



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

May 20, 2003

Ms. Melissa L. Barloco
Assistant County Attorney
Harris County
1019 Congress, 15th Floor
Houston, Texas 77002-1700

OR2003-3366

Dear Ms. Barloco:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 181367.

The Harris County Medical Examiner (the "medical examiner") received a request for the medical examiner's investigation file on a named decedent. In particular, the requestor asks for the following information:

any and all health care information, medical records, correspondence, and any other tangible documents including the entire contents of your file, investigative reports, incident reports, police reports, statements from witnesses, tissue samples and results of tissue samples, slides, photographs, memos, notes, outside lab reports, summaries and handwritten notes, tests, test results, a list of items which accompanied the body, investigative reports or correspondence generated by the Medical Examiner's Office and made part of the file, investigative reports or correspondence generated by the Medical Examiner's Office to any governmental entity or statistical reporting bureau or any other entity to which a report of the death or causation of the death was made or filed and any and all other documents which are kept, maintained, and/or generated by the Medical Examiner's Office as a result of the investigation into the death of [the named decedent].

You claim that the requested information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We begin by noting that you have submitted two documents pertaining to individuals other than the named decedent at issue. These documents, which we have marked, are not responsive to the present request and need not be released.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This section encompasses information protected by other statutes. The submitted information includes autopsy photographs, disclosure of which is governed by section 11 of article 49.25 of the Code of Criminal Procedure. Section 11 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.

The medical examiner must withhold the submitted autopsy photographs under section 11 of article 49.25 of the Code of Criminal Procedure.

You also contend that disclosure of the fingerprints contained in Exhibit D is not authorized under section 559.002 of the Government Code. Sections 559.001, 559.002, and 559.003 of the Government Code provide for the confidentiality of biometric identifiers. *See* Gov’t Code §§ 559.001, .002, .003. A “biometric identifier” includes a fingerprint. *Id.* § 559.001. Under section 559.003, a biometric identifier in the possession of a governmental body is excepted from disclosure under the Public Information Act. *Id.* § 559.003. Section 559.002 describes circumstances under which a governmental body may disclose a biometric identifier. *Id.* § 559.002. We note, however, that sections 559.002 and 559.003 are designed to protect the privacy of the individual to whom the fingerprint information relates.

See id. § 559.002(1)(A) (individual may consent to disclosure of individual's own biometric identifier). The right of privacy is purely personal and lapses upon death. *See Moore v. Charles B. Pierce Film Enterprises Inc.*, 589 S.W.2d 489 (Tex. Civ. App.—Texarkana 1979, writ ref'd n.r.e.); *see also* Attorney General Opinions JM-229 (1984), H-917 (1976). Therefore, the medical examiner may not withhold the fingerprints in Exhibit D on the basis of sections 559.002 and 559.003 of the Government Code. *See Moore*, 589 S.W.2d 489; *see also* Attorney General Opinions JM-229 (1984), H-917 (1976).

Next, the information you have submitted as Exhibit C includes medical records, access to which is governed by the Medical Practice Act ("MPA"), chapter 159 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.

Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See* Occ. Code §§ 159.002, .004; 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). We have further found 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 physician-patient communications or "[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician." Open Records Decision No. 546 (1990). In this case, the patient at issue is deceased. Medical records pertaining to a deceased individual may be released only on the signed consent of the personal representative of the deceased. Occ. Code §§ 159.005(a)(5). The consent must specify (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Occ. Code §§ 159.004, .005. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records

Decision No. 565 at 7 (1990). Upon review, it is clear that portions of Exhibit C were created after the death of the individual at issue. Section 159.001 of the Occupations Code defines a "patient" as a person who consults with or is seen by a physician to receive medical care. Occ. Code § 159.001. Based on this definition, a deceased individual cannot be a "patient" under section 159.001 of the Occupations Code. Section 159.002 of the Occupations Code protects only the medical records of individuals who were alive at the time the records were created. We have marked the information in Exhibit C that was created after the death of the individual at issue, as well as several other documents that are not medical records for purposes of the MPA. The marked information may not be withheld under the MPA. The remainder of Exhibit C consists of medical records of the decedent that may be released only as provided under the MPA.

Finally, you contend that the incident report submitted as Exhibit E is excepted from disclosure under section 552.108 of the Government Code. Section 552.108 of the Government Code provides in pertinent part:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:

...

(2) it is information that deals with the detection, investigation or prosecution of crime only in relation to an investigation that did not result in 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. We note that information held by the medical examiner is not information held by a law enforcement agency. However, this office has recognized that information that is not held by a law enforcement agency may be excepted from disclosure under section 552.108 if the information relates to a pending criminal investigation by a law enforcement agency. *See* Open Records Decision Nos. 474 (1987) (statutory predecessor to section 552.108 may be invoked by proper custodian of information relevant to an incident involving allegedly criminal conduct that is still under active investigation or prosecution), 372 (1983). Similarly, this office has determined that records from an administrative investigation of a non-law enforcement agency may be withheld under section 552.108 if the records reveal possible criminal conduct that the non-law enforcement agency intends to report or has reported to the appropriate law enforcement agency or prosecutor. Attorney General Opinion MW-575 (1982); Open Records Decision No. 493 (1988).

You advise that the Houston Police Department is the investigating agency that produced the incident report at issue. Thus, the incident report is not information from an administrative investigation revealing possible criminal conduct to be forwarded to a law enforcement agency or prosecutor. *See* Attorney General Opinion MW-575 (1982). Furthermore, you do not indicate that the incident at issue is under active investigation by a law enforcement agency or prosecutor. *See* Open Records Decision No. 474 (1987). We therefore find you have not adequately demonstrated the applicability of section 552.108 to this information. Consequently, the medical examiner may not withhold the incident report submitted as Exhibit E pursuant to section 552.108 of the Government Code.

In summary, we have marked two documents that are not responsive to the present request and need not be released. The medical examiner must withhold the submitted autopsy photographs pursuant to section 552.101 of the Government Code in conjunction with article 49.25 of the Code of Criminal Procedure. Medical records in Exhibit C may be released only as provided under the MPA. The remainder of the submitted information 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 Dep't of Pub. 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,



David R. Saldivar
Assistant Attorney General
Open Records Division

DRS/seg

Ref: ID# 181367

Enc: Submitted documents

c: Ms. Elaine Gerard-Climo
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(w/o enclosures)