



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

August 7, 2012

Ms. Holly C. Lytle  
Assistant County Attorney  
El Paso County Attorney's Office  
500 East San Antonio, Room 503  
El Paso, Texas 79901

OR2012-12330

Dear Ms. Lytle:

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# 461290.

The El Paso County Sheriff's Office (the "sheriff's office") received a request for information related to a named deceased individual who was confined in the county jail. You claim 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 information you submitted.

We first note section 552.022 of the Government Code encompasses some of the submitted information. Section 552.022(a)(1) provides for required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body[,]" unless the information is made confidential under the Act or other law or excepted from disclosure under section 552.108 of the Government Code. Gov't Code § 552.022(a)(1). Section 552.022(a)(17) provides for required disclosure of "information that is also contained in a public court record[,]" unless the information is made confidential under the Act or other law. *Id.* § 552.022(a)(17). Thus, the completed reports and the court documents we have marked are subject to disclosure under section 552.022(a)(1) and (17). We note the sheriff's office does not claim an exception to disclosure under section 552.108 for the marked information. Although the sheriff's office does claim section 552.103 of the Government Code, that section is a discretionary exception 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 Gov't Code § 552.103); Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.103 does not make information confidential for purposes of section 552.022(a)(1) and (17). Thus, the sheriff's office may not withhold any of the information encompassed by section 552.022(a)(1) and (17) under section 552.103 of the Government Code. Therefore, because the sheriff's office claims no other exception for any of that information, and none of the information in question is confidential under the Act or other law, the marked information encompassed by section 552.022(a)(1) and (17) of the Government Code must be released to the requestor.

We next note the remaining information includes the deceased individual's medical records, which are confidential under the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code.<sup>1</sup> Section 159.002 of the MPA provides in 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). 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* Open Records Decision No. 598 (1991). Medical records must be released on the patient's signed, written consent, provided 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. *See* Occ. Code §§ 159.004, .005. 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); Open Records Decision No. 565 at 7 (1990). In this instance, the information submitted as Exhibit C consists of the deceased individual's medical records. We note the requestor identifies himself as an attorney for the individual's parents. The medical records must be withheld under section 159.002 of the MPA unless the sheriff's

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<sup>1</sup>Section 552.101 of the Government Code excepts from public 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.

office receives the required written consent for their release under sections 159.004 and 159.005 of the MPA.

We also note the remaining information includes the deceased individual's fingerprints, which we have marked. The public availability of fingerprints is governed by sections 560.001, 560.002, and 560.003 of the Government Code. Section 560.003 provides that "[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 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). Although the sheriff's office seeks to withhold the marked fingerprints under section 552.103 of the Government Code, we note the exceptions to disclosure found in the Act are generally not applicable to information other statutes make public. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Therefore, if the requestor is a representative of the deceased individual's estate, then he has a right of access to the marked fingerprints under section 560.002(1)(A) of the Government Code, and they must be released. *See* Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning himself). If the requestor is not a representative of the deceased individual's estate, then the sheriff's office must dispose of the fingerprints in accordance with the rest of this decision.

Next, we address your claim under section 552.103 of the Government Code for the remaining information at issue, including the fingerprints if the requestor is not a representative of the deceased individual's estate. Section 552.103 provides in 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 that seeks to withhold information under section 552.103 has the burden of providing relevant facts and documents sufficient

to establish the applicability of this exception to the information at issue. To meet this burden, the governmental body must demonstrate that (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) the information at issue is related to the pending or anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1<sup>st</sup> Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See* Open Records Decision No. 551 at 4 (1990).

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 that 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.”<sup>2</sup> *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 (the “TTCA”), chapter 101 of the Civil Practice and Remedies Code, is sufficient to establish that litigation is reasonably anticipated. If this representation is not made, then the receipt of the claim letter is a factor we will consider in determining, from the totality of the circumstances presented, whether the governmental body has established that litigation is reasonably anticipated. *See* Open Records Decision No. 638 at 4 (1996).

You note, and our review confirms, the requestor states he represents the family of the deceased individual “pursuant to [the TTCA].” You contend the sheriff’s office reasonably anticipated litigation on the date of its receipt of the present request for information. You have provided documentation indicating the sheriff’s office would be a party to the litigation. Based on your representations and documentation, our review, and the totality of the circumstances, we find the remaining information is related to litigation the sheriff’s office reasonably anticipated when it received the present request for information. We therefore conclude the sheriff’s office may withhold the remaining information, including the deceased individual’s fingerprints if the requestor is not a representative of his estate, under section 552.103 of the Government Code.

In reaching this conclusion, we assume the opposing parties in the anticipated litigation have not seen or had access to any of the remaining information. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information that relates to litigation through discovery procedures. *See* ORD 551 at 4-5. If the opposing parties have seen or had access to information related to anticipated

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<sup>2</sup>Among other examples, this office concluded litigation was reasonably anticipated where the opposing party took the following objective steps toward litigation: (1) filed a complaint with the Equal Employment Opportunity Commission (“EEOC”), *see* Open Records Decision No. 336 (1982); (2) 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 (3) threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

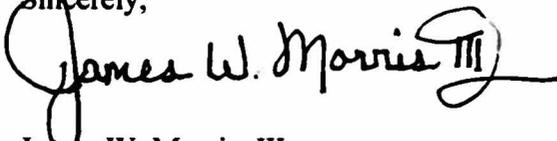
litigation, through discovery or otherwise, then there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). We also note the applicability of section 552.103 ends once the related litigation concludes or is no longer reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, the sheriff's office (1) must release the marked information encompassed by section 552.022(a)(1) and (17) of the Government Code; (2) must withhold the medical records in Exhibit C under section 159.002 of the MPA unless the sheriff's office receives the required consent for their release under sections 159.004 and 159.005 of the MPA; (3) must release the marked fingerprints pursuant to section 560.002 of the Government Code if the requestor is a representative of the deceased individual's estate; and (4) may withhold the remaining information at issue, including the fingerprints if the requestor is not a representative of the individual's estate, under section 552.103 of the Government Code.<sup>3</sup> As we are able to make these determinations, we need not address your other arguments against disclosure.

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,



James W. Morris, III  
Assistant Attorney General  
Open Records Division

JWM/tch

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<sup>3</sup>We note the information to be released includes social security numbers of prisoners other than the deceased individual. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

Ref: ID# 461290

Enc: Submitted information

c: Requestor  
(w/o enclosures)