



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

November 23, 1998

Ms. Elaine S. Hengen
Assistant City Attorney
The City of El Paso
2 Civic Center Plaza
El Paso, Texas 79901-1196

OR98-2823

Dear Ms. Hengen:

You have asked whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 119808.

The El Paso Police Department (the "department") received a request from the Federal Bureau of Investigation (the "FBI") for records concerning an internal affairs investigation and copies of photographs taken of a person who was arrested. It is our understanding that there is no applicable federal or state law requiring disclosure of this information to the FBI. *See* Open Records Decision No. 650 (1996). You assert that some of the records are confidential medical records and that the remaining records at issue are protected from disclosure under section 552.103(a).

We agree that the records in Exhibit B which are marked as "medical reports" are medical records, access to which is governed by the Medical Practice Act (the "MPA"), article 4495b of Vernon's Texas Civil Statutes rather than the Open Records Act. Open Records Decision No. 598 (1991). Sections 5.08(b) and (c) of the MPA provide:

(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.

(c) Any person who receives information from confidential communications or records as described in this section other than the persons listed in Subsection (h) of this section who are 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.

Section 5.08(j)(1) provides for release of medical records upon the patient's written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Section 5.08(j)(3) also requires that any subsequent release of medical records be consistent with the purposes for which the police department obtained the records. Open Records Decision No. 565 at 7 (1990).

You assert that the remaining records at issue are protected from disclosure under section 552.103(a) of the Government Code. The test for establishing that section 552.103(a) applies is a two-prong showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 588 (1991). You have shown that litigation is pending, and our review of the records at issue shows that the records are related to the pending litigation.

However, there is generally no section 552.103(a) interest in withholding information that an opposing party in the litigation has seen or had access to. Open Records Decision Nos. 349 (1982), 320 (1982). You indicate that the opposing party in the pending litigation has not had access to the records at issue. However, we note that some of the submitted records were obtained from or provided to the opposing party. We agree that section 552.103(a) is applicable to the other records at issue, though we note that the applicability of section 552.103(a) ends once the litigation concludes.¹ Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

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 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 Records Division

RHS/ch

¹However, if the records contain information that is confidential by law, you must not release such information even at the conclusion of the litigation. Gov't Code §§ 552.101, .352

Ref: ID# 119808

Enclosures: Submitted documents

cc: Mr. Kenneth Lyn Counts
FBI
660 S. Mesa Hills, Suite 3000
El Paso, Texas 79912
(w/o enclosures)