



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 4, 2008

Ms. Michelle Weiser
Schneider, Krugler, Kleinschmidt & Placke, P.C.
P.O. Box 507
Giddings, Texas 78942

OR2008-16551

Dear Ms. Weiser:

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# 329270.

The Giddings City Attorney's Office (the "city attorney") and the Giddings Municipal Court (the "court"), which you represent, received separate requests from the same requestor for several categories of information regarding a specified incident. You state the city attorney does not have some of the requested information.¹ You claim the remaining 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.

Initially, we note the Act does not apply to records of the judiciary. Gov't Code § 552.003(1)(B). Because one of the requests for information was received by the court, and the information at issue in the request consists of court records, we conclude that documents responsive to the request received by the court are records of the judiciary. Thus, information responsive to the request received by the court is not subject to the Act. See Attorney General Opinion DM-166 (1992). As records of the judiciary, however, the information may be public by other sources of law. See Gov't Code § 29.007(d)(4)

¹The Act does not require a governmental body to release information that did not exist when a request for information was received, create responsive information, or obtain information that is not held by or on behalf of the city. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

(complaints filed with municipal court clerk); *id.* § 29.007(f) (municipal court clerks shall perform duties prescribed by law for county court clerk); Local Gov't Code § 191.006 (records belonging to office of county clerk shall be open to public unless access restricted by law or court order); *see also* Attorney General Opinions DM-166 at 2-3 (public has general right to inspect and copy judicial records), H-826 (1976); Open Records Decision No. 25 (1974); *see Star-Telegram, Inc. v. Walker*, 834 S.W.2d 54, 57 (Tex. 1992) (documents filed with courts are generally considered public and must be released). Because we find that the information responsive to the request received by the court is not subject to the Act, we need not address your argument against the disclosure of this information.

Next, we note that some of the submitted information, which we have marked, is not responsive to the request received by the city attorney because it was created after the date the city attorney received the request. Additionally, we have marked a document that is not responsive because it does not pertain to the requested information. The city attorney need not release non-responsive information in response to this request, and this ruling will not address that information.

We also note the submitted responsive information includes documents that have been filed with a court. Section 552.022 of the Government Code 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:

...

(17) information that is also contained in the public court record[.]

Gov't Code § 552.022(a)(17). Section 552.022(a)(17) makes information filed with a court expressly public unless it contains information that is expressly confidential under other law. Although you raise section 552.103 of the Government Code for this information, this exception is discretionary and does not make information confidential. *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. 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived). Thus, section 552.103 does not constitute other law for the purpose of section 552.022(a)(17). Therefore, the city attorney may not withhold the information we have marked under section 552.103. As you raise no other arguments against disclosure of this information, the city attorney must release the information we have marked in accordance with section 552.022(a)(17) of the Government Code.

We note the submitted information includes a dental record, the public availability of which is governed by chapter 258 of the Occupations Code. Section 258.102 of the Occupations Code provides as follows:

(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.

Occ. Code § 258.102. 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. *See id.* §258.101(1). Information that is privileged under chapter 258 of the Occupations Code may be disclosed only under certain specified circumstances. *See id.* § 258.104 (consent to disclosure); *see also id.* §§ 258.105, .106, .107 (exceptions to privilege). The written consent for the release of privileged information required under section 258.104 must specify (1) the information covered by the release, (2) the person to whom the information is to be released, and (3) the purpose for the release. *See id.* § 258.104(c). A person who receives information that is privileged under section 258.102 of the Occupations Code may disclose that information to another person only to the extent that disclosure is consistent with the purpose for which the information was obtained. *See id.* § 258.108. We have marked the dental record that is privileged under section 258.102 of the Occupations Code and may only be released in accordance with chapter 258 of the Occupations Code.

Next, we address your argument under section 552.103 for the remaining responsive information that is not subject to section 552.022(a)(17). Section 552.103 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.

...

(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 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 was pending or reasonably anticipated on the date the governmental body received the request for information, 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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You indicate the remaining responsive information relates to a pending criminal prosecution, styled *State of Texas vs. Zachary Boswell*, No. 070002293. You state, and provide documentation showing, that the prosecution was pending in the court prior to the city attorney's receipt of this request. Based upon your representation and our review, we conclude that litigation was pending when the city attorney received the request and that the information not subject to section 552.022(a)(17) is related to the pending litigation for the purposes of section 552.103.

We note, however, basic factual information about a crime must be released. Open Records Decision No. 362 (1983). Information normally found on the front page of an offense report is generally considered public and must be released. *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.); see Open Records Decision No. 127 (1976) (summarizing types of information considered to be basic information). Thus, with the exception of this basic information, we conclude that section 552.103 is generally applicable to the remaining information not subject to section 552.022(a)(17).

In reaching this conclusion, we note that the requestor, who is the opposing party in the pending litigation, has already seen or had access to some of the information at issue. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. See ORD 551 at 4-5. If the opposing party has seen or had access to information relating to litigation, through discovery or otherwise, then there is no interest in withholding such information from the public under section 552.103. See Open Records Decision Nos. 349 (1982), 320 (1982). Therefore, the city attorney may not withhold the information to the extent that the requestor has seen or had access to it. As you claim no other exception to disclosure, any such information must be released. The city attorney may withhold the rest of the information at issue at this time under section 552.103. We note the applicability of this exception ends once the related litigation concludes. See Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, the information responsive to the request received by the court need not be released. The city attorney must release the information subject to section 552.022(a)(17) of the Government Code, which we have marked. The marked dental record may only be released in accordance with chapter 258 of the Occupations Code. With the exception of basic information, the city attorney may withhold the remaining responsive information that the requestor has not seen or had access to under section 552.103 of the Government Code.

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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3). If the governmental body does not file suit over 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).

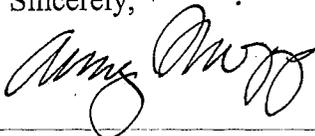
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records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

A handwritten signature in cursive script, appearing to read "Amy Shipp".

Amy L.S. Shipp
Assistant Attorney General
Open Records Division

ALS/jb

Ref: ID# 329270

Enc. Submitted documents

cc: Requestor
(w/o enclosures)