ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 5, 2009

Mr. Charles H. Weir
Assistant City Attorney
City of San Antonio
P.O. Box 839966
San Antonio, Texas 78283-3966

OR2009-06007

Dear Mr. Weir:

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# 342073.

The City of San Antonio (the "city") received a request for all information generated by the city Police Department, the city Fire Department, and any other city agency pertaining to a specified incident. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that a portion of the requested information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2008-12758 (2008). In that ruling, we found that the city may withhold the 911 radio calls related to the specified incident under section 552.108(a)(1) of the Government Code. With regard to the submitted information that is identical to the information previously requested and ruled upon by this office in the prior ruling, we conclude that, as we have no indication that the law, facts, or circumstances on which the prior ruling was based have changed, the city may continue to rely upon Open Records Letter No. 2008-12758 as a previous determination and withhold or release the identical information in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, 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 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 is not encompassed by the previous ruling, we will address the submitted arguments.

Next, we note that the information you have submitted as Items 2 and 3 is subject to required public disclosure under section 552.022(a)(1) of the Government Code. Under section 552.022(a)(1), a completed report, audit, evaluation, or investigation made of, for, or by a governmental body is expressly public unless it either is excepted under section 552.108 of the Government Code or is expressly confidential under other law. Gov't Code § 552.022(a)(1). Upon review, we conclude that Item 2 consists of a completed internal investigation by the city's police department and Item 3 consists of completed emergency medical services ("EMS") patient care reports. Thus, Items 2 and 3 are subject to section 552.022(a)(1) of the Government Code. Although you assert that Items 2 and 3 are excepted under section 552.103 of the Government Code, this section is a discretionary exception under the Act and does not constitute "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. 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived). Accordingly, the city may not withhold Items 2 and 3 under section 552.103. However, section 552.101 of the Government Code constitutes other law for purposes of section 552.022; therefore, we will consider your claims under section 552.101 for Items 2 and 3. We will also consider your claims for the information not subject to section 552.022(a)(1).

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, such as section 143.089 of the Local Government Code. You state that the city is a civil service city under chapter 143 of the Local Government Code.

Section 143.089 provides for the maintenance of two different types of personnel files for each police officer employed by a civil service city: one that must be maintained as part of the officer's civil service file and another that the police department may maintain for its own internal use. *See* Local Gov't Code § 143.089(a), (g). Under section 143.089(a), the officer's civil service file must contain certain specified items, including commendations, periodic evaluations by the police officer's supervisor, and documents relating to any misconduct in which the police department took disciplinary action against the officer under chapter 143 of the Local Government Code. *Id.* § 143.089(a)(1)-(2). Section 143.089 does not make confidential the information maintained in an officer's civil service file.

Section 143.089(g) authorizes a police department to maintain, for its own use, a separate and independent internal personnel file relating to a police officer. *See id.* § 143.089(g). Section 143.089(g) provides as follows:

> A fire or police department may maintain a personnel file on a fire fighter or police officer employed by the department for the department's use, but the department may not release any information contained in the department file to any agency or person requesting information relating to a fire fighter or police officer. The department shall refer to the director or the director's designee a person or agency that requests information that is maintained in the fire fighter's or police officer's personnel file.

Id. The information in a file maintained by a police department pursuant to section 143.089(g) is confidential. *Id.; see also City of San Antonio v. San Antonio Express-News*, 47 S.W.3d 556 (Tex. App.—San Antonio 2000, no pet.) (restricting confidentiality under Local Gov't Code § 143.089(g) to "information reasonably related to a police officer's or fire fighter's employment relationship"); Attorney General Opinion JC-0257 at 6-7 (2000) (addressing functions of Local Gov't Code § 143.089(a) and (g) files).

You state that the information submitted as Item 2 is held in a file maintained by the city's police department under section 143.089(g). Based on your representations and our review of the information at issue, we conclude that Item 2 is confidential under section 143.089(g) of the Local Government Code and must be withheld from the requestor on that basis under section 552.101 of the Government Code.[1]

Next, we address your argument under section 552.101 for Item 3, which consists of three EMS patient care reports. Section 552.101 also encompasses section 773.091 of the Health and Safety Code, which is applicable to EMS information and provides in part:

> (b) Records of the identity, evaluation or treatment of a patient by emergency medical services personnel or by a physician providing medical supervision that are created by the emergency medical services personnel or physician or maintained by an emergency medical services provider are confidential and privileged and may not be disclosed except as provided by this chapter.
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> (c) Any person who receives information from confidential communications or records as described by this chapter, other than a person listed in Section 773.092 who is acting on the survivor's behalf, may not disclose the

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[1]Section 143.089(g) requires a police department that receives a request for information maintained in a file under section 143.089(g) of the Local Government Code to refer that person to the civil service director or the director's designee. You state that the city's civil service files do not contain any information that is responsive to the instant request.

> information except to the extent that disclosure is consistent with the authorized purposes for which the information was obtained.

Health & Safety Code § 773.091(b)-(c). Section 773.091 further provides, however, that

> [t]he privilege of confidentiality under this section does not extend to information regarding the presence, nature of injury or illness, age, sex, occupation, and city of residence of a patient who is receiving emergency medical services.

Id. § 773.091(g). We note that some of the submitted EMS information in Item 3 concerns an individual who was determined to be deceased at the scene of the incident. The term "patient" is not defined for the purposes of section 773.091 of the Health and Safety Code. When a word used in a statute is not defined and that word is "connected with and used with reference to a particular trade or subject matter or is used as a word of art, the word shall have the meaning given by experts in the particular trade, subject matter, or art." Gov't Code § 312.002; *see also Liberty Mut. Ins. Co. v. Garrison Contractors, Inc.*, 966 S.W.2d 482, 485 (Tex. 1998). Taber's Cyclopedic Medical Dictionary defines "patient" as "one who is sick with, or being treated for, an illness or injury; [or] . . . an individual receiving medical care." Taber's Cyclopedic Medical Dictionary 1446 (17th ed. 1989). We also note that other statutes dealing with medically related professions generally define patient as an individual who consults a health care professional. *See* Health & Safety Code § 611.001 (mental health records), Occ. Code §§ 159.001 (physician records), 201.401 (chiropractic records), 202.401 (podiatric records), 258.101 (dental records). Thus, because the generally accepted medical definition of patient indicates that the term refers to a living individual, we find that the term does not encompass the submitted information that concerns the deceased individual. That information, which we have marked, is therefore not confidential under section 773.091 of the Health and Safety Code and may not be withheld from the requestor on that basis under section 552.101 of the Government Code.

We find that the rest of the information in Item 3 consists of EMS records of the identity, evaluation, or treatment of patients by EMS personnel. Thus, except for the information specified by section 773.091(g), the remaining information is confidential under section 773.091 of the Health and Safety Code and may only be released in accordance with chapter 773 of the Health and Safety Code. *See* Health & Safety Code §§ 773.091-.094. In this instance, the requestor states that he is the legal representative of one of the individuals whose EMS information is at issue. We note that information encompassed by section 773.091 may be disclosed to "any person who bears a written consent of the patient or other persons authorized to act on the patient's behalf for the release of confidential information." *Id.* §§ 773.092(e)(4), .093; *see* Open Records Decision No. 632 (1995). Section 773.093 provides that a consent for the release of EMS information must specify: (1) the information or records to be covered by the release; (2) the reasons or purpose for the release; and (3) the person to whom the information is to be released. *See* Health & Safety

Code § 773.093(a). Therefore, except for the marked information that concerns the deceased individual, the city must withhold the information within Tab 3 under section 773.091 of the Health and Safety Code, except as specified by section 773.091(g). However, the city must release the EMS records if it receives the required written consent under section 773.093.

Next, you claim that Items 1 and 4 are excepted from disclosure under section 552.103 of the Government Code. Section 552.103 of the Government Code 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.
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> . . .
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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 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).

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." *Id.* This office has concluded that a governmental body's receipt of a claim letter that it represents to be in compliance with the notice requirements of the Texas Tort Claims Act, chapter 101 of the Civil Practice and Remedies Code, is sufficient to establish that litigation is reasonably anticipated.

You assert and provide documentation that prior to the receipt of the instant request for information, the city received a claim letter from the requestor pertaining to an officer

involved shooting incident, where one of his clients was killed and the other was injured. You state and the claim letter you have provided reflects, that the requestor sent the claim letter as proper notice of the claim pursuant to the requirements of the Texas Tort Claims Act. Further, the claim letter at issue reveals that it was sent to the city and alleges that the city is liable for civil rights violations, wrongful death, negligence, and personal injury damages relating to the specified incident. Based on the city's representations and our review of the submitted information, we conclude that the city has established that litigation was reasonably anticipated when the city received the request. We also find that Items 1 and 4 relate to the anticipated litigation. Thus, we conclude that the city may generally withhold Items 1 and 4 under section 552.103.

We note, however, that Item 1, which consists of the police department file pertaining to the incident, contains basic information. Basic information may not be withheld from disclosure under either section 552.103 or section 552.108 of the Government Code. *See* Open Records Decision Nos. 597 (1991), 362 (1983); *see also* Gov't Code § 552.108(c) (stating that section 552.108 does not except from disclosure "basic information about an arrested person, an arrest, or a crime"), *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); Open Records Decision No. 127 at 3- 4 (1976) (summarizing types of information deemed public by *Houston Chronicle*). Thus, with the exception of the basic information in Item 1, which must be released, the city may withhold Items 1 and 4 under section 552.103 of the Government Code.[2]

However, 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 anticipated litigation is not excepted from disclosure under section 552.103(a), and 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, to the extent the submitted information is identical to the information previously requested and ruled upon by this office in Open Records Letter No. 2008-12758, the city may continue to rely upon that ruling as a previous determination and withhold or release the identical information in accordance with that ruling. As for the submitted information not previously ruled upon in Open Records Letter No. 2008-12758, the city must withhold Item 2 under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code. Except for the marked information that concerns the deceased individual, the city must withhold the information within Item 3 under section 552.101 of the Government Code in conjunction with section 773.091 of the Health and Safety Code, except

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[2]As our ruling is dispositive, we need not address your remaining arguments against the disclosure of Items 1 and 4.

as specified by section 773.091(g) of the Health and Safety Code. However, the city must release the EMS records if it receives the required written consent under section 773.093. Except for basic information in Item 1, which must be released, the city may withhold Items 1 and 4 under section 552.103 of the Government Code. The remaining information must be released to the requestor.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,

Laura E. Ream
Assistant Attorney General
Open Records Division

LER/dls

Ref: ID# 342073

Enc. Submitted documents

c: Requestor
(w/o enclosures)