



November 1, 2001

Mr. George D. Cato
Deputy General Counsel
Texas Department of Health
1100 West 49th Street
Austin, Texas 78756-3199

OR2001-5031

Dear Mr. Cato:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 154189.

The Texas Department of Health (the “department”) received two requests for information relating to an investigation. You claim that most of the requested information is confidential under section 552.101 of the Government Code in conjunction with other law. We have considered the exception you raise and have reviewed the information you submitted.¹

Initially, we must address the department’s failure to comply with section 552.301 of the Government Code in requesting this decision. Section 552.301 prescribes procedures that a governmental body must follow in asking this office to decide whether requested information may be withheld from public disclosure. Under section 552.301(b), “[t]he governmental body must ask for the attorney general’s decision and state the exceptions that apply . . . not later than the 10th business day after the date of receiving the written request [for information].” Section 552.302 of the Government Code provides that “[i]f a governmental body does not request an attorney general decision as provided by Section 552.301 . . . the information requested in writing is presumed to be subject to required public disclosure and must be released unless there is a compelling reason to withhold the information.”

¹You inform this office that unredacted copies of the requested records were inadvertently sent to the requestor, who returned them to the department. The inadvertent release of this information does not constitute a waiver of the department’s claim that portions of the information are made confidential by law. *See* Gov’t Code § 552.007 (governmental body may not voluntarily release information if disclosure is prohibited by law or information is confidential under law).

You inform this office that the department received these requests for information on May 23, 2001, and July 24, 2001. You requested this decision by letter dated August 28, 2001. You concede that the department thus failed to comply with section 552.301(b). Consequently, the requested information is presumed to be public and must be released under section 552.302, unless there is a compelling reason to withhold any of the information from public disclosure. *See also Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.--Austin 1990, no writ). The presumption that information is public under section 552.302 can generally be overcome by demonstrating that the information is confidential by law or that third party interests are at stake. *See Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982)*. As you claim that portions of the requested information are confidential under section 552.101 in conjunction with other law, we will address your arguments.

We first note, however, that the submitted documents include copies of an autopsy report. Autopsy reports are subject to disclosure under law other than chapter 552 of the Government Code.² Section 11 of article 49.25 of the Code of Criminal Procedure provides as follows:

The medical examiner shall keep full and complete records properly indexed, giving the name if known of every person whose death is investigated, the place where the body was found, the date, the cause and manner of death, and shall issue a death certificate. The full report and detailed findings of the autopsy, if any, shall be a part of the record. Copies of all records shall promptly be delivered to the proper district, county, or criminal district attorney in any case where further investigation is advisable. The records are subject to required public disclosure in accordance with Chapter 552, Government Code, except that a photograph or x-ray of a body taken during an autopsy is excepted from required public disclosure in accordance with Chapter 552, Government Code, but is subject to disclosure:

- (1) under a subpoena or authority of other law; or
- (2) if the photograph or x-ray is of the body of a person who died while in the custody of law enforcement.

Code Crim. Proc. art. 49.25, § 11. The department must release the autopsy reports that we have marked in accordance with section 11 of article 49.25 of the Code of Criminal Procedure.

²As a general rule, statutes outside chapter 552 of the Government Code that expressly make certain information public prevail over exceptions to required public disclosure under chapter 552. *See Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989)*.

Next, we address your claims under section 552.101. This section excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Thus, section 552.101 protects information that other statutes make confidential. Chapter 48 of the Human Resources Code governs investigations and protective services for elderly and disabled persons. Section 48.101 provides in relevant part:

(a) The following information is confidential and not subject to disclosure under Chapter 552, Government Code:

- (1) a report of abuse, neglect, or exploitation made under this chapter;
- (2) the identity of the person making the report; and
- (3) except as provided by this section, all files, reports, records, communications, and working papers used or developed in an investigation made under this chapter or in providing services as a result of an investigation.

(b) Confidential information may be disclosed only for a purpose consistent with this chapter and as provided by . . . investigating state agency rule and applicable federal law.

Hum. Res. Code § 48.101(a)-(b); *see also id.* § 48.051(b). You inform this office that portions of the submitted documents relate to reports and investigations by the department of abuse, neglect, or exploitation of elderly or disabled persons in facilities licensed by the department. You assert that this information must be withheld from disclosure under section 48.101.

Section 48.101 permits the department to promulgate rules, under which it may release information that section 48.101 makes confidential. Section 48.101(d) provides that "[t]he . . . investigating state agency by rule shall provide for the release on request to a person who is the subject of a report of abuse, neglect, or exploitation or to that person's legal representative of otherwise confidential information relating to that report." Section 48.101(e) provides that "[t]he . . . investigating state agency may adopt rules relating to the release of information contained in the record of a deceased individual who was the subject of an investigation conducted by the . . . investigating state agency." *Id.* § 48.101(e). You inform us that the rules adopted under section 48.101 appear at section 1.207 of chapter 25 of the Texas Administrative Code.³ Section 1.207(h) provides as follows:

³Section 1.207 is part of subchapter Q (Investigations of Abuse, Neglect, or Exploitation of Children or Elderly or Disabled Persons), chapter 1 (Texas Board of Health), part 1 (Texas Department of Health), title 25 (Health Services), Texas Administrative Code.

(h) The completed investigative report regarding abuse, neglect, or exploitation of an elderly or disabled person shall be released to the subject of a report of abuse, neglect, or exploitation or to that person's legal representative upon request. Any information relating to the reporter's identity or any other individual whose safety or welfare may be endangered by the disclosure shall be blacked out or deidentified.

25 T.A.C. § 1.207(h). In this instance, the requestor represents to the department that he recently obtained authorization pertaining to this investigation. If this requestor has a right of access to these investigation records under section 1.207, then the department must release the records to him, after de-identifying the documents in accordance with the department's rule. If not, then the department must withhold the records that relate to its investigations under section 48.101 of the Human Resources Code.

You also raise section 552.101 of the Government Code in conjunction with the Medical Practice Act (the "MPA"). The MPA is codified as 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 . . . 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). The MPA also includes provisions that govern the disclosure of information that it encompasses. *See id.* §§ 159.003, .004, .005, .006. This office has determined that in governing access to a specific subset of information, the MPA prevails over the more general provisions of chapter 552 of the Government Code. *See* Open Records Decision No. 598 (1991). We also have concluded that when a file is created as the result of a hospital stay, all the documents in the file relating to diagnosis and treatment constitute either physician-patient communications or records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician. *See* Open Records Decision No. 546 (1990).

You state that the department received the submitted medical documents and/or information under section 159.004(1) of the MPA. Section 159.005(e) provides that a person who receives information made confidential by the MPA may disclose the information only to the extent consistent with the authorized purposes for which consent to release the information is obtained. We have marked the submitted information that the MPA makes confidential. The department may release this information only if the MPA permits the department to do so.

In summary, the autopsy reports must be released under section 11 of article 49.25 of the Code of Criminal Procedure. The information relating to the department's investigations is confidential under section 48.101 of the Human Resources Code and must be withheld from disclosure under section 552.101 of the Government Code, unless the requestor has a right of access to de-identified information under section 1.207 of title 25 of the Texas Administrative Code. The department may release the information that is governed by the Medical Practice Act only if the MPA permits the department to do so. As section 48.101 of the Human Resources Code and the MPA are dispositive of all the information for which you claim an exception to disclosure, we do not address your arguments under sections 576.005 and 611.002 of the Health and Safety Code. The remaining information must be released.

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 appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal 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, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, 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 appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dept. of Public 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 General Services Commission 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 black ink, appearing to read 'J W Morris III', with a large, stylized flourish extending to the right.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 154189

Enc: Submitted documents

c: Mr. Robert H. Kidd, IV
Franklin, Cardwell & Jones
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(w/o enclosures)