Office of the Attorney General · State of Texas
John Cornyn

March 20, 2001

Ms. Laura Garza Jimenez
Nueces County
901 Leopard, Room 207
Corpus Christi, Texas 78401-3680

OR2001-1095

Dear Ms. Jimenez:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 145126.

The Nueces County Medical Examiner (the "examiner") received a request for all documents relating to the death of a specified individual. You claim that the requested information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that the submitted information in Exhibit C contains an autopsy report. Section 11 of article 49.25 of the Code of Criminal Procedure provides as follows:

> The medical examiner shall keep full and complete records properly indexed, giving the name if known of every person whose death is investigated, the place where the body was found, the date, the cause and manner of death, and shall issue a death certificate. . . . The records are subject to required public disclosure in accordance with Chapter 552, Government Code, except that a photograph or x-ray of a body taken during an autopsy is excepted from required public disclosure in accordance with Chapter 552, Government Code, but is subject to disclosure:
>
> (1) under a subpoena or authority of other law; or
>
> (2) if the photograph or x-ray is of the body of a person who died while in the custody of law enforcement.

Code Crim. Proc. art. 49.25, § 11. Pursuant to section 11, the autopsy report is a public record and must be released to the requestor. *See also* Health & Safety Code § 671.011(a)(2) (including toxicology report as part of the autopsy report). Because the individual died while

in the custody of law enforcement, the photographs taken during the autopsy must be released. We have marked the information that you must release.

You assert that the information in Exhibit G is excepted under section 552.101 in conjunction with section 159.002(b) of the Occupations Code, the Medical Practices Act (the "MPA"). 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 statute. Section 159.002(b) provides the following:

> A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

Thus, access to medical records is governed by provisions outside the Public Information Act. *See* Open Records Decision No. 598 (1991). The MPA provides for both confidentiality of medical records and certain statutory access requirements. Occ. Code §§ 159.002, .003. Medical records may be released only in accordance with the MPA. Open Records Decision No. 598 (1991); *see* Occ. Code §§ 159.004, .005.[1] Therefore, we agree that the documents in Exhibit G are medical records that are subject to the MPA.

You assert that the information in Exhibits C, D, E, F, and G is excepted under section 552.103 of the Government Code. Section 552.103(a) provides as follows:

> (a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

A governmental body has the burden of providing relevant facts and documents to show the applicability of an exception in a particular situation. 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). Further, litigation must be pending or reasonably anticipated on the date the requestor applies to the public information officer for access. Gov't Code § 552.103(c).

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[1]Section 159.004(5) provides for the disclosure of confidential information to a person who has the written consent of the patient as authorized by section 159.005. Section 159.005 states that the consent must be in writing and signed by the patient, parent, or legal guardian and specify the medical records to be released, the reasons for the release and the person to whom the information is to be released. Occ. Code § 159.005(a)-(b).

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986).

You have provided a copy of a letter from an attorney who represents the family of the individual who is the subject of this request. The attorney claims that Nueces County is liable for damages as a result of the individual's death. Accordingly, you have demonstrated that litigation is reasonably anticipated and that the submitted information relates to the anticipated litigation.

However, we note that the submitted information contains a completed report. Section 552.022(a) provides in pertinent part:

> Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:
>
> (3) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Section 552.103 is a discretionary exception under the Public Information Act and is, therefore, not "other law" that makes the submitted information confidential. *See* Open Records Decision No. 551 (1990) (statutory predecessor to section 552.103 serves only to protect a governmental body's position in litigation and does not itself make information confidential). Further, you have not demonstrated nor are we aware of any "other law" that would make the report confidential. Therefore, you must release the marked report.

We note that if the opposing party in the litigation has seen or had access to any of the information in these records, there is no section 552.103(a) interest in withholding that information from the requestor. Open Records Decision Nos. 349 (1982), 320 (1982). We note that the applicability of section 552.103(a) ends once the litigation concludes. Attorney General Opinion MW-575 (1982), Open Records Decision No. 350 (1982). Therefore, you may withhold the remaining information in Exhibits C, D, E, F, and G under section 552.103 of the Government Code.

In conclusion, you must withhold the submitted medical records pursuant to the MPA. You may withhold the submitted information under section 552.103, but you must release the marked autopsy report and photographs as well as the completed report.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

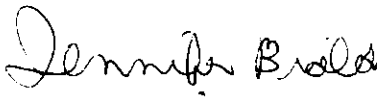
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Jennifer H. Bialek
Assistant Attorney General
Open Records Division

JHB/er

Ref: ID# 145126

Encl: Submitted documents

cc: Mr. Christopher J. Gale
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(w/o enclosures)