



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

November 3, 1995

Mr. James W. Carr
Lavaca County Attorney
Second Floor Courthouse
P.O. Box 576
Hallettsville, Texas 77964

OR95-1178

Dear Mr. Carr:

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# 35882.

Lavaca County (the "county") has received a request for documents relating to an investigation into a death that occurred in a county jail. You have released some of the information to the requestor, the father of the deceased. You assert, however, that the remaining information is excepted from required public disclosure under sections 551.101 and 552.103 of the Government 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." You ask whether article 49.18(b) of the Code of Criminal Procedure in conjunction with section 552.101 of the Government prohibits disclosure of the requested records. In Open Records Decision No. 521 (1989) at 5, this office concluded that under article 49.18(b) of the Code of Criminal Procedure, in conjunction with a directive issued by the Office of the Attorney General, section one of a custodial death report filed with this office is public information, but sections two through five of the report are confidential. *See* Code Crim. Proc. art. 49.18(b) ("The attorney general shall make the report, with the exception of any portion of the report that the attorney general determines is privileged, available to any interested person"). The county has released section one of the related custodial death reports. However, because sections two through five of the reports are deemed confidential under article 49.18(b), the county may not release those sections to the requestor.

You ask whether all of the documents relating to the death are protected under article 49.18(b) of the Code of Criminal Procedure. In Open Records Decision No. 521 (1989) at 6, this office concluded that although article 49.18 authorized the withholding of sections II through IV of the custodial death report and the attachments to that report:

This does not mean that the specific pieces of information contained in the form cannot be obtained through an open records request when the information exists in other forms; it simply means that the investigative report required by subsection (b) need not be released to the public.

In that opinion, we concluded that if a governmental body receives a request for information maintained as part of its ordinary responsibilities, the documents may be withheld only if one of the Open Record Act's exceptions or another specific law protects them. *Id.* at 7. Thus, except for sections two through five of the custodial death report and attachments thereto, the requested records may not be withheld under article 49.18 of the Code of Criminal Procedure.

The requested records include a report prepared by the Lavaca County Emergency Medical Service. Section 773.091(b) of the Health and Safety Code provides in pertinent part:

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.

However, the Emergency Medical Services Act also provides under section 773.092(e):

Communications and records that are confidential under this section may be disclosed to:

....

(4) any person who bears a written consent of the patient or other persons authorized to act on the patient's behalf for the release of confidential information as provided by Section 773.093.

Section 773.093, regarding consent, provides the following:

(a) Consent for the release of confidential information must be in writing and signed by the patient . . . or a *personal representative* if the patient is deceased. [Emphasis added.]

In this case, the requestor is the father of the deceased. We believe this is sufficient proof of the father's personal representative status as provided by section 773.093(a) of the Health and Safety Code.¹ See Open Records Decision No. 598 (1991) (assuming without information to contrary that deceased's widow is his personal representative for purposes of the Medical Practice Act and Health & Safety Code provisions). Therefore, you must release the report prepared by the Lavaca County Emergency Medical Service records to the requestor pursuant to section 773.092(e)(4) of the Health and Safety Code.

Finally, we address your claim that section 552.103 of the Government Code exempts the records from required public disclosure. Section 552.103 exempts from required public disclosure information relating to litigation "to which the state or a political subdivision . . . is or may be a party." Section 552.103 requires concrete evidence that litigation is realistically contemplated; it must be more than mere conjecture. Open Records Decision Nos. 518 (1989) at 5, 328 (1982). Thus, to secure the protection of this exception, a governmental body must demonstrate that requested information "relates" to a pending or reasonably anticipated judicial or quasi-judicial proceeding. Open Records Decision No. 551 (1990). This office has concluded that a reasonable likelihood of litigation exists when an attorney makes a written demand for disputed payments and promises further legal action if they are not forthcoming, see Open Records Decision No. 452 (1986) at 2, and when a requestor hires an attorney who then asserts an intent to sue, see Open Records Decision No. 555 (1990). On the other hand, the mere fact that a person, on more than one occasion, publicly states an intent to sue does not trigger section 552.103(a). Open Records Decision No. 452 (1986) at 5.

The county has the burden of establishing why and how an exception applies to requested information. Open Records Decision Nos. 542 (1990), 532 (1989), 515 (1988). You offer no evidence of any threat of litigation. We conclude that the county has not demonstrated that litigation regarding this matter to which the county may be a party is reasonably anticipated. Accordingly, you may not withhold the requested information under section 552.103 of the Government Code. Therefore, the county must release the requested records, except for sections two through five of the custodial death report and attachments thereto.

¹Although you do not raise it, we note that section 4.01(e) of the Medical Liability and Insurance Improvement Act establishes procedures for obtaining medical records relating to claims of medical liability. See V.T.C.S. art. 4590i, § 4.01 Section 4.01(e) provides that:

notwithstanding Section 5.08, Medical Practice Act . . . or any other law, a request for medical records of a deceased person or 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.

Id. § 4.01(e). While this provision applies only to claims of medical liability, this provision lends support to our conclusion that you may not withhold the EMS records from the requestor in this instance.

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,



Loretta R. DeHay
Assistant Attorney General
Open Records Division

LRD/rho

Ref.: ID# 35882

Enclosures: Submitted documents

cc: Mr. Daniel Silgero
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(w/o enclosures)