



April 30, 2002

Ms. Ann-Marie P. Sheely
Assistant County Attorney
Travis County
P.O. Box 1748
Austin, Texas 78767

OR2002-2239

Dear Ms. Sheely:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 162075.

The Travis County Sheriff Department (the “sheriff”) received a written request for all records pertaining to the “wrongful death” of the requestor’s son. You contend that the requested information is excepted from required public disclosure pursuant to sections 552.101, 552.108, and 552.130 of the Government Code.

We first note that some of the information at issue is made confidential by statutes found outside the Public Information Act and thus must be withheld from the public pursuant to section 552.101 of the Government Code.¹ Among the documents at issue is criminal history record information (“CHRI”) obtained from the National Crime Information Center (“NCIC”) and the Texas Crime Information Center (“TCIC”). The dissemination of CHRI obtained from the NCIC network is limited by federal law. *See* 28 C.F.R. § 20.1; Open Records Decision No. 565 at 10-12 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. Open Records Decision No. 565 at 10-12 (1990). Sections 411.083(b)(1) and 411.089(a) of the Government Code authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release the CHRI except to another criminal justice agency for a criminal justice purpose. Gov’t Code § 411.089(b)(1). 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.

¹ Section 552.101 of the Government Code protects “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.”

Furthermore, any CHRI obtained from the Texas Department of Public Safety or any other criminal justice agency must be withheld as provided by Government Code chapter 411, subchapter F. Consequently, the sheriff must withhold all CHRI obtained from the TCIC and NCIC.

We additionally note that fingerprints are specifically excluded from the definition of CHRI. Gov't Code § 411.082(2)(A). However, the Seventy-seventh Legislature recently added sections 559.001, 559.002, and 559.003 to the Government Code, effective September 1, 2001. These new statutes provide as follows:

Sec. 559.001. DEFINITIONS. In this chapter:

- (1) "Biometric identifier" means a retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry.
- (2) "Governmental body" has the meaning assigned by Section 552.003 [of the Government Code], except that the term includes each entity within or created by the judicial branch of state government.

Sec. 559.002. DISCLOSURE OF BIOMETRIC IDENTIFIER. A governmental body that possesses a biometric identifier of an individual:

- (1) may not sell, lease, or otherwise disclose the biometric identifier to another person unless:
 - (A) the individual consents to the disclosure;
 - (B) the disclosure is required or permitted by a federal statute or by a state statute other than Chapter 552 [of the Government Code]; or
 - (C) the disclosure is made by or to a law enforcement agency for a law enforcement purpose; and
- (2) shall store, transmit, and protect from disclosure the biometric identifier using reasonable care and in a manner that is the same as or more protective than the manner in which the governmental body stores, transmits, and protects its other confidential information.

Sec. 559.003. APPLICATION OF CHAPTER 552. A biometric identifier in the possession of a governmental body is exempt from disclosure under Chapter 552.

The submitted documents include fingerprint information that is governed by these statutes. It does not appear to this office that section 559.002 permits the disclosure of this information to the requestor. Therefore, the sheriff must withhold all fingerprint information pursuant to section 559.003 of the Government Code.

The documents you submitted to this office also contain CHRI compiled by the sheriff. Where an individual's criminal history information has been compiled by a governmental entity, the information takes on a character that implicates the individual's right to privacy. *See United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989). Similarly, open records decisions issued by this office acknowledge this privacy interest. *See Open Records Decision Nos. 616 (1993), 565 (1990)*. Consequently, the sheriff must withhold the criminal history compilations on privacy grounds.

You have also submitted to this office certain documents you have labeled as confidential medical records. The release of medical records is governed by the Medical Practice Act (the "MPA"), Occ. Code § 151.001 *et. seq.* Section 159.002 of the Occupations Code provides in pertinent part:

- (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.

Occ. Code § 159.002(a)-(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 agree that the documents you marked as medical records are made confidential under section 159.002 of the Occupations Code. The sheriff may not release the submitted medical records unless the MPA permits the sheriff to do so.

Finally, we address whether the remaining submitted records are excepted from public disclosure pursuant to section 552.108 of the Government Code. Section 552.108(a)(1) of the Government Code excepts from required public disclosure "[i]nformation held by a law

enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime.” Section 552.108(a)(1) protects information pertaining to a pending criminal investigation or prosecution because it is presumed that the release of such information would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.--Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976).

Our review of the submitted documents reveals that the fatal shooting occurred while deputy sheriffs were in the process of serving an executed search warrant on an alleged drug dealer,² who was subsequently arrested for possession of a controlled substance. You indicate that the criminal investigation of that matter is currently pending with the sheriff and the Travis County District Attorney's Office. Based on your representation, we conclude that the sheriff may withhold most of the remaining requested information pursuant to section 552.108(a)(1) of the Government Code.³

Section 552.108, however, does not except from disclosure “basic information about an arrested person, an arrest, or a crime.” Gov't Code § 552.108(c). Section 552.108(c) refers to the basic front-page information held to be public in *Houston Chronicle*. The sheriff must therefore release to the requestor all basic information pertaining to the criminal investigation.

In summary, the sheriff must withhold all CHRI and fingerprint information pursuant to section 552.101 of the Government Code. The submitted medical records may be released only in accordance with the MPA. The remaining information may be withheld pursuant to section 552.108(a)(1) of the Government Code, except for basic information, which 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

² We note that you did not submit a copy of the search warrant or the accompanying affidavit to this office for review. The search warrant and affidavit are specifically made public information under article 18.01 of the Code of Criminal Procedure.

³ Because we resolve this aspect of your request under section 552.108(a)(1), we need not address the applicability of section 552.108(b)(1) or 552.130 of the Government Code.

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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



Kristen Bates
Assistant Attorney General
Open Records Division

KAB/RWP/sdk

Ref: ID# 162075

Enc: Submitted documents

c: Ms. Nadine Gonzales
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(w/o enclosures)