



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

July 24, 1995

Mr. David Lloyd
Assistant City Attorney
City of Austin
Department of Law
P.O. Box 1088
Austin, Texas 78767-1088

OR95-667

Dear Mr. Lloyd:

You ask 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# 32036.

The City of Austin (the "city") received a request for Emergency Medical Service ("EMS") records concerning a particular patient. The requestor, an attorney, has asked for EMS records under the Medical Liability and Insurance Improvement Act, V.T.C.S. art. 4590i, (the "Medical Liability Act"). The requestor also gave notice of a pending health care claim under the act. The request for records and notice of claim were made on behalf of the requestor's clients, the survivors of the deceased patient. You contend that the requested information is excepted from disclosure under sections 552.101 and 552.103(a) of the Government Code.

In Open Records Decision No. 598 (1991), as in this situation, the city received a request for information about a patient and notice of claim under the Medical Liability Act. The requestor in that situation also was an attorney representing a survivor of a deceased patient. Section 4.01 of the Medical Liability Act provides:

(a) Any person or his authorized agent asserting a health care liability claim shall give written notice of such claim by certified mail, return receipt requested, to each physician or health care provider against whom such claim is made at least 60 days before the filing of a suit in any court of this state based upon a health care liability claim.

(b) In such pleadings as are subsequently filed in any court, each party shall state that it has fully complied with the provisions of this section and shall provide such evidence thereof as the judge of the court may require to determine if the provisions of this Act have been met.

....

(d) *All parties shall be entitled to obtain complete and unaltered copies of the claimant's medical records from any other party within 10 days from the date of receipt of a written request for such records;* provided, however, that the receipt of a medical authorization executed by the claimant herein shall be considered compliance by the claimant with this section.

(e) For purposes of this section and *notwithstanding Section 5.08, Medical Practice Act (Article 4495b, Vernon's Texas Civil Statutes), or any other law*, a request for the medical records of a deceased person or a person who is incompetent shall be deemed to be valid if accompanied by an authorization signed by a parent, spouse, or adult child of the deceased or incompetent person. [Emphasis added.]

In Open Records Decision No. 598 (1991) at 1, this office stated that EMS records are medical records subject to the provisions of section 5.08 of the Medical Practice Act, V.T.C.S. art. 4495b. We also determined that since access to EMS records is governed by statutory provisions outside of chapter 552, section 552.103(a) is inapplicable. Open Records Decision No. 598 (1991) at 1. However, when notice of a health care claim is made to an appropriate health care provider under the Medical Liability Act, the terms of section 4.01(e) provide the mechanism for access to those records rather than section 5.08 of the Medical Practice Act. See V.T.C.S. art. 4590i, § 1.03(3) (health care provider defined).

You assert that section 773.091 of the Health and Safety Code specifically makes the EMS records confidential. Section 773.091 provides, in part:

(b) Records of the identity, evaluation or treatment of a patient by emergency medical services personnel or by a physician providing medical supervision that are created by the emergency medical services personnel or physician or maintained by an emergency medical services provider are confidential and privileged and may not be disclosed except as provided by this chapter.

Section 773.093 provides for release of confidential information upon receipt of written consent complying with certain statutory provisions. In Open Records Decision No. 598 (1991) at 3, n. 2, this office stated that its analysis concerning confidentiality and access to records under section 773.091 would be the same as under the Medical Practice Act:

Section 773.091 thus provides for the same confidentiality, exceptions to confidentiality, and requirements for release of the information at issue as does section 5.08 of the Medical Practice Act. . . . our analysis under the Medical Practice Act is therefore equally applicable to a consideration of the issue under the Health and Safety Code provisions.

You have not indicated that the city has received any type of authorization to release the EMS records. However, we note that the provisions of section 4.01(e) of the Medical Liability Act concerning release of medical records of a deceased individual are valid "notwithstanding the Medical Practice Act or any other law" when notice of a health care claim is made to an appropriate health care provider under the Medical Liability Act. Thus, the EMS records on pages 4 through 8 must be released in accordance with section 4.01 of the Medical Liability Act.

You also submitted documents, labeled pages 11 and 12, of a peer review committee that you contend are confidential pursuant to section 773.095 of the Health and Safety Code, which provides:

(a) The proceedings and records of organized committees of hospitals, medical societies, emergency medical service providers, or first responder organizations relating to the review, evaluation, or improvement of an emergency medical service provider, a first responder organization, or emergency medical services personnel are confidential and not subject to disclosure by court subpoena or otherwise.

(b) The records and proceedings may be used by the committee and the committee members only in the exercise of proper committee functions.

(c) This section does not apply to records made or maintained in the regular course of business by an emergency medical services provider, a first responder organization, or emergency medical services personnel.

Pages 11 and 12 appear to be records of an EMS departmental peer review committee relating to the review, evaluation or improvement of the EMS provider's services. As such, they are confidential and not subject to disclosure. See Open Records Decision No. 591 (1991) (construing similar provision regarding medical peer review committee

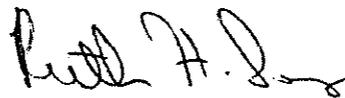
records under Medical Practice Act and concluding (1) that purpose of confidentiality statute is to encourage frank discussion rather than to protect patient privacy and (2) patient whose situation was subject of review had no special right of access to those records).

As to the remaining information on pages 9 and 10, it may be withheld from disclosure pursuant to section 552.103(a). Section 552.103(a) provides an exception for information relating to litigation to which the governmental body is or may be a party. To secure the protection of section 552.103(a), a governmental body must demonstrate 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. You have demonstrated that litigation is reasonably anticipated. Our review of the information at issue indicates it is related to the pending litigation for purposes of section 552.103(a). You may thus withhold from disclosure the information on pages 9 and 10.

In making this determination, we assume that the information on pages 9 and 10 has not previously been disclosed to the requestor, who represents other parties to the anticipated litigation. Absent special circumstances, once information has been obtained by all parties to the litigation, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 (1982) at 2. Gov't Code § 552.007; Open Records Decision No. 542 (1990) at 4. The applicability of section 552.103(a) for non-confidential information also generally ends when the litigation is concluded.¹ Attorney General Opinion MW-575 (1982) at 2; Open Records Decision Nos. 350 (1982) at 3, 349 (1982) at 2.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Ruth H. Soucy
Assistant Attorney General
Open Government Section

¹The information at issue may contain some confidential information that would not be available to the general public once the litigation has concluded and even if the other parties to the litigation have seen the information.

RHS/LRD/rho

Ref.: ID# 32036

Enclosures: Submitted documents

cc: Mr. Don L. Davis
Byrd, Davis and Eisenberg, L.L.P.
707 West 34th Street
Austin, Texas 78705-1294
(w/o enclosures)