



May 8, 2002

Mr. Michael D. Chisum
General Counsel
Texas Department of Licensing and Regulation
P.O. Box 12157
Austin, Texas 78711

OR2002-2436

Dear Mr. Chisum:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 161972.

The Texas Department of Licensing and Regulation (the “department”) received a request for three categories of information relating to the department’s licensing orders and decisions. You inform us that the department is in the process of clarifying items 1 and 2 of the request with the requestor. *See* Gov’t Code § 552.222 (providing that a governmental body may ask the requestor to clarify the request if what information is requested is unclear to the governmental body). You state that most of item 3 of the request, the department’s file pertaining to a named individual applicant, has been released to the requestor. You claim that the remainder of the requested information in item 3 is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This exception encompasses information protected by other statutes. You claim that most of the submitted documents are confidential under the Medical Practice Act (the “MPA”), chapter 159 of the Occupations Code. 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, 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). Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See* Open Records Decision No. 598 (1991). We agree that most of the documents you have submitted are confidential medical records. The department may only release these records in accordance with the MPA. *See* Occ. Code §§ 159.002(c), 159.004, 159.005; *see also* Open Records Decision No. 598 (1991) (in governing access to specific subset of information, Medical Practice Act governs over more general provisions of the Public Information Act).

You also contend that several of the submitted documents, which you have marked, must be withheld under section 81.103 of the Health and Safety Code which makes certain test result information confidential. Section 81.103(a) provides:

A test result is confidential. A person that possesses or has knowledge of a test result may not release or disclose the test result or allow the test result to become known except as provided by this section.

"Test results" are defined as:

any statement that indicates that an identifiable individual has or has not been tested for AIDS or HIV infection, antibodies to HIV, or infection with any other probable causative agent of AIDS, including a statement or assertion that the individual is positive, negative, at risk, or has or does not have a certain level of antigen or antibody.

Health & Safety Code § 81.101(5). We agree that the documents you have marked contain confidential test results that must be withheld under section 552.101 in conjunction with section 81.103(a).

You also contend that some of the submitted information is excepted from disclosure under section 559.003 of the Government Code. Section 559.003 provides that a biometric identifier in the possession of a governmental body is exempt from disclosure under Chapter 552. A "biometric identifier" means a retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry. Gov't Code § 559.001(1). Specifically, you assert that the applicant's photograph is an example of face geometry. We disagree. Facial geometry or as it is more properly known, facial scan technology, is based on the distinctive features of the face: the position of the eyes, nose, mouth, the location of the cheekbones, chin, eyebrows, and the relation of these key features to each other. *Biometric Market Report*

2000-2005, International Biometric Group. The legislative history of House Bill 678 also reflects that face geometry is more than just the photograph of an individual; it is the unique contours of the face. *See generally* Hearing on H.B. 678 before the House Committee on Business & Industry, 77th Leg., R.S. (February 13, 2001) (remarks of bill sponsor, Representative Brian McCall, and testifying expert). Based on the foregoing, we find that the applicant's photograph is not a biometric identifier for the purposes of section 559.003. Consequently, the department may not withhold the applicant's photograph from disclosure.

In summary, you may only release the marked medical records in accordance with the MPA. You must withhold the confidential test results under section 552.101. You must release the remaining information 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. 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,

A handwritten signature in black ink, appearing to read 'DRS', with a stylized flourish at the end.

David R. Saldivar
Assistant Attorney General
Open Records Division

DRS/sdk

Ref: ID# 161972

Enc: Submitted documents

c: Mr. Hector Uribe
1005 Congress, Suite 550
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(w/o enclosures)