



OFFICE of the ATTORNEY GENERAL  
GREG ABBOTT

March 21, 2003

Ms. Eugenia A. Cano  
City Attorney  
City of Alvin  
216 W. Sealey  
Alvin, Texas 77511

OR2003-1948

Dear Ms. Cano:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 178208.

The City of Alvin (the "city") received a request for records related to dogs that were impounded or cited for killing other animals or biting people during a certain period of time, certain records of rabies vaccinations, and fines associated with a certain animal impoundment. You claim that the requested information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

We first note that the submitted information includes a medical record that is subject to the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. The MPA provides that "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." Occupations Code § 159.002(b). This office has concluded that the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). Medical records must be released upon the governmental body's 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. *See* 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. *See* Open Records Decision No. 565 at 7 (1990). Accordingly, we conclude that the medical record that we have marked may be disclosed

only in accordance with the access provisions of the MPA. *See* Occ. Code §§ 159.002, .004; *see also* Open Records Decision Nos. 598 (1991), 546 (1990) (because hospital treatment is routinely conducted under supervision of physicians, documents relating to diagnosis and treatment during hospital stay would constitute protected MPA records). Absent the applicability of an MPA access provision, we conclude that the city must withhold this record pursuant to the MPA.

We next note that some of the remaining submitted information is subject to section 552.022. Section 552.022 provides in relevant part:

(a) 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:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108 . . . .

The submitted documents include completed reports made of, for, or by the city, which we have marked. Therefore, as prescribed by section 552.022, the city must release the completed reports unless they are excepted from disclosure under section 552.108 of the Government Code or are confidential under other law. You do not raise section 552.108. You argue that the submitted information is confidential under section 552.103. However, section 552.103 of the Government Code is a discretionary exception and therefore is not “other law” for purposes of section 552.022.<sup>1</sup> Accordingly, you must release to the requestor the information we have marked under section 552.022(a)(1), subject to the following exception.

Some of the information in the reports is excepted from disclosure pursuant to section 552.130. Section 552.130 provides in relevant part:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

(1) a motor vehicle operator’s or driver’s license or permit issued by an agency of this state; [or]

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<sup>1</sup>*See, e.g., Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (governmental body may waive litigation exception, section 552.103), 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), 473 at 2 (1987) (failure to meet 10-day deadline waived protections of sections 552.103 and 552.111).

(2) a motor vehicle title or registration issued by an agency of this state[.]

You must withhold the information we have marked in the reports under section 552.130 of the Government Code.

You claim that the remaining submitted information is excepted from disclosure under section 552.103. Section 552.103 provides in pertinent part:

(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.

Gov't Code, § 552.103(a),(c). The city maintains 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 that the governmental body receives the request for information and (2) the information at issue is related to that litigation. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *see also Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1<sup>st</sup> Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990); Gov't Code § 552.103(c). The city must meet both prongs of this test for information to be excepted under section 552.103(a).

In this case, you state that the city's police chief ordered the requestor's dogs to be destroyed, and that prior to the city's receipt of her request for information, the requestor appealed the police chief's order to the Alvin Municipal Court Judge. You further state that the requestor hired an attorney to assist in her appeal. On the basis of these assertions, we conclude that the city has established that litigation involving the city was pending on the date that the city received the records request. Upon review of the remaining submitted information, we conclude that it is related to the litigation for purposes of section 552.103. Therefore, we conclude that the city may withhold the remaining submitted information at this time pursuant to section 552.103, with the following exceptions.

Generally, 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 pending 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, absent the applicability of an MPA access provision, the city must withhold the medical record we have marked pursuant to the MPA. Completed reports, which we have marked, must be released in accordance with section 552.022(a)(1), with the exception of the information we have marked in those reports to be withheld under section 552.130. The city may withhold the remaining submitted information from disclosure 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 Dep't of Pub. 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,



V.G. Schimmel  
Assistant Attorney General  
Open Records Division

VGS/sdk

Ref: ID# 178208

Enc: Submitted documents

c: Ms. Linda Newcomb  
742 Dezso Drive  
Alvin, Texas 77511-2902  
(w/o enclosures)