



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

January 17, 2003

Mr. Gordon Bowman
Assistant County Attorney
Travis County
P.O. Box 1748
Austin, Texas 78767

OR2003-0378

Dear Mr. Bowman:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 175142.

The County of Travis (the "county") received a request for "the investigative report into the death of Shannon Sharp in December 2001." You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.108, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that the submitted information consists of a completed report that is subject to section 552.022(a) of the Government Code, which provides in relevant part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). Section 552.103 is a discretionary exception under the Public Information Act and, as such, does not constitute "other law" for purposes of

section 552.022(a)(1).¹ See Open Records Decision No. 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation and does not itself make information confidential). Consequently, we do not address your section 552.103 claim with regard to this report. However, since you claim that portions of the report are also excepted from disclosure pursuant to sections 552.101, 552.108, and 552.130 of the Government Code, we will address these claims.

Section 552.101 of the Government Code protects "information considered to be confidential by law, either constitutional, *statutory*, or by judicial decision." Gov't Code § 552.101 (emphasis added). Article 49.18(b) of the Code of Criminal Procedure requires that law enforcement agencies complete custodial death reports and file those reports with the attorney general, who "shall make the report, with the exception of any portion of the report that the attorney general determines is privileged, available to any interested party." In Open Records Decision No. 521 at 5 (1989), this office held that under article 49.18(b), in conjunction with a directive issued by the Office of the Attorney General, section one of custodial death reports filed with this office is public information. All remaining portions of the custodial death report, *i.e.* Parts II through V, including all attachments, are deemed privileged under article 49.18(b) and must be withheld from the public. Open Records Decision No. 521 at 5 (1989). Accordingly, the county must withhold Parts II through V of the custodial death report. However, Part I of the custodial death report is expressly made public under article 49.18(b) and therefore must be released to the requestor.

Article 49.18(b) of the Code of Criminal Procedure does not, however, make confidential all information held by a local law enforcement agency simply because the information is also included in or attached to a custodial death report submitted to the attorney general. If a governmental body receives a request for information otherwise generated or maintained by the law-enforcement agency as part of its ordinary responsibilities, those documents may be withheld only if one of the Public Information Act's exceptions or another specific law protects them. Open Records Decision No. 521 at 7 (1989). You state that "with the exception of Part I of the Custodial Death Report and the Medical Examiner's Report, the responsive records are maintained as part of the custodial death investigation per se—not as part of the [county]'s ordinary responsibilities." While you have marked some of the submitted documents as attachments to the Custodial Death Report, it is not clear whether the remainder of the submitted documents are attachments to the Custodial Death Report. Therefore, to the extent the submitted information was attached to the Custodial Death Report, we agree that the information, with the exception of the medical examiner's report,

¹ Discretionary exceptions are intended to protect only the interests of the governmental body as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. See, *e.g.*, Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 473 (1987) (governmental body may waive section 552.111), 522 at 4 (1989) (discretionary exceptions in general). Discretionary exceptions, therefore, do not constitute "other law" that makes information confidential.

must be withheld under article 49.18(b) of the Code of Criminal Procedure. To the extent the submitted information was not an attachment to the Custodial Death Report, we will address your other arguments.

Section 11 of article 49.25 of the Code of Criminal Procedure governs autopsy reports prepared by a medical examiner. Section 11 reads:

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 dies while in the custody of law enforcement. [Emphasis added.]

We have concluded that a plain reading of the phrase “subject to required public disclosure in accordance with Chapter 552, Government Code,” means that the information must be disclosed in accordance with section 552.021, unless one of the Act’s exceptions applies. *See Ex Parte Torres*, 943 S.W. 2d 469 (Tex. Crim. App. 1997) (stating that if language of statute is not ambiguous, court must give effect to plain meaning of its words unless doing so would lead to absurd results).

You contend that the autopsy report as well as Tabs F and G are excepted from disclosure under section 552.108(a)(2) of the Government Code. Section 552.108(a)(2) excepts from disclosure information concerning an investigation that concluded in a result other than conviction or deferred adjudication. A governmental body claiming section 552.108(a)(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. Based on the information you provided, we understand you to assert that the autopsy report and Tabs F and G pertain to a criminal investigation that concluded in a result other than conviction or deferred adjudication. Therefore, we agree that section 552.108(a)(2) is applicable to the medical examiner’s report and Tabs F and G.

However, section 552.108 is inapplicable to basic information about an arrested person, an arrest, or a crime. Gov't Code § 552.108(c). We believe such basic information refers to the information held to be public in *Houston Chronicle Publishing 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). Thus, with the exception of the basic front page offense and arrest information, you may withhold the medical examiner's report and the information at Tabs F and G from disclosure based on section 552.108(a)(2). We note that you have the discretion to release all or part of the remaining information that is not otherwise confidential by law. Gov't Code § 552.007.

You argue that the single-page document marked as Tab C is excepted from disclosure under section 552.101 in conjunction with common-law privacy. Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 also encompasses the doctrines of common law and constitutional privacy. Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683.

You contend that Tab C contains highly intimate information about a deceased inmate's medical condition and medical history. However, because "the right of privacy is purely personal," that right "terminates upon the death of the person whose privacy is invaded." *Moore v. Charles B. Pierce Film Enters., Inc.*, 589 S.W.2d 489, 491 (Tex. App.—Texarkana 1979, *writ ref'd n.r.e.*); *see also Justice v. Belo Broadcasting Corp.*, 472 F. Supp. 145, 146-47 (N.D. Tex. 1979) ("action for invasion of privacy can be maintained only by a living individual whose privacy is invaded") (quoting Restatement of Torts 2d); *See* Attorney General Opinions JM-229 (1984) ("the right of privacy lapses upon death"), H-917 (1976) ("We are . . . of the opinion that the Texas courts would follow the almost uniform rule of other jurisdictions that the right of privacy lapses upon death."); Open Records Decision No. 272 (1981) ("the right of privacy is personal and lapses upon death"). Therefore, you must release the single-page document you have marked Tab C.

Finally, we note that you argue that the documents at Tab E must be withheld from disclosure. However, you have not cited any specific exception under which the documents may be withheld. *See* Gov't Code § 552.301. You instead have cited to Open Records Decision Nos. 430 (1985), 428 (1985), and 185(1978). These decisions, relying on the predecessor statute to section 552.101 of the Government Code, held that inmate visitor lists and correspondence lists are confidential pursuant to constitutional privacy. We have examined the documents in Tab E and have not found visitor lists or correspondence lists.

Therefore, your reliance on these decisions is misplaced. As you cite no other argument, the documents must be released, with the exception of the Texas driver's license number that you have marked. Section 552.130 of the Government Code excepts Texas driver's license numbers from disclosure. Therefore, you must withhold the Texas driver's license number under section 552.130 of the Government Code.

In summary, you must release Part I of the Custodial Death Report. Parts II through V of the Custodial Death Report are confidential under section 552.101 and article 49.18(b) of the Code of Criminal Procedure. The county must also withhold all of the documents it has marked as attachments to the Custodial Death Report, except for the medical examiner's report, under article 49.18. To the extent any of the remaining submitted information was attached to the Custodial Death Report, it too must be withheld under article 49.18. Otherwise, the medical examiner's report and the documents at Tabs F and G may be withheld under section 552.108(a)(2) and (b)(2), the driver's license number you have marked must be withheld under section 552.130, and the remainder of the submitted 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 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,



Jennifer E. Berry
Assistant Attorney General
Open Records Division

JEB/sdk

Ref: ID# 175142

Enc: Submitted documents

c: Mr. Jason Spencer
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