ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 8, 2006

Mr. Juan P. Reyna
Attorney at Law
P. O. Box 2067
Alice, Texas 78333

OR2006-04738

Dear Mr. Reyna:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 248467.

The City of Alice (the "city"), which you represent, received a request for the following information pertaining to the August 19, 2005 arrest of a named individual by the city police department (the "department"):

1) All 911 phone calls;

2) All officer dispatches for assistance;

3) All officer dispatches reporting injuries;

4) All videotapes, photographs, sketches and drawings of the interaction between the officers and the named individual;

5) All police incident reports;

6) All emergency medical services reports;

7) All witness statements taken in connection with any subsequent investigation into the homicide of the named individual;

> 8) All police reports made in connection with any subsequent investigation into the homicide of the named individual.

You inform us that the city does not have information responsive to parts 1, 6, and 7 of the request.[1] You claim that the submitted 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 some of the submitted information may have been the subject of a previous request for information to the city, in response to which this office issued Open Records Letter No. 2006-03008 (2006). With regard to the submitted information that is identical to the information previously requested and ruled upon by this office in this prior ruling, we conclude that, as we have no indication that the law, facts, and circumstances on which the prior ruling was based have changed, you must continue to rely on Open Records Letter No. 2006-03008 as a previous determination. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). To the extent that the submitted information was not the subject of the prior ruling, we will address the submitted arguments.

First, however, we note that the information submitted as Exhibits C and E is subject to section 552.022(a)(1) of the Government Code, which provides:

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

Gov't Code § 552.022(a)(1). In this instance, Exhibit C is a completed report of an injury to a department officer, and Exhibit E is a completed department incident report; both of these exhibits were made for or by the department. Thus, Exhibits C and E must be released under section 552.022(a)(1), unless the information is excepted from disclosure under section 552.108 or confidential under other law. Although you claim that Exhibits C and E

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[1] We note that the Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex.Civ.App.—San Antonio 1978, writ dism'd); Open Records Decision No. 452 at 3 (1986).

are excepted from disclosure under section 552.103 of the Government Code, this section is a discretionary exception that protects a governmental body's interests and is, therefore, not "other law" for purposes of section 552.022(a)(1). *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 (1999) (governmental body may waive section 552.103). However, because section 552.101 of the Government Code constitutes "other law" for purposes of section 552.022, we will address the applicability of this exception to Exhibits C and E.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section excepts from disclosure information made confidential by statute. Access to medical records is governed by the Medical Practice Act ("MPA"), chapter 159 of the Occupations Code. 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.
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> (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.

Occ. Code § 159.002. Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See* Occ. Code §§ 159.002, .004; Open Records Decision No. 598 (1991). 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 may be released only as provided under the MPA. Open Records Decision No. 598 (1991). A medical record must be released upon 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. 565 at 7 (1990). Upon review, we find that Exhibit C constitutes a medical record, and, thus, Exhibit C may only be released in accordance with the MPA.

Section 552.101 also encompasses the doctrine of common law privacy which you claim applies to some of the information in Exhibit E. Common law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. We note, however, information concerning domestic violence generally does not come within the scope of common law privacy. Open Records Decision No. 611 (1992) ("An assault by one family member on another is a crime, not a family matter normally considered private"). Furthermore, because "the right of privacy is purely personal," that right "terminates upon the death of the person whose privacy is invaded." *Moore v. Charles B. Pierce Film Enters., Inc.*, 589 S.W.2d 489, 491 (Tex. App.–Texarkana 1979, writ ref'd n.r.e.); *see also Justice v Belo Broadcasting Corp.*, 472 F. Supp. 145, 146-47 (N.D. Tex. 1979) ("action for invasion of privacy can be maintained only by a living individual whose privacy is invaded") (quoting Restatement of Torts 2d); *See* Attorney General Opinions JM-229 (1984) ("the right of privacy lapses upon death"), H-917 (1976) ("We are . . . of the opinion that the Texas courts would follow the almost uniform rule of other jurisdictions that the right of privacy lapses upon death."); Open Records Decision No. 272 (1981) ("the right of privacy is personal and lapses upon death"). Upon review, we find that none of the information in Exhibit E is protected by common law privacy, and none of it may be withheld on that basis.

However, we note that Exhibit E includes Texas motor vehicle information subject to section 552.130 of the Government Code. Section 552.130 is a mandatory exception under the Act and constitutes other law for purposes of section 552.022.[2] This provision excepts from disclosure information that "relates to . . . a motor vehicle operator's or driver's license or permit issued by an agency of this state [or] a motor vehicle title or registration issued by an agency of this state." Gov't Code § 552.130. In accordance with section 552.130, the city must withhold the Texas motor vehicle information we have marked in Exhibit E. *See* Gov't Code § 552.130. The remainder of Exhibit E must be released pursuant to section 552.022(a)(1) of the Government Code.

Next, we address your claim that section 552.103 of the Government Code excepts the remainder of the submitted information. Section 552.103 of the Government Code provides:

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[2] The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

> (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.
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> . . . .
>
> (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 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. *Univ. of Tex. Law Sch. v. Tex. 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 city 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, when a governmental body receives a notice of claim letter, it can meet its burden of showing that litigation is reasonably anticipated by representing that the notice of claim letter is in compliance with the requirements of the Texas Tort Claims Act ("TTCA"), Civil Practice and Remedies Code, chapter 101, or an applicable municipal ordinance. If a governmental body does not make this representation, the claim letter is a factor that this office will consider in determining whether a governmental body has established that litigation is reasonably anticipated based on the totality of the circumstances.

You contend that the remaining submitted information relates to reasonably anticipated litigation regarding a wrongful death claim. You inform us that prior to the date the city received this request for information, the city received a notice of claim letter from the anticipated plaintiff's attorney. We note, however, that you have not represented that this notice of claim letter meets the requirements of the TTCA. Therefore, we will only consider the claim letter as a factor in determining whether the city reasonably anticipated litigation over the incident in question. Based on your representations and our review of the submitted information, we agree that litigation was reasonably anticipated on the date the request was

received. Furthermore, we find that the remaining submitted information relates to the anticipated litigation for purposes of section 552.103(a). Thus, we find that you have demonstrated the applicability of section 552.103. Therefore, the city may generally withhold the remaining submitted information pursuant to section 552.103 of the Government Code.

We note, however, that once information has been obtained by all parties to the pending litigation, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). We also note that the applicability of section 552.103(a) ends when the litigation has concluded. Attorney General Opinion MW-575 at 2 (1982); Open Records Decision Nos. 350 at 3 (1982), 349 at 2 (1982).

In summary, Exhibit C may only be released in accordance with the MPA. Pursuant to section 552.022(a)(1), Exhibit E must be released except for the Texas motor vehicle information we have marked pursuant to section 552.130. The remaining submitted information may be withheld under section 552.103 at this time.

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Office of the Attorney General 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,

Ramsey A. Abarca
Assistant Attorney General
Open Records Division

RAA/eb

Ref: ID# 248467

Enc. Submitted documents

c: Mr. Michael De La Paz
214 Dyer Avenue, Suite 315
San Antonio, Texas 78204
(w/o enclosures)