ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 3, 2009

Mr. Robert J. Perez
Shelton & Valadez
600 Navarro, Suite 500
San Antonio, Texas 78205

OR2009-17151

Dear Mr. Perez:

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# 363091.

The City of Hondo (the "city"), which you represent, received a request for all disciplinary actions and official complaints against the former chief of police and the former chief of police's personnel file.[1] You state that you do not have any documents responsive to the request for disciplinary actions concerning the former chief of police.[2] You state that you will release some of the requested information. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.111, and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered comments submitted by a representative of Bandera County (the "county"). *See* Gov't Code § 552.304 (interested party may submit written comments regarding availability of requested information).

[1]We note the requestor has specifically excluded personal identifiers from his request. Thus, any such information is not responsive to the request. This decision does not address the public availability of the non-responsive information, and that information need not be released.

[2]We note that the Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dism'd); Open Records Decision No. 452 at 3 (1986).

Initially, we note a portion of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a)(1) provides for the required public disclosure of "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). The submitted information contains a completed evaluation and a completed performance review subject to section 552.022(a)(1). You raise section 552.111 of the Government Code for this information and the county raises section 552.103 for this information; however, sections 552.103 and 552.111 are discretionary exceptions under the Act and do 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 Nos. 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived), 665 at 2 n.5 (2000) (discretionary exceptions in general), 663 at 5 (1999) (governmental body may waive section 552.111), 470 at 7 (1987) (statutory predecessor to section 552.111 is discretionary exception). Thus, the information subject to section 552.022(a)(1), which we have marked, may not be withheld under these exceptions. As no further exceptions to disclosure of this information are claimed, it must be released.

We now address the arguments for the information not subject to section 552.022. Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses information made confidential by other statutes. We note the remaining information includes a medical record, access to which is governed by the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. Section 159.002 of the MPA provides the following:

> (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 concluded that the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). Medical records must be released upon the patient's signed, written consent, provided 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. We have marked the portion of the remaining information that constitutes medical records and that may only be released in accordance with the MPA.[3]

The county, in its brief to our office, asserts 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 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). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See id.*

The purpose of section 552.103 is to protect the litigation interests of governmental bodies that are parties to the litigation at issue. *See* Gov't Code § 552.103(a); Open Records Decision No. 638 at 2 (1996) (section 552.103 only protects the litigation interests of the governmental body claiming the exception). The county states, and provides documentation demonstrating, that there is a pending lawsuit filed in United States District Court for the Western District of Texas, San Antonio Division styled *Scott A. Sharp v. Bandera County, et al*; Cause No. SA09CA0676 which involves the former police chief and the county. The county states informs us the submitted information relates to that pending litigation. We note that the city is not a party to these proceedings and, therefore, does not have a litigation interest in the matter for purposes of section 552.103. In such a situation, we require an

[3]As our ruling for this information is dispositive, we need not address your remaining argument against its disclosure.

affirmative representation from the governmental body with the litigation interest that the governmental body wants the information at issue withheld from disclosure under section 552.103. We have received such a representation from the county. Therefore, we agree litigation was pending as of the date the request was received. We further find the information at issue relates to the pending litigation. Accordingly, the city may withhold the remaining submitted information on behalf of the county pursuant to section 552.103 of the Government Code.

In summary, the city must release the information we have marked that is subject to section 552.022(a)(1) of the Government Code. The city must withhold the information we have marked in accordance with the MPA. The remaining information may be withheld under section 552.103 of the Government Code on behalf of the county.

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,

Jonathan Miles

Jonathan Miles
Assistant Attorney General
Open Records Division

JM/cc

Ref: ID# 363091

Enc. Submitted documents

c: Requestor
(w/o enclosures)