



February 15, 2002

Mr. David Kemp
Assistant County Attorney
County of Potter
500 South Fillmore, Room 303
Amarillo, Texas 79101

OR2002-0766

Dear Mr. Kemp:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 158674.

The Potter County Detention Center (the "center") received a request for all information pertaining to a named individual. You inform us that the center has released some of the requested information, and claim that the remaining requested information, which you have marked as the center's Exhibits 2 and 3, is excepted from disclosure under section 552.101 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we must address the center's failure to comply with section 552.301 of the Government Code. Section 552.301 prescribes the procedures that a governmental body must follow in asking for an attorney general decision as to whether requested information is excepted from disclosure. Pursuant to section 552.301(b), a governmental body must ask this office for a decision and state the exceptions that apply not later than the tenth business day after the date of receiving the written request. The center received the information request on November 15, 2001. The center requested a decision from this office by a letter postmarked December 4, 2001, which is the eleventh business day following the date of the request. *See id.* § 552.308 (concerning timeliness of action by United States or interagency mail). Thus, the center failed to comply with section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See Gov't Code § 552.302; Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of

openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). The applicability of section 552.101 presents a compelling reason sufficient to overcome the section 552.302 presumption. *See, e.g.*, Open Records Decision No. 150 (1977). Therefore, we will address your claimed exceptions to disclosure.

You claim that the information you have marked as Exhibit 2 comprises criminal history record information ("CHRI") that is excepted from disclosure under section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by statute. CHRI generated by the National Crime Information Center ("NCIC") and the Texas Crime Information Center ("TCIC") is confidential. Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety ("DPS") maintains, except that the DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See* Gov't Code § 411.083.

Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090 - .127. Thus, any CHRI generated by the federal government or another state may not be made available to the requestor except in accordance with federal regulations. *See* Open Records Decision No. 565 (1990). Furthermore, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F. After reviewing the Exhibit 2 information, we conclude that most of the information consists of CHRI that is confidential under section 411.083 of the Government Code, and therefore must be withheld under section 552.101. We have marked the remaining Exhibit 2 information to which section 411.083 is inapplicable, which must be released to the requestor.

We next note that the information that you have marked as Exhibit 3 contains what appears to be a completed report, entitled "Jail Incident Report." Section 552.022 of the Government Code makes certain information expressly public, and therefore not excepted from required public disclosure unless made expressly confidential under other law. *See* Gov't Code § 552.022(a). One such category of expressly public information under section 552.022 is "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by [s]ection 552.108[.]" *Id.* § 552.022(a)(1). You do not claim

exception for this report under section 552.108. Therefore, as prescribed by section 552.022, the information contained in the report must be released to the requestor unless it is made "expressly confidential" under "other law."

You claim that the entirety of Exhibit 3 is confidential under the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. Section 159.002 of the MPA provides:

(a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.

(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.

The MPA requires that any subsequent release of medical records be consistent with the purposes for which a governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Thus, the MPA governs access to medical records. Open Records Decision No. 598 (1998). Moreover, information that is subject to the MPA includes both medical records and information obtained from those medical records. *See* Occ. Code § 159.002(a), (b), (c); Open Records Decision No. 598 (1991). 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).

After a review of your arguments and the Exhibit 3 information, we find that the "Jail Incident Report," a post-mortem report involving a center detainee, does not constitute a communication between a physician and a patient. *See id.* § 159.002(a). You state that the "medical records are kept under the supervision of the Detention Center's physician." However, you do not inform us, nor is it apparent on the face of any of the Exhibit 3 records, that the records were created either by a physician or by someone *acting under the supervision or direction of a physician*. *See id.* § 159.002(b); Open Records Decision Nos. 546 (1990), 487 (1987), 370 (1983), 343 (1982). Therefore, we conclude that the MPA is inapplicable to the Exhibit 3 information, and that the center may not withhold any of the

Exhibit 3 information under section 552.101 in conjunction with the MPA. Accordingly, the "Jail Incident Report" must be released to the requestor pursuant to section 552.022. As for the Exhibit 3 information not subject to section 552.022, you raise no other applicable exception to public disclosure, nor are we aware of any. Therefore, this information must likewise be released to the requestor.

In summary, the center must withhold from disclosure most of the Exhibit 2 information under section 552.101 in conjunction with section 411.083 of the Government Code. The "Jail Incident Report" contained in Exhibit 3 must be released to the requestor pursuant to section 552.022. The remaining information, including the information we have marked in Exhibit 2, must be released to the requestor.

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).

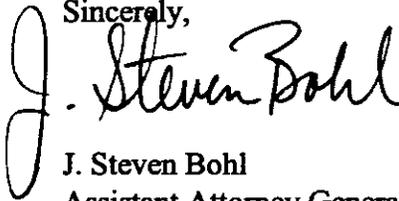
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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 Department 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 Texas Building and Procurement 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 that reads "J. Steven Bohl". The signature is written in a cursive style with a large, looped initial "J".

J. Steven Bohl
Assistant Attorney General
Open Records Division

JSB/sdk

Ref: ID# 158674

Enc: Submitted documents

c: Mr. Chris Hoffman
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(w/o enclosures)