



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 20, 2012

Ms. Charlotte A. Towe
Assistant General Counsel
Office of the General Counsel
Texas Department of Criminal Justice
P.O. Box 4004
Huntsville, Texas 77342-4004

OR2012-00977

Dear Ms. Towe:

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# 442975.

The Texas Department of Criminal Justice (the "department") received a request for photographs and statements of passengers concerning a motor vehicle accident. You state the department has released or will release some of the requested information. You claim that the submitted information is excepted from disclosure under sections 552.103 and 553.134 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note you have submitted information in addition to the requested photographs and passengers' statements which is not responsive to the instant request. This ruling does not address the public availability of non-responsive information, and the department is not required to release non-responsive information in response to this request.

We note the submitted information includes injury reports with nurses' notes that are subject to the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations 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.”¹ Gov’t Code § 552.101. This section encompasses information protected by the MPA which provides in relevant part:

(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 (1987), 370 (1983), 343 (1982). The 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. Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). In this instance, the requestor is the authorized representative of one of the individuals whose medical records are at issue. Thus, the requestor may have a right of access to this individual’s medical records under the MPA. *See* Occ. Code § 159.005(a)(2). 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* ORD 598. Accordingly, the medical records we have marked may only be released in accordance with the MPA.²

Next, we address your argument under section 552.103 of the Government Code for the remaining responsive information. Section 552.103 provides 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

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

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

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. To meet this burden, the governmental body must show (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.). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). *See* Open Records Decision No. 551 at 4 (1990).

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." Open Records Decision No. 452 at 4 (1986). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See id.* Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.³ *See* Open Records Decision No. 555 (1990); *see also* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Further, the fact a potential opposing party has

³In addition, this office has concluded litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

hired an attorney who makes a request for information does not establish litigation is reasonably anticipated. *See* Open Records Decision No. 361 (1983).

You assert the department reasonably anticipated litigation regarding the specified incident. The requestor's law firm represents an offender who was a passenger in the department's vehicle at the time of the accident. The requestor stated in her request that neither the department nor the adverse driver's insurance has accepted liability for the accident and that is a problem for her client. You state that the issue in any ensuing litigation would be offender civil rights - medical, to which the requested photographs would be essential for establishing a claim. Based on your representations and our review, we find litigation was reasonably anticipated when the department received this request for information and the information at issue relates to the anticipated litigation. Accordingly, the department may withhold the remaining responsive information, consisting of the requested photographs, under section 552.103 of the Government Code.⁴

In reaching this conclusion, we assume the opposing party in the anticipated litigation has not already seen or had access to any of the information at issue. 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. If the opposing party has seen or had access to information relating to litigation, through discovery or otherwise, 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 also note the applicability of section 552.103 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 medical records we have marked may only be released in accordance with the MPA. The department may withhold the remaining information under section 552.103 of the Government Code.

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

⁴As our ruling for this information is dispositive, we need not address your remaining argument against disclosure.

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, reading "Kathryn R. Mattingly". The signature is written in black ink and is positioned above the typed name.

Kathryn R. Mattingly
Assistant Attorney General
Open Records Division

KRM/som

Ref: ID# 442975

Enc. Submitted documents

c: Requestor
(w/o enclosures)