



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

December 28, 1994

Mr. David J. LaBrec
Strasburger & Price, L.L.P.
901 Main Street, Suite 4300
Dallas, Texas 75202

OR94-819

Dear Mr. LaBec:

You have asked whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 25014.

An inmate in the Wise County Jail was working on a construction project to expand the jail when he was killed by a wall that collapsed. The Wise County Attorney received several open records requests from the attorney representing the deceased inmate's family. You contend that this information is excepted from disclosure under section 552.103(a) of the Government Code.¹

These open records requests from the attorney were directed to you. The requestor, Terry Fleming, notified Wise County (the "county") that he was representing the deceased inmate's family "for the purpose of asserting a claim against the Sheriff's Department for the untimely and wrongful death" of the inmate. According to correspondence submitted to this office, you subsequently notified Mr. Fleming that any

¹You asserted that the attorney-client privilege under section 552.107 protects this information. Section 552.107 protects information that reveals client confidences to an attorney or that reveals the attorney's legal advice, opinion, and recommendation. Open Records Decision No. 574 (1990). However, this exception was not raised within the ten day period required by section 552.301 of the Government Code.

We note that our review of the "representative samples" of documents you submitted to this office indicates that section 552.107 is not applicable to the documents at issue. Also, section 552.107 is waived if not timely asserted. Open Records Decision No. 630 (1994). The "mere fact" that information falls within the section 552.107 exception does not constitute a compelling reason to overcome the presumption of openness under section 552.302. *Id.* at 6-7.

communication or correspondence with the county must to be made through your office. A memorandum from the county auditor concerning the "jail addition accident" was also sent to all employees, stating:

ALL requests for ANY information or records from ANY county office, official or employee to ANY individual or entity, even those coming under the auspices of the Open Records Act, are to be denied and are to be referred either to this office or to our attorney, Mr. David J. LaBrec

In accordance with your instructions and the county's policy, Mr. Fleming submitted to your office various open records requests.² We note that since the county directed open records requests concerning the accident be sent to you and this requestor was specifically told to direct inquiries for information to you, it was entirely appropriate for the requestor to send his open records requests to you.³ Mr. Fleming has asked for:

- (1) The accident report concerning the inmate's death;
- (2) Investigative memos or documents pertaining to the accident and cause of the wall collapse and a copy of the security camera videotape for the day of the accident;
- (3). Copies of the inmate's literacy, I.Q. and mental function capacity tests;
- (4) Documents concerning mental consultations and evaluations performed on the inmate;
- (5) Information pertaining to testing, evaluation, treatment and counseling for Edward Logan, another inmate, and the county's requests for mental counseling for Mr. Logan;
- (6) Records concerning Mr. Logan's transfers to other correctional facilities;

²We note that in all but one of the requests Mr. Fleming specifically stated that he was seeking this information under the "Texas Open Records Act." Mr. Fleming's failure to reference the Open Records Act in one request does not make that request invalid, however. Any written communication which can reasonably be judged a request for public information falls under the Open Records Act, whether or not it references the statute. Open Records Decision No. 497 (1988) at 1-3.

³We note that section 552.223 of the Government Code requires a governmental body to treat all requests for information uniformly without permitting consideration of the person making the request or his motives in doing so. Open Records Decision No. 542 (1990).

- (7) Records showing what medications were prescribed for Mr. Logan while he was incarcerated;
- (8) The name, address, and telephone number for a special inspector hired for the jail construction project;
- (9) Information as to what day the special inspector made certain inspections;
- (10) A copy of any information concerning inspection of the jail construction project;
- (11) The inmate's autopsy report;
- (12) Any county training manuals or documents dealing with the construction of jails and safety for construction workers;
- (13) Architectural plans for the construction project;
- (14) Lists of engineers, contractors, laborers or specialists hired to work on the construction project; and
- (15) Copies of the security camera videotape for three days before and three days after the death.

In your letter of March 3, 1994, you state that you based your decision to withhold these documents on prior decisions of this office. Information is excepted from disclosure under section 552.103(a) if a governmental entity timely raises the exception and demonstrates that (1) litigation is pending or reasonably anticipated and (2) the information at issue is related to that litigation. *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 (1990) at 4. Although section 552.103(a) gives an attorney for a governmental body the discretion to claim this exception, the determination as to whether section 552.103(a) is applicable is subject to review by this office. Open Records Decision Nos. 551 at 5; 511 (1988) at 3. Whether litigation is reasonably anticipated is determined on a case-by-case basis. Open Records Decision No. 452 (1986) at 4.

Your first letter to this office seeking an open records decision was dated March 3, 1994. Mr. Fleming's requests for a copy of the accident report, the videotape for the day of the accident, and copies of investigative memos and documents are stamped as having been received by your office on January 5 and January 19, 1994. You therefore failed to request a decision from this office concerning the first two requests within the ten days required by section 552.301 of the Government Code. Section 552.301 requires a governmental body to request a decision from the attorney general within ten days of receiving the request if it is information that the governmental body wishes to withhold.

If the governmental body fails to request a decision within ten days of receiving the open records request, the information at issue is presumed public. Gov't Code § 552.302.

To overcome this presumption of openness, the governmental body must show a compelling interest to withhold the information, such as a confidentiality statute or protection of third party interests which have been recognized by the courts. *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.--Austin 1990, no writ); *City of Houston v. Houston Chronicle Publishing Co.*, 673 S.W.2d 316 (Tex. App.--Houston [1st Dist.] 1984, no writ); Open Records Decision Nos. 319 (1982); 150 (1977); 26 (1974). However, the exception you raise, section 552.103(a), is a discretionary exception that is waived by the failure to raise it within the ten day deadline. Gov't Code § 552.007; Open Records Decision No. 473 (1987) at 2. You must release the accident report, investigative documents pertaining to the accident,⁴ and a copy of the security camera videotape for the day of the accident, except for those documents that are confidential as discussed below.

Some of the requested information is confidential information that may not be released. The requestor asked for the inmate's autopsy report. You submitted to this office a copy of a custodial death report. The custodial death report indicates that an autopsy report was an attachment to the custodial death report. Article 49.18(b) of the Code of Criminal Procedure provides an exception from disclosure for custodial death reports that are prepared by a law enforcement agency and filed with the Office of the Attorney General, as was the report submitted to this office. Open Records Decision No. 521 (1989). Generally, attachments to the custodial death report are also excepted from disclosure. *Id.* However, autopsy reports are expressly made public under section 11, article 49.25 of the Code of Criminal Procedure and may not be withheld from disclosure. *See* Open Records Decision No. 529 (1989). You therefore must withhold the custodial death report but must release the autopsy report.

The requestor has asked for information that may be medical and mental health records. We note that none of these requested records were submitted to this office for review. However, medical and mental health records may not be withheld under the Open Records Act; rather, these records are made confidential by other law with specific access provisions. Section 5.08(b) of the Medical Practices Act, art. 4495b, V.T.C.S. provides for the confidentiality of records created or maintained by a physician:

(b) Records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician are confidential and privileged and may not be disclosed except as provided in this section.

⁴We note that an open records request applies to the information in existence at the time the request is received. Open Records Decision No. 452 (1986) at 3. However, the county must make a good faith effort to relate a request to the information it has. Open Records Decision No. 561 (1990).

Section 5.08 of the Medical Practices Act provides both for the confidentiality of such records from the general public and for *mandatory access* to the records for individuals who fall within the exceptions to confidentiality and who comply with the statutory access requirements. *Id.* § 5.08(b), (h), (j), (k). Section 5.08(j)(1) provides that a “personal representative” of a deceased patient must provide a written, signed consent stating (1) the records covered by the release, (2) reasons or purpose for release, and (3) giving the identify of the person to whom the information is to be released. *See* Open Records Decision No. 578 (1990). We have not been advised as to whether the requestor has submitted a valid request for medical records, but note that if proper consent has been given these records must be released by the county.

Chapter 611 of the Health and Safety Code provides for the confidentiality of mental health records created or maintained by a mental health professional. Section 611.002(a) reads as follows:

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.

Section 611.004 provides for access to these records by certain individuals, including “a person who has the written consent of the patient” and a personal representative if the patient is deceased. *See* Open Records Decision No. 565 (1990). It appears that the requestor may be entitled to the deceased inmate’s mental health records. The requestor would also be entitled to Mr. Logan’s mental health records if the requestor has obtained written consent.

You submitted to this office newspaper reports showing that the requestor has publicly stated he will sue the county.⁵ Correspondence you submitted to this office indicates litigation is reasonably anticipated. You also submitted “representative samples of the materials responsive” to the requests.⁶ The information that was submitted is related to the anticipated litigation. We note that you did not submit any documents that appear to be responsive to requests numbered (3), (4), (5), and (7) above. We assume that you have documents responsive to these requests, since you did not indicate otherwise.

⁵Since the newspaper stories you sent are not responsive to the request, we assume they were sent to demonstrate that litigation is reasonably anticipated.

⁶We assume that 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, 497 (1988) (where requested documents are numerous and repetitive, governmental body should submit representative sample; but if each record contains substantially different information, all must be submitted.) This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Because you have met your burden of showing the applicability of 552.103(a), you may withhold information other than which we have previously indicated must be disclosed or access to which is governed by other law. In making this determination, we assume that the opposing parties to the litigation have not previously had access to these records. Absent special circumstances, once information has been obtained by all parties to the litigation, *e.g.*, through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 (1982) at 2. If the opposing parties in the anticipated litigation have seen or had access to any of the information in these records, there would be no justification for now withholding that information from the requestor pursuant to section 552.103(a).

The applicability of section 552.103(a) also ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982) at 3. We note that since the section 552.103(a) exception is discretionary with the governmental entity asserting the exception, it is within the county's discretion to release this information to the requestor. Gov't Code § 552.007; Open Records Decision No. 542 (1990) at 4. We are resolving this matter with an informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact our office.

Yours very truly,



Ruth H. Soucy
Assistant Attorney General
Open Government Section

RHS/LRD/rho

Ref.: ID# 25014

Enclosures: Submitted documents

cc: Mr. Terry K. Fleming
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(w/o enclosures)