Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

March 25, 1997

Mr. Gregory S. Norris
Assistant City Attorney
City of Arlington
P.O. Box 231
Arlington, Texas 76004-0231

OR97-0616

Dear Mr. Norris:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 104978.

The City of Arlington (the "city") received a request for all information about the suicide of a particular individual in the Arlington City Jail. You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.108, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

You claim that some of the requested information is excepted from disclosure under article 49.18 of the Code of Criminal Procedure. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. We conclude that, pursuant to article 49.18 of the Code of Criminal Procedure, as applied through section 552.101 of the Government Code, you may withhold sections II through V of the custodial death report. *See* Open Records Decision No. 521 (1989). Similarly, the documents compiled and attached to the custodial death report as attachments may be withheld. *Id.* at 7. The city may not withhold section I of the custodial death report, as it is expressly made public by statute.

We now address the remainder of the submitted information; that is, information that is not attached to the custodial death report. Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state is or may be a party. The city has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this

burden is a showing 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. The city must meet both prongs of this test for information to be excepted under section 552.103(a).

Litigation cannot be regarded as "reasonably anticipated" unless there is more than a "mere chance" of it--unless, in other words, we have concrete evidence showing that the claim that litigation may ensue is more than mere conjecture. Open Records Decision Nos. 452 (1986), 331 (1982), 328 (1982). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision Nos. 452 (1986), 350 (1982). This office has concluded that litigation is reasonably anticipated when an attorney makes a written demand for disputed payments and promises further legal action if they are not forthcoming, and when a requestor hires an attorney who threatens to sue a governmental entity. Open Records Decision Nos. 555 (1990), 551 (1990).

We believe that, based on the totality of the circumstances, litigation is reasonably anticipated for purposes of chapter 552 of the Government Code.[1] After reviewing the submitted documents, we conclude that they are related to the anticipated litigation. Consequently, with the exception of section I of the custodial death report and the information discussed below, the city may withhold the requested information under section 552.103 of the Government Code.[2]

When the opposing party in the litigation has seen or had access to any of the information in these records, there is no justification for withholding that information from the requestor pursuant to section 552.103(a). Open Records Decision Nos. 349 (1982), 320 (1982). In addition, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982). However, we note that some of the submitted information is confidential by law and must be withheld after the litigation is concluded.

The Medical Practice Act (the "MPA"), article 4495b of Vernon's Texas Civil Statutes, protects from disclosure "[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician." V.T.C.S. art. 4495b, § 5.08(b). The documents submitted to this office include medical records access to which is governed by provisions outside the Open Records Act. Open Records Decision No. 598 (1991). The MPA provides for both confidentiality of medical records and certain

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[1]We note that, although the city claims section 552.103 applies because of its receipt of a notice of claim, the city did not represent to this office that the notice of claim complies with the Texas Tort Claims Act or applicable municipal ordinance as is required by Open Records Decision No. 638 (1996).

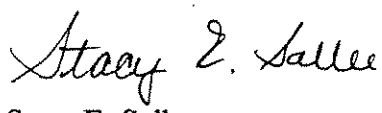
[2]As we have resolved the city's request under sections 552.101 and 552.103, we need not address the city's claimed exceptions under sections 552.108 and 552.111.

statutory access requirements. *Id.* at 2. If the medical records are not attachments to the custodial death report, they may only be released as provided by the MPA.

We are unable to determine if the submitted offense reports are attachments to the custodial death report. If they are, they must be withheld under article 49.18 of the Code of Criminal Procedure. If they are not, the city may withhold all but the information that typically appears on the first page of an offense report under section 552.103. Section 552.103 will not except that information from disclosure. *See* Open Records Decision No. 597 (1991).

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 on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,



Stacy E. Sallee
Assistant Attorney General
Open Records Division

SES/glg

Ref.: ID# 104978

Enclosures: Submitted documents

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Reporter
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(w/o enclosures)