



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

November 26, 2012

Ms. Janet I. Monteros  
Assistant County Attorney  
El Paso County  
500 East San Antonio, Room 503  
El Paso, Texas 79901

OR2012-18857

Dear Ms. Monteros:

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# 471913 (CA-OP-12-428).

The El Paso County Medical Examiner's Office (the "medical examiner's office") received a request for medical record information related to a named individual. You state you have released some of the requested information. You claim that the submitted information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, we note the submitted information contains documents subject to section 552.022 of the Government Code. Section 552.022 provides, in relevant part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

(1) 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). Information subject to subsection 552.022(a)(1) may be withheld only if it is excepted by section 552.108 of the Government Code or confidential under the Act or other law. *Id.* Although you raise section 552.103 of the Government Code for this information, that is a discretionary exception to disclosure that

protects only a governmental body's interests and does not make information confidential under the Act. *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 Nos. 665 at 2 n.5 (discretionary exceptions generally), 473 (1987) (section 552.103 may be waived). As such, the medical examiner's office may not withhold any of the information subject to section 552.022(a)(1) under section 552.103. As you raise no additional exceptions to disclosure for this information, which we have marked, you must release it to the requestor. However, we will address your argument against disclosure for the remaining information.

We next note a portion of the remaining information is subject to section 552.101 of the Government Code.<sup>1</sup> Section 552.101 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 made confidential by other statutes. Access to medical records is governed by the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. *See Occ. Code* §§ 151.001-165.160. Section 159.002 of the MPA provides, in 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). Information 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 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 ORD* Nos. 487, 370, 343. We have also found when a file is created as the result of a hospital stay, all the documents in the file relating to diagnosis

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

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). Section 159.001 of the MPA defines “patient” as a person who consults with or is seen by a physician to receive medical care. See Occ. Code § 159.001(3). Under this definition, a deceased person cannot be a patient under section 159.002 of the MPA. See Open Records Decision No. 487, 370, 343. Thus, the MPA is applicable only to records related to a person who was alive at the time of diagnosis, evaluation, or treatment to which the records pertain. Upon review, we find the information we have marked constitutes confidential medical records subject to the MPA.

Medical records must be released on the patient’s signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) the 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). 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. Thus, although you claim 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 Open Records Decision No. 451 at 4 (1986). Accordingly, the medical records we have marked must be withheld under section 552.101 of the Government Code in conjunction with the MPA, unless the medical examiner’s office receives signed written consent for release of those records that complies with section 159.004 and 159.005 of the MPA.<sup>2</sup>

You assert the remaining information is subject to section 552.103 of the Government Code. Section 552.103 provides, in relevant 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

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<sup>2</sup>As our ruling is dispositive, we need not address your remaining argument for this information.

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 applies in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the requested information is related to that litigation. *See 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 parts of this test for information to be excepted under section 552.103(a). *See* ORD 551 at 4.

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 litigation is reasonably anticipated, a governmental body must provide this office with “concrete evidence showing the claim that litigation may ensue is more than mere conjecture.” *Id.* This office has concluded a governmental body’s receipt of a claim letter 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 litigation is reasonably anticipated. *See* Open Records Decision No. 638 at 4 (1996).

You state the El Paso County Attorney’s Office (the “county attorney’s office”) reasonably anticipates litigation related to the remaining information at issue. You note the medical examiner’s office does not anticipate being a party to the anticipated litigation. In such a situation, we require an affirmative representation from the governmental body with the litigation interest that the governmental body wants the information withheld. You provide a letter from the county attorney’s office stating it objects to release of the remaining information because it received a notice of claim letter from the requestor prior to receiving the present request for information. The county attorney’s office asserts the claim letter meets the requirements of the TTCA, and alleges El Paso County’s (the “county”) liability for the death of the requestor’s client. The county attorney’s office states it represents the county in such matters. Based on these representations and our review, we conclude the county attorney’s office reasonably anticipated litigation when the medical examiner’s office received the request for information. The county attorney’s office states the remaining information at issue relates to the litigation because it pertains to the death at issue in the anticipated litigation. Upon review, we agree section 552.103(a) applies to the remaining information. Accordingly, the medical examiner’s office may withhold the remaining information at issue on behalf of the county attorney’s office.

We note, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been

obtained from or provided to the opposing party in the litigation is not excepted from disclosure under section 552.103(a). We note the applicability of section 552.103(a) ends once the litigation has concluded or is no longer reasonably anticipated. See Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

In summary, the medical examiner's office must release the information subject to section 552.022 of the Government Code. The medical examiner's office must withhold the medical records we have marked under section 552.101 of the Government Code in conjunction with the MPA, unless the medical examiner's office receives signed written consent for release of those records that complies with section 159.004 and 159.005 of the MPA. The remaining information may be withheld under section 552.103 of the Government Code on behalf of the county attorney's office.

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,



Vanessa Burgess  
Assistant Attorney General  
Open Records Division

VB/dls

Ref: ID# 471913

Enc. Submitted documents

c: Requestor  
(w/o enclosures)