consents to disclosure). Therefore, the sheriff must withhold the fingerprints in Exhibit I we have marked under section 552.101 in conjunction with section 560.003 of the Government Code.

Section 552.101 of the Government Code also encompasses 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). This office has concluded 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). Upon review, we find none of the remaining information in Exhibit I constitutes medical records subject to the MPA; thus, the sheriff may not withhold any of the remaining information on that basis.

We understand you to also claim portions of the remaining information in Exhibit I are excepted from public disclosure under section 552.101 in conjunction with section 181.101 of the Health and Safety Code. Section 181.101 provided “[a] covered entity shall comply with the [HIPAA] and Privacy Standards relating to . . . (3) uses and disclosures of protected health information, including requirements relating to consent[.]” Act of June 17, 2001, 77th Leg., R.S., ch. 1511, § 1, sec. 181.101, 2001 Tex. Gen. Laws 5384, 5386. However, that section was repealed effective September 1, 2003. Act of June 17, 2001, 77th Leg., R.S., ch. 1511, § 1, sec. 181.101, 2001 Tex. Gen. Laws 5384, 5386, repealed by Act of April 10, 2003, 78th Leg., R.S., ch. 3, § 1, 2003 Tex. Gen. Laws 5. Therefore, the sheriff may not withhold any of the remaining information in Exhibit I under section 552.101 of the Government Code in conjunction with former section 181.101 of the Health and Safety Code.

Next, we turn to your arguments under section 552.108 of the Government Code. Section 552.108 provides in part:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:

...

(4) it is information that:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from [required public disclosure] if:

...

(3) the internal record or notation:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

Gov't Code § 552.108(a)(4), (b)(3). A governmental body that claims an exception to disclosure under section 552.108 must reasonably explain how and why this exception is applicable to the information the governmental body seeks to withhold. *See id.* §§ 552.108, .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986). Exhibit I consists of a sheriff investigation of the custodial death of a jail inmate. We find you have failed to demonstrate how this information either was prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation or reflects the mental processes or legal reasoning of an attorney representing the state. Thus, we conclude the sheriff may not withhold any of the remaining information in Exhibit I under section 552.108(a)(4) or (b)(3) of the Government Code.

You also raise section 552.134 for the remaining information in Exhibit I. Section 552.134 provides, in part, as follows:

(a) Except as provided by Subsection (b) or by Section 552.029, information obtained or maintained by the Texas Department of Criminal Justice is excepted from the requirements of Section 552.021 if it is information about an inmate who is confined in a facility operated by or under a contract with the department.

Gov't Code § 552.134(a). Section 552.134 is applicable only to information that relates to an inmate of the Texas Department of Criminal Justice. You seek to withhold information relating to an inmate of the Bexar County Adult Detention Center under section 552.134. However, you do not explain, and it is not otherwise clear, how or why section 552.134 would be applicable to the information at issue. Therefore, we conclude the sheriff may not withhold any of the remaining information in Exhibit I under section 552.134 of the Government Code. As you raise no further argument against disclosure, the sheriff must release the remaining information in Exhibit I.

Next, we address your arguments for the information not subject to section 552.022 of the Government Code. Section 552.103 of the Government Code provides in part the following:

(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 is pending or reasonably anticipated on the date the governmental body receives the request for information, and (2) the information at issue is related to that litigation. *See Thomas v. Cornyn*, 71 S.W.3d 473, 487 (Tex. App.—Austin 2002, no pet.); *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 satisfy both prongs of this test for information to be excepted under section 552.103(a).

You assert Exhibits J and K relate to pending litigation against the sheriff. You provide documentation showing that, prior to the sheriff's receipt of the present request for information, a lawsuit styled *Harlan E. McVea v. Bexar County, Texas; Unknown, Unnamed Officers of the Bexar County Sheriff's Office; and Bexar County Hospital District*, Cause No. SA-11-CV-0256-FB (NN), was filed and is currently pending in the San Antonio Division of the United States District Court for the Western District of Texas. Therefore, we agree litigation was pending on the date the sheriff received the present request for information. We also find Exhibits J and K relate to the pending litigation for purposes of section 552.103. Therefore, the sheriff may withhold Exhibits J and K under section 552.103 of the Government Code. As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

We note, however, 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. Thus, 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). We note the applicability of section 552.103(a) ends when the litigation has concluded or is no longer anticipated. Attorney General Opinion MW-575 at 2 (1982); Open Records Decision Nos. 350 at 3 (1982), 349 at 2 (1982).

In summary, the sheriff must withhold the CHRI in Exhibit I we have marked under section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code. The sheriff must withhold the fingerprints in Exhibit I we have marked under section 552.101 in conjunction with section 560.003 of the Government Code. The sheriff may withhold Exhibits J and K under section 552.103 of the Government Code. The sheriff must release the remaining information.

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,



Mack T. Harrison  
Assistant Attorney General  
Open Records Division

MTH/em

Ref: ID# 437390

Enc. Submitted documents

c: Requestor  
(w/o enclosures)