



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 14, 2009

Mr. David M. Swope
Assistant County Attorney
Harris County
1019 Congress 15th Floor
Houston, Texas 77002

OR2009-12908

Dear Mr. Swope:

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# 355012 (C.A. File No. 09GEN1042).

The Harris County Sheriff's Office (the "sheriff") received a request for several categories of information pertaining to an incident involving the requestor's client. You claim that the submitted 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.¹ We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Initially, we note section 552.022 of the Government Code is applicable to some of the submitted 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. *Id.* § 552.022(a)(1). In this

¹To the extent any additional responsive information existed on the date the sheriff received this request, we assume you have released it. If you have not released any such records, you must do so at this time. *See* Gov't Code §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

instance, the submitted information includes completed reports, which we have marked, that are subject to section 552.022(a)(1). You claim this information is excepted from disclosure under section 552.103 of the Government Code. However, section 552.103 is a discretionary exception to disclosure that protects the governmental body's interests and is therefore not "other law" that makes information expressly confidential for purposes of section 552.022(a). *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Consequently, the sheriff may not withhold the completed reports under section 552.103 of the Government Code and they must be released.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."² Gov't Code § 552.101. Section 552.101 encompasses information that other statutes make confidential. We note that the submitted information includes medical records, which are confidential under the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. *See* Occ. Code § 151.001. 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.

Id. § 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). Medical records must be released on receipt of 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. *See* Occ. Code §§ 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 the medical records that are confidential under the MPA. The sheriff may only release that information in accordance with the MPA. *See* Open Records Decision No. 598 (1991).

²The Office of the Attorney General will raise a mandatory exception like section 552.101 on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

The submitted documents also include dental records, 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 records that are privileged under section 258.102 of the Occupations Code and may only be released in accordance with chapter 258 of the Occupations Code.

The submitted documents also include mental health records that are confidential under section 611.002 of the Health and Safety Code. That section provides in part:

(a) Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.

(b) Confidential communications or records may not be disclosed except as provided by Section 611.004 or 611.0045.

Health & Safety Code § 611.002(a)-(b); *see also id.* § 611.001 (defining “patient” and “professional”). Sections 611.004 and 611.0045 of the Health and Safety Code provide for access to information that is made confidential by section 611.002 only by certain individuals. *See id.* §§ 611.004, 611.0045; Open Records Decision No. 565 (1990). We

have marked the mental health records that the sheriff must withhold under section 611.002, unless the requestor is authorized to obtain that information under sections 611.004 and 611.0045.

We next note that the remaining submitted information contains the fingerprints of the requestor's client. Chapter 560 of the Government Code provides that a governmental body may not release fingerprint information except in certain limited circumstances. *See* Gov't Code §§ 560.001 (defining "biometric identifier" to include fingerprints), 560.002 (prescribing manner in which biometric identifiers must be maintained and circumstances in which they can be released), 560.003 (biometric identifiers in possession of governmental body exempt from disclosure under the Act). The submitted fingerprints would normally be confidential under section 560.003. In this instance, however, the requestor is the attorney for the individual to whom the submitted fingerprints pertain. Consequently, we find that the requestor has a right of access to the submitted fingerprints under section 560.002(1)(A) of the Government Code. *See id.* § 560.002(1)(A) (individual whose biometric identifier is at issue may consent to its release). Therefore, the sheriff must release to the requestor the fingerprint information that we have marked.

We now address your argument under section 552.103 of the Government Code for the remaining information. 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 is pending or reasonably anticipated on the date the governmental body receives the request for information, and (2) the information at issue is related to that litigation. *See Thomas v. Cornyn*, 71 S.W.3d 473, 487 (Tex. App.—Austin 2002, no pet.); *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 governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). ORD 551 at 4.

You state, and provide documentation showing, that the sheriff is party to a lawsuit styled *Jeanna Marie Greer v. Harris County*, et al, Civil Action No. 4:09-cv-00480, filed in the United States District Court for the Southern District of Texas, Houston Division that was filed prior to the sheriff's receipt of the request for information. Thus, based on your representations and our review, we find that litigation was pending on the date the sheriff received the request for information. Furthermore, upon review, we conclude that the information that you seek to withhold under section 552.103 is related to the pending litigation. See ORD 551 at 5 (attorney general will determine whether governmental body has reasonably established that information at issue is related to litigation). Accordingly, we find that section 552.103 is generally applicable to the information at issue.

We note, however, that the opposing party in the pending litigation has seen or had access to the 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. Thus, 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 public disclosure under section 552.103. See Open Records Decision Nos. 349 (1982), 320 (1982). Therefore, to the extent that the opposing party in the pending litigation has seen or had access to any portion of the remaining information, such information is not protected by section 552.103 and may not be withheld on that basis. We note that the applicability of section 552.103 ends once the related litigation concludes. See Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, the sheriff must release the information we have marked under section 552.022(a)(1) of the Government Code and the marked fingerprint information pursuant to section 560.002(1)(A) of the Government Code.³ The sheriff may only disclose the marked medical records in accordance with the MPA. The dental records may only be released in accordance with chapter 258 of the Occupations Code. The mental health records we have marked must be withheld under section 611.002, unless the requestor is authorized to obtain that information under sections 611.004 and 611.0045. To the extent the opposing party in the pending litigation has not seen or had access to the remaining information at issue, the sheriff may withhold it under section 552.103 of the Government Code. To the extent the opposing party has seen or had access to the information, it must be released:

³We note that the information being released contains confidential information to which the requestor has a right of access. Therefore, if the sheriff receives another request for this same information from a different requestor, then the sheriff should again seek a decision from this office.

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, toll free, at (888) 672-6787.

Sincerely,



Paige Savoie
Assistant Attorney General
Open Records Division

PS/eeg

Ref: ID# 355012

Enc. Submitted documents

cc: Requestor
(w/o enclosures)