ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 29, 2007

Mr. Robert J. Davis
Matthews, Stein, Shiels, Pearce, Knott, Eden & Davis, L.L.P.
8131 LBJ Freeway, Suite 700
Dallas, Texas 75251

OR2007-15647

Dear Mr. Davis:

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# 298688.

In this instance, you have asked this office to reconsider Open Records Letter No. 2007-13604 (2007). We note that a governmental body is prohibited from asking this office to reconsider a decision issued under section 552.306 of the Government Code. *See* Gov't Code § 552.301(f). Furthermore, you have not demonstrated that this office made an error in issuing the prior ruling. Nevertheless, we have determined that the prior ruling should be corrected for purposes of due process. *See id.* §§ 552.306, .352. Accordingly, we hereby withdraw the prior ruling. This decision is substituted for Open Records Letter No. 2007-13604 and serves as the correct ruling.

The Collin County Sheriff's Office (the "sheriff"), which you represent, received two requests from the same requestor for (1) jail records relating to the death of the requestor's son and (2) a copy of an escape warrant. You claim that the requested information is excepted from disclosure under sections 552.103 and 552.108 of the Government Code. We have considered the exceptions you claim and have reviewed the information you submitted.

We first note that the submitted documents include a custodial death report. Article 49.18(b) of the Code of Criminal Procedure provides that with the exception of any portion of the custodial death report that the Office of the Attorney General (the "OAG") determines is privileged, the attorney general shall make the report public. *See* Crim. Proc. Code art. 49.18(b). The report was revised in May 2006 and now consists of four pages and an attached summary of how the death occurred. The OAG has determined that the four-page report and summary must be released to the public but that any other documents submitted with the revised report are confidential under article 49.18(b). However, article 49.18(b)

does not make confidential all information held by a local law enforcement agency simply because the information is also included in extraneous documents attached to a custodial death report submitted to the OAG. If a governmental body receives a request for information otherwise generated or maintained by the law enforcement agency as part of its ordinary responsibilities, those documents may be withheld only if one of the Act's exceptions or another specific law protects them. *See* Open Records Decision No. 521 at 7 (1989). In this instance, you have submitted a four-page custodial death report with an attached summary. The sheriff must release that information, which we have marked, pursuant to article 49.18(b) of the Code of Criminal Procedure.

We also note that section 552.022 of the Government Code is applicable to some of the remaining information. Section 552.022(a)(1) provides for required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body[,]" unless the information is expressly confidential under other law or excepted from disclosure under section 552.108 of the Government Code. Gov't Code § 552.022(a)(1). Section 552.022(a)(17) provides for required public disclosure of "information that is also contained in a public court record[,]" unless the information is expressly confidential under other law. *Id.* § 552.022(a)(17). In this instance, the submitted information includes completed reports that are subject to section 552.022(a)(1) and court records that are subject to section 552.022(a)(17). Section 552.103 is not other law that makes information expressly confidential for the purposes of section 552.022(a)(1) and section 552.022(a)(17). *See id.* § 552.007; *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 Gov't Code § 552.103); Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Likewise, section 552.108 is not other law that makes information confidential for the purposes of section 552.022(a)(17). *See* Open Records Decision No. 177 at 3 (1977) (statutory predecessor to Gov't Code § 552.108 subject to waiver). Therefore, the court records that we have marked may not be withheld under section 552.103 or section 552.108, and the sheriff must release that information pursuant to section 552.022(a)(17). However, we will consider the sheriff's claim under section 552.108 with respect to the remaining information, including the information that is subject to section 552.022(a)(1). We also will consider the sheriff's claim under section 552.103 with respect to the remaining information that is not subject to section 552.022(a)(1).

We first note, however, that section 552.101 of the Government Code is applicable to some of the remaining information.[1] Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," and encompasses information that other statutes make confidential. Gov't Code § 552.101.

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[1]Unlike other exceptions to disclosure, this office will raise section 552.101 on behalf of a governmental body, because the Act prescribes criminal penalties for the release of confidential information. *See id.* §§ 552.007, .352; Open Records Decision No. 325 at 2 (1982).

Medical records are confidential under the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. Section 159.002 of the MPA provides in part:

> (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(b)-(c). This office has determined that in governing access to a specific subset of information, the MPA prevails over the more general provisions of the Act. *See* Open Records Decision No. 598 (1991). We also have determined that the MPA ordinarily encompasses only records created either by a physician or by someone acting under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). However, when a file is created as the result of a hospital stay, we have concluded that all of the documents in the file that relate to diagnosis and treatment constitute either physician-patient communications or records of the identity, diagnosis, evaluation, or treatment of a patient by a physician, created or maintained by a physician, for purposes of the MPA. *See* Open Records Decision No. 546 (1990). We note that section 159.001 of the MPA defines "patient" as a person who consults with or is seen by a physician to receive medical care. *See* Occ. Code § 159.001(3). Under this definition, a deceased person cannot be a "patient" under section 159.002 of the MPA. Thus, section 159.002 is applicable only to the medical records of a person who was alive at the time of the creation of the records.

After the death of a patient, medical records may be released only on the signed written consent of the decedent's personal representative. *See id.* § 159.005(a)(5). The consent must specify (1) the information to be covered by the release, (2) the reasons or purposes for the release, and (3) the person to whom the information is to be released. *See id.* §§ 159.004, .005. Any subsequent release of medical records must be consistent with the purposes for which the governmental body obtained the records. *See id.* § 159.002(c); Open Records Decision No. 565 at 7 (1990). We have marked medical records that are confidential under the MPA. The sheriff must withhold those records under the MPA unless the deceased inmate's personal representative provides the sheriff with written consent that meets the requirements of section 159.005(a)(5) of the MPA.

Next, we address your claim under section 552.103, which provides in 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.
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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). A governmental body that raises section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information at issue. To meet this burden, the governmental body must demonstrate that (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) the information at issue is related to the pending or anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. 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.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See* Open Records Decision No. 551 at 4 (1990).

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To establish that litigation is reasonably anticipated, a governmental body must provide this office with "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture."[2] *Id.* You inform us that the submitted information is related to a custodial death in the county jail. You also state that the sheriff has received information reflecting that the requestor has contacted and/or retained an attorney. You contend that a custodial death in jail, combined with the retention of an attorney, demonstrates that litigation is reasonably anticipated. You also have submitted the affidavit of an assistant chief in the sheriff's office asserting that the litigation is reasonably anticipated. Having considered your arguments and the affidavit, we find that you have not established that litigation was reasonably anticipated when the sheriff received this request for information. *See* Open Records Decision Nos. 361 (1983) (fact that request was made by attorney on behalf of rejected applicant not sufficient to invoke

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[2]Among other examples, this office has concluded that litigation was reasonably anticipated where the opposing party took the following objective steps toward litigation: (1) filed a complaint with the Equal Employment Opportunity Commission ("EEOC"), *see* Open Records Decision No. 336 (1982); (2) hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and (3) threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

statutory predecessor to Gov't Code § 552.103), 331 (1982) (reasonable anticipation of litigation not established by requestor's public statements on more than one occasion of intent to file suit). We therefore conclude that the sheriff may not withhold any of the remaining information under section 552.103 of the Government Code.

Lastly, we address your claims under section 552.108. Section 552.108(a)(1) excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]" Gov't Code § 552.108(a)(1). A governmental body must reasonably explain how and why section 552.108(a)(1) is applicable to the information at issue. *See id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You have provided a letter from an assistant district attorney for Collin County stating that the submitted information is related to a pending criminal investigation and should not be released at this time. We note that section 552.108 may be invoked by any proper custodian of information relating to an incident involving allegedly criminal conduct that is still under active investigation or prosecution. See Open Records Decision No. 372 at 4 (1983) (addressing statutory predecessor). Therefore, based on the assistant district attorney's letter and our review of the remaining information, we conclude that section 552.108(a)(1) is generally applicable to the remaining documents and the contents of the submitted DVDs. *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases).

We note that section 552.108 does not except from disclosure "basic information about an arrested person, an arrest, or a crime." Gov't Code § 552.108(c). Section 552.108(c) refers to the basic front-page information held to be public in *Houston Chronicle*. *See* 531 S.W.2d at 186-88. The sheriff must release basic information, even if the information does not literally appear on the front page of an offense or arrest report. *See* Open Records Decision No. 127 at 3-4 (1976) (summarizing types of information deemed public by *Houston Chronicle*). The sheriff may withhold the remaining information in the submitted documents and the DVDs on behalf of the district attorney under section 552.108(a)(1).

Section 552.108(b)(1) excepts from disclosure "[a]n internal record of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution . . . if . . . release of the internal record or notation would interfere with law enforcement or prosecution." Gov't Code § 552.108(b)(1); *see City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet.) (Gov't Code § 552.108(b)(1) protects information that, if released, would permit private citizens to anticipate weaknesses in police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate state laws). The statutory predecessor to section 552.108(b)(1) protected information that would reveal law enforcement techniques. *See, e.g.*, Open Records Decision Nos. 531 (1989) (release of detailed use of force guidelines

would interfere with law enforcement), 456 (1987) (release in advance of information regarding location of off-duty police officers would interfere with law enforcement), 413 (1984) (release of sketch showing security measures to be used at next execution would interfere with law enforcement), 252 (1980) (statutory predecessor was designed to protect investigative techniques and procedures used in law enforcement). The statutory predecessor to section 552.108(b)(1) was not applicable to generally known policies and procedures. *See, e.g.*, ORD 531 at 2-3 (Penal Code provisions, common law rules, and constitutional limitations on use of force not protected), 252 at 3 (governmental body failed to indicate why investigative procedures and techniques requested were any different from those commonly known).

A governmental body that raises section 552.108(b)(1) must sufficiently explain how and why the release of the information would interfere with law enforcement and crime prevention. *See* Open Records Decision Nos. 562 at 10 (1990), 531 at 2 (1989). We understand you to contend that section 552.108(b)(1) is applicable to the contents of the submitted CDs. You argue that the release of that information could enable inmates to learn of and develop ways to thwart security or detention procedures. Based on your arguments and our review of the information at issue, we have marked information from the CDs that the sheriff may withhold under section 552.108(b)(1). Because we conclude that you have not sufficiently demonstrated that release of any of the remaining information would interfere with law enforcement or crime prevention, the sheriff may not withhold any of the remaining information on the CDs under section 552.108(b)(1).

In summary: (1) the sheriff must release the marked custodial death report and attached summary pursuant to article 49.18(b) of the Code of Criminal Procedure; (2) the sheriff must release the marked court records pursuant to section 552.022(a)(17) of the Government Code; (3) the sheriff must withhold the marked medical records under the MPA unless the deceased inmate's personal representative provides the sheriff with written consent that meets the requirements of section 159.005(a)(5) of the MPA; (4) the sheriff may withhold the remaining documents and the DVDs under section 552.108(a)(1) of the Government Code, except for the basic information that must be released under section 552.108(c); and (5) the sheriff may withhold the marked information from the CDs under section 552.108(b)(1) of the Government Code. The rest of the submitted information must be released.

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).

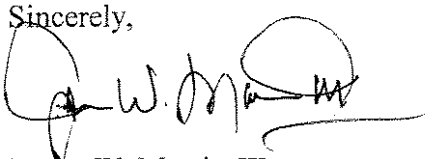
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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,



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