



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

February 9, 2007

Ms. Carol Day-Moss  
Assistant District Attorney  
Hunt County  
P.O. Box 441  
Greenville, Texas 75403-0441

OR2007-01746

Dear Ms. Carol Day-Moss:

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# 271020.

The Hunt County Sheriff's Office (the "sheriff") received a request for the investigation file and personnel file of a particular individual. You have submitted four exhibits, C, D, E, and F, that constitute the investigation file and personnel file. You raise no exception with respect to Exhibits D and F. You claim that two of the exhibits, C containing a portion of the investigation file, and E containing a portion of the personnel file, are excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, we note that Exhibit E includes information that is subject to section 552.022 of the Government Code. Section 552.022(a) provides in 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,

Gov't Code § 552.022(a)(1). Exhibit E contains completed evaluations made by the sheriff that are expressly public under section 552.022(a)(1) unless excepted under section 552.108 of the Government Code or confidential under other law. The sheriff only asserts that this information is excepted from disclosure under section 552.103 of the Government Code. However, section 552.103 is a discretionary exception and, as such, is not other law for purposes of section 552.022. *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 No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the sheriff may not withhold the completed evaluations under section 552.103.

We now address your arguments under section 552.103 of the Government Code for Exhibit C and the remaining information in Exhibit E. 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.

Gov't Code § 552.103(a), (c). The sheriff 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 governmental body received the request, 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 sheriff 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. *See id.* 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. *See* Open Records Decision No. 555 (1990); *see also* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that, if an individual publicly threatens to bring suit against a governmental body but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. *See* Open Records Decision No. 361 (1983).

In this instance, you state that the requestor is an attorney representing the prospective opposing party. You also indicate that the requestor has actively participated on behalf of the prospective opposing party by making the current request and accompanying the opposing party to meetings with the sheriff. However, you have failed to submit any additional arguments showing that the requestor has taken objective steps toward filing litigation. As stated above, a request for information made by the opposing party's attorney, without objective steps toward filing suit, is not sufficient to show that litigation is reasonably anticipated. *See* Open Records Decision No. 361 (1983). Therefore, the sheriff has failed to demonstrate the applicability of section 552.103 to the submitted information, and we conclude that the sheriff may not withhold Exhibit C or E under that exception.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information protected by other statutes. Access to medical records is governed by the Medical Practice Act (the "MPA"), Occ. Code §§ 151.001-165.160. Section 159.002 of the MPA provides:

- (a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.
- (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.

Occ. Code § 159.002. Information subject to the MPA includes both medical records and information obtained from those medical records. *See* Open Records Decision No. 598

(1991). Medical records 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 have marked the medical records in Exhibit F that are subject to the MPA. As the attorney for the individual whose medical records are at issue, the requestor may have a right of access to it. The sheriff must not release the marked medical records to the requestor unless it has authorization under the MPA to do so. *See ORD No. 598*.

Next, we note that Exhibit F contains an L-2 Declaration of Medical Condition and an L-3 Declaration of Psychological and Emotional Health. Section 552.101 also encompasses section 1701.306 which provides as follows:

(a) The commission may not issue a license to a person as an officer or county jailer unless the person is examined by:

(1) a licensed psychologist or by a psychiatrist who declares in writing that the person is in satisfactory psychological and emotional health to serve as the type of officer for which a license is sought; and

(2) a licensed physician who declares in writing that the person does not show any trace of drug dependency or illegal drug use after a physical examination, blood test, or other medical test.

(b) An agency hiring a person for whom a license as an officer or county jailer is sought shall select the examining physician and the examining psychologist or psychiatrist. The agency shall prepare a report of each declaration required by Subsection (a) and shall maintain a copy of the report on file in a format readily accessible to the commission. A declaration is not public information.

*Id.* § 1701.306(a), (b). Therefore, the L-2 Declaration of Medical Condition and the L-3 Declaration of Psychological and Emotional Health we have marked are confidential under section 1701.306 of the Occupations Code and must be withheld under section 552.101 of the Government Code.

Section 552.101 also encompasses the common-law right to privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). This office has found that the some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common

law privacy. *See* Open Records Decision No. 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Upon review, we have marked the information in Exhibit D that must be withheld under section 552.101 in conjunction with common-law privacy.

We note that Exhibits C and D contain the home addresses and social security numbers of sheriff employees. Section 552.117(a)(2) of the Government Code excepts from disclosure the home address, home telephone number, social security number, and family member information of a peace officer, regardless of whether the peace officer complies with sections 552.024 or 552.1175. Section 552.117(a)(2) adopts the definition of peace officer found at article 2.12 of the Code of Criminal Procedure. Therefore, to the extent the information we have marked pertains to a peace officer, this information must be withheld under section 552.117(a)(2).

We are unable to discern from the records whether two of the employees at issue are peace officers. Thus, to the extent that the individuals whose information is at issue are not currently licensed peace officers, but are current or former sheriff employees, section 552.117(a)(1) may apply. Section 552.117(a)(1) excepts from disclosure the home address, home telephone number, social security numbers, and family member information of current or former official or employee of a governmental body who requests that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the sheriff may only withhold information under section 552.117(a)(1) on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Accordingly, if the employees timely elected to keep their personal information confidential, the sheriff must withhold the information we have marked under section 552.117(a)(1). The sheriff may not withhold this information under section 552.117(a)(1) if the employees did not make timely elections to keep the information confidential. If the section 552.117 does not apply to this information, then the sheriff must withhold the social security number we have marked pursuant to section 552.147 of the Government Code. *See* Gov't Code § 552.147 (stating the social security number of a living person is excepted from required public disclosure under the Act).

Finally, section 552.130 of the Government Code 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]

Gov't Code § 552.130(a)(1). Therefore, the sheriff must withhold the Texas driver's license numbers we have marked under section 552.130. The remaining information must be released.

In summary, the sheriff must withhold the information we have marked under section 552.101 in conjunction with the MPA, section 1701.306 of the Occupations Code, and common-law privacy. You must withhold the marked addresses, social security numbers, and family information of peace officers under section 552.117(a)(2). If the employees are not licensed peace officers, but did timely elect to withhold their personal information, then you must withhold the marked addresses and social security numbers under section 552.117(a)(1). If neither section 552.117(a)(1) nor section 552.117(a)(2) applies, then you must withhold the marked social security number under section 552.147. You must withhold the marked driver's license numbers under section 552.130. The remaining information must be released.<sup>1</sup>

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

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<sup>1</sup>The submitted documents contain information about the named individual that is confidential with respect to the general public. You indicate, however, that the requestor is the authorized representative the named individual. Thus, the requestor has a special right of access to her client's personal information. *See* Gov't Code § 552.023 (person's authorized representative has special right of access to information that is excepted from public disclosure under laws intended to protect person's privacy interest as subject of the information); *see also* Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when person asks governmental body for information concerning the person). In the event the sheriff receives another request for this information from someone other than this requestor or her client, the sheriff must ask this office for a decision whether the information is subject to public disclosure.

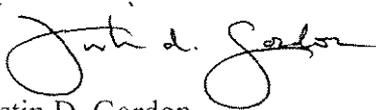
Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor 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,



Justin D. Gordon  
Assistant Attorney General  
Open Records Division

JDG/eb

Ref: ID# 271020

Enc. Submitted documents

c: Ms. Jane E. Bishkin  
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(w/o enclosures)