ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 10, 2009

Mr. Ben Stool
Assistant District Attorney
Dallas County
411 Elm Street, 5th Floor
Dallas, Texas 75202-3384

OR2009-17492

Dear Mr. Stool:

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#363901.

The Dallas County Commissioners Court (the "county") received a request for any documents or information pertaining to twelve named individuals. You state you will release some information to the requestor. You also state that you do not maintain information responsive to a portion of this request.[1] You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, and 552.108 of the Government Code.[2]

[1]We note that the Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dism'd); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

[2]Although you raise section 552.107 in the your initial brief to this office, you make no arguments explaining the applicability of this exception to the submitted information. Therefore, we assume you have withdrawn this exception.

We have considered the exceptions you claim and reviewed the submitted representative sample of information.[3]

You assert that information pertaining to three of named individuals is excepted from disclosure under section 552.103 of the Government Code, which provides in part 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). The 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 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). The 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

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[3]We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Claims Act (the "TTCA"), chapter 101 of the Civil Practice and Remedies Code, is sufficient to establish that litigation is reasonably anticipated. If this representation is not made, then the receipt of the claim letter is a factor that we will consider in determining, from the totality of the circumstances presented, whether the governmental body has established that litigation is reasonably anticipated. *See* Open Records Decision No. 638 at 4 (1996).

You state, and provide documentation showing, that prior to the county's receipt of the request, one of the named individuals was in active litigation with Dallas County in district court. Based on your representations and our review, we find that you have established that litigation was pending when the county received the request for information and that the information pertaining to this individual is related to the pending litigation for the purposes of section 552.103. You also state, and provide documentation showing, that prior to the county's receipt of the request, two of the named individuals filed notices of claim alleging torts and seeking damages against Dallas County. You do not affirmatively represent to this office, however, that the notice of claim complies with the TTCA. Nevertheless, based on your representations, the county's receipt of the claims, and our review of the claims, we conclude that, for purposes of section 552.103, you have established litigation was reasonably anticipated when the county received the request for information. Based on your representations and our review, we conclude that the responsive information pertaining to these individuals is related to the anticipated litigation for purposes of section 552.103(a). Therefore, we agree that the county may withhold the responsive information pertaining to these three named individuals under section 552.103 of the Government Code.

Although you generally assert that the responsive information pertaining to the remaining nine individuals is also excepted from disclosure under section 552.103, you have provided no arguments that litigation is pending or reasonably anticipated with respect to these individuals. Accordingly, information pertaining to the remaining nine individuals may not be withheld under section 552.103 of the Government Code.

We note, however, that once the information has been obtained by all parties to the pending litigation, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). We also note that the applicability of section 552.103(a) ends when the litigation has concluded. Attorney General Opinion MW-575 (1982) at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2 (1982).

You generally state that portions of the remaining information pertaining to the remaining nine individuals are excepted from disclosure under section 552.108 of the Government Code.[4] Section 552.108 of the Government Code provides the following:

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[4]You submitted a representative sample of this information as Attachment E.

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of Section 552.021 if:

(1) release of the information would interfere with the detection, investigation, or prosecution of crime;

(2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication;

(3) it is information relating to a threat against a peace officer collected or disseminated under Section 411.048; or

(4) it is information that:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from the requirements of Section 552.021 if:

(1) release of the internal record or notation would interfere with law enforcement or prosecution;

(2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication; or

(3) the internal record or notation:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

> (B) reflects the mental impressions or legal reasoning of an attorney representing the state.

Gov't Code § 552.108. A governmental body claiming section 552.108(a)(1) or 552.108(b)(1) must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), (b)(1), 552.301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You have not stated that the submitted information pertains to an ongoing criminal investigation or prosecution, nor have you explained how its release would interfere in some way with the detection, investigation, or prosecution of crime. Thus, you have not met your burden under section 552.108(a)(1) or 552.108(b)(1). A governmental body claiming section 552.108(a)(2) or 552.108(b)(2) must demonstrate that the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. It is not clear to this office, nor have you explained, how the information at issue pertains to investigations that have concluded. Thus, you have not met your burden under section 552.108(a)(2) or 552.108(b)(2). Section 552.108(a)(3) is also inapplicable as the submitted information does not relate to a threat against a police officer. *See* Gov't Code § 552.108(a)(3). Lastly, you do not assert that the information at issue was prepared by an attorney representing the state or that it reflects the mental impressions or legal reasoning of an attorney representing the state. *See id.* §§ 552.108(a)(4), (b)(3). Therefore, the county may not withhold any of the responsive information under section 552.108 of the Government Code.

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. This exception encompasses information that other statutes make confidential. You state that Attachment G contains medical records of deceased individuals, access to which is governed by the Medical Practice Act ("MPA"). Occ. Code §§ 151.001-165.160. Section 159.002 of the MPA provides in part as follows:

> (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). Medical records must be released upon the patient's 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. *Id.* §§ 159.004, 159.005. Medical records pertaining to a deceased patient may only be released upon the signed consent of the deceased's personal representative. *See id.* § 159.005(a)(5). 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). The responsive information in Attachment G, as well as the information we have marked in Attachment F, constitutes medical records that may only be released in accordance with the MPA. Open Records Decision No. 598 (1991).

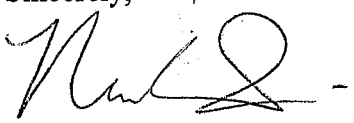
Section 552.101 also encompasses chapter 611 of the Health and Safety Code. You assert the remaining information in Attachment F consists of mental health records. Chapter 611 of the Health and Safety Code provides for the confidentiality of records created or maintained by a mental health professional. Section 611.002(a) states that "[c]ommunications 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." Section 611.001 defines a "professional" as (1) a person authorized to practice medicine, (2) a person licensed or certified by the state to diagnose, evaluate or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. Health & Safety Code § 611.001(b). Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals. *See* Open Records Decision No. 565 (1990). The information we have marked in Attachment F constitutes mental health records that may only be released in accordance with sections 611.004 and 611.0045 of the Health and Safety Code. *See* Health & Safety Code § 611.004(a)(5) (professional may disclose confidential information to patient's personal representative if patient is deceased). However, no portion of the remaining information at issue consists of mental health records subject to section 611.002, and it may not be withheld on this basis.

In summary, the county may withhold the responsive information pertaining to three of the named individuals under section 552.103 of the Government Code. The county may only release the medical records in Attachment G, and the information we have marked in Attachment F, in accordance with the MPA. The county may only release the mental health records we have marked in Attachment F in accordance with sections 611.004 and 611.0045 of the Health and Safety Code. The remaining information must be released.

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,



Nneka Kanu
Assistant Attorney General
Open Records Division

NK/eeg

Ref: ID# 363901

Enc. Submitted documents

cc: Requestor
(w/o enclosures)