



May 2, 2002

Mr. Gordon Bowman
Assistant County Attorney
Travis County
P.O. Box 1748
Austin, Texas 78767

OR2002-2309

Dear Mr. Gordon:

Your predecessor asks whether certain information is subject to required public disclosure under chapter 552 of the Government Code, the Public Information Act (the "Act"). The request was assigned ID# 162228.

The County of Travis (the "county") received a request for copies of medical records and bills pertaining to a named individual. The county claims that the requested information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered the exceptions claimed and reviewed the submitted information.

You assert that the requested information is subject to the Medical Practice Act (the "MPA"). Section 159.002 of the MPA provides:

(b) 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.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is 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.

We agree that some of the records at issue are medical records, access to which is governed by the MPA, chapter 159 of the Occupations Code. We have marked the MPA records accordingly. This office has previously explained that statutes governing access to a specific subset of information held by a governmental body prevail over the generally applicable Act. *See* Open Records Decision Nos. 478 (1987) at 2-3 (Act does not govern special rights of access granted under other statutes); 451 (1986) (predecessor to section 552.103 inapplicable to investigative file to which subject is granted access by other statute); 43 (predecessor to section 552.103 inapplicable to report made public by statute). Thus, access to medical records is governed by the MPA rather than the Act. *See* Open Records Decision No. 598 (1991). Therefore, section 552.103 of the Act is not relevant to the question of access to records subject to the MPA. *See id.* Moreover, our analysis under the MPA is equally applicable to the question of access to records subject to other access statutes, such as section 611.002 of the Health and Safety Code and section 258.051 of the Occupations Code, both of which govern access to portions of the requested information, as we will explain below after we conclude our discussion of the MPA records.

The MPA permits the release of confidential information upon receipt of a signed, written, valid consent as provided under section 159.005 of the MPA. *See* Occ. Code §159.004(5). You assert that the consent accompanying the request is insufficient to overcome the confidentiality of the requested information. The medical records must be released upon receipt of the patient's signed, 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. Occ. Code §§ 159.004, .005. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 546 (1990).

We have reviewed the consent for release. The patient did not specify the purpose or reason for the release of the medical records to the requestor. In the absence of a valid consent for their release, the MPA records are confidential under the MPA and must not be released. *See id.*

The submitted documents also contain mental health records. Chapter 611 of the Health and Safety Code governs the disclosure of mental health records. Chapter 611 provides for the confidentiality of records created or maintained by a mental health professional. Section 611.002 reads in pertinent part as follows:

Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.

Health & Safety Code § 611.002. Section 611.001 defines a “professional” as (1) a person authorized to practice medicine, (2) a person licensed or certified by the state to diagnose, evaluate or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. Sections 611.004, 611.0045, and 611.006 provide for access to mental health records only by certain individuals. *See Open Records Decision No. 565 (1990)*. Section 611.004(a)(4) states that “[a] professional may disclose confidential information only. . . to a person who has the written consent of the patient, . . .[.]” The county may only release the marked document in accordance with the access provisions of chapter 611.

The submitted information also contains dental records. Section 258.051 of the Occupations Code governs dental records. Section 258.102 provides:

(a) The following information is privileged and may not be disclosed except as provided by this article:

- (1) a communication between a dentist and a patient that relates to a professional service provided by the dentist; and
- (2) a dental record.

(b) The privilege described by this section applies regardless of when the patient received the professional service from the dentist.

A “dental record” means dental information about a patient that is created or maintained by a dentist and relates to the history or treatment of the patient. Occ. Code §258.101. Section 258.104 provides for access to dental records upon receipt of the patient’s valid consent. We have marked the information that may only be released in accordance with section 258.104 of the Occupations Code. As with MPA records, dental records must be released upon receipt of the patient’s signed, written consent, provided 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. Occ. Code §258.104. In the absence of a valid consent, the dental records are confidential and must not be disclosed.

As for the remaining information, we will consider your claim under section 552.103. Section 552.103 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.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

The county 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 on the date the requestor requests the information, 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, 481 (Tex. App.--Austin 1997, no pet.); *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 at 4 (1990). The county must meet both prongs of this test for information to be excepted under 552.103(a).

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). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986). In Open Records Decision No. 638 (1996), this office stated that a governmental body has met its burden of showing that litigation is reasonably anticipated when it received a notice of claim letter and the governmental body represents that the notice of claim letter is in compliance with the requirements of the Texas Tort Claims Act ("TTCA"), Civ. Prac. & Rem. Code, ch. 101, or an applicable municipal ordinance.

The county states that it received a notice of claim under the TTCA. The claim was dated February 20, 2001 and appears to have been received by the county on February 28, 2001. The county received the instant request for information on February 13, 2002. Furthermore, the county has established that the requested information is related to the anticipated litigation. Based on your arguments and our review of the submitted information, the county may withhold the remainder of the requested information pursuant to section 552.103(a).

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, 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).

In summary, the county may release the marked medical records only in accordance with the MPA. The county may release the marked mental health records only in accordance with sections 611.004 and 611.0045 of the Health and Safety Code. The county may release the marked dental records only in accordance with section 258.104 of the Occupations Code. The county may withhold the remaining information under section 552.103.

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).

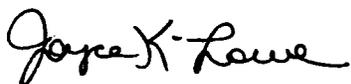
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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 Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



Joyce K. Lowe
Assistant Attorney General
Open Records Division

JKL/sdk

Ref: ID# 162228

Enc: Submitted documents

c: Mr. Robert R. Swafford
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(w/o enclosures)