



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 4, 2003

Mr. James M. Frazier, III
Assistant General Counsel
Texas Department of Criminal Justice
P.O. Box 4004
Huntsville, Texas 77342

OR2003-7919

Dear Mr. Frazier:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 190467.

The Texas Department of Criminal Justice ("TDCJ") received a request for all information concerning the requestor and a particular inmate. The requestor specifies that his request encompasses the following information: the cause of death of the inmate, autopsy and toxicology reports, witness statements, investigation results, the requestor's "TXLG 99's," the safety training record of the named inmate, and certain maintenance and policy information. You assert the submitted information is excepted from disclosure under sections 552.101, 552.108, 552.117, and 552.134 of the Government Code. We reviewed the information you submitted and considered the exceptions you claim.

Initially, we note that the request for information encompasses a broad spectrum of information. We assume TDCJ has provide the requestor with any responsive information that you have not submitted to this office for our review. If TDCJ has not released any such information, it must do so at this time. *See Gov't Code §§ 552.301(a), .302.*

Next, we note article 49.18(b) of the Code of Criminal Procedure protects some of the submitted information from required public disclosure. Article 49.18(b) 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., sections two through five, 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). You indicate that you have released section one of the custodial death report to the requestor. TDCJ must withhold sections two through five of the custodial death report in accordance with article 49.18(b) of the Code of Criminal Procedure.

Next, we address the applicability of the section 552.101 of the Government Code in conjunction with certain provisions of the Occupations Code to some of the submitted information. Section 552.101 excepts from required public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This exception encompasses information that other statutes make confidential. The disclosure of medical records is governed by the Medical Practice Act (the “MPA”), subtitle B of title 3 of the Occupations Code. *See* Occ. Code § 151.001. Section 159.002 of the MPA provides, in part, as follows:

- (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.

Id. § 159.002(a)-(c). 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). Also, we have determined that the MPA ordinarily encompasses only records created either by a physician or by someone acting under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). When a file is created as the result of a hospital stay, however, we have concluded that all of the information in the file that relates to diagnosis and treatment constitutes either physician-patient communications or records of the identity,

diagnosis, evaluation, or treatment of a patient by a physician, created or maintained by a physician, for purposes of the MPA. *See* Open Records Decision No. 546 (1990). Furthermore, following the death of a patient, medical records may be released only on the signed written consent of the decedent's personal representative. *See id.* § 159.005(a)(5). That 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. *See id.* §§ 159.004, .005. Any subsequent release of medical records must be consistent with the purposes for which the governmental body obtained the records. *See id.* § 159.002(c); Open Records Decision No. 565 at 7 (1990). In this instance, the submitted information contains records that were created both before and after the death of the person to whom the information pertains. Further, the requestor is not the personal representative of the deceased patient. Therefore, we conclude TDCJ may release the records we have marked only in accordance with the MPA.

Also, we note that chapter 258 of the Occupations Code applies to some of the submitted information. Section 258.102 of the Occupations Code provides as follows:

(a) The following information is privileged and may not be disclosed except as provided by this article:

(1) a communication between a dentist and a patient that relates to a professional service provided by the dentist; and

(2) a dental record.

(b) The privilege described by this section applies regardless of when the patient received the professional service from the dentist.

Occ. Code § 258.102. A "dental record" means dental information about a patient that is created or maintained by a dentist and relates to the history or treatment of the patient. *See id.* § 258.101(1). Information that is privileged under chapter 258 of the Occupations Code may be disclosed only under certain specified circumstances. *See id.* § 258.104 (consent to disclosure); *see also id.* §§ 258.105, .106, .107 (exceptions to privilege). When the patient is deceased, as is the case here, consent for the release of privileged information must be signed by a personal representative of the patient. *See id.* § 258.104(b)(5). The written consent for the release of privileged information required under section 258.104 must specify (1) the information covered by the release, (2) the person to whom the information is to be released, and (3) the purpose for the release. *Id.* § 258.104(c). A person who receives information that is privileged under section 258.102 of the Occupations Code may disclose that information to another person only to the extent that disclosure is consistent with the purpose for which the information was obtained. *See id.* § 258.108. Thus, we conclude the submitted dental records are privileged under section 258.102 of the

Occupations Code and may only be released in accordance with chapter 258 of the Occupations Code.

Further, we note some of the submitted information is governed by chapter 611 of the Health and Safety Code provides for the confidentiality of records created or maintained by a mental health professional. Section 611.002(a) provides:

Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.

Health & Safety Code § 611.002. Section 611.001 defines a “professional” as (1) a person authorized to practice medicine, (2) a person licensed or certified by the state to diagnose, evaluate or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. *See* Health and Safety Code § 611.001. Sections 611.004 and 611.0045 provide for access to mental health records only for certain individuals. *See* Open Records Decision No. 565 (1990). Therefore, we conclude that TDCJ may release the submitted mental health records only in accordance with chapter 611 of the Health and Safety Code.

For the remaining submitted information, we address your claims under section 552.108 of the Government Code. Specifically, you argue subsection 552.108(b)(1) governs the submitted key logs and shift rosters. This provision states the following, in relevant part:

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from the requirements of Section 552.021 if:

(1) release of the internal record or notation would interfere with law enforcement or prosecution[.]

Gov’t Code § 552.108(b)(1). Section 552.108(b)(1) is intended to protect “information which, if released, would permit private citizens to anticipate weaknesses in a police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate the laws of this State.” *City of Ft. Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App.—Austin 2002, no writ). This office has stated that under the statutory predecessor to section 552.108(b), a governmental body may withhold information that would reveal law enforcement techniques. *See, e.g.*, Open Records Decision Nos. 531 (1989) (detailed use of force guidelines), 252 (1980) (investigative techniques and procedures used in law enforcement protected by predecessor to section 552.108), 143 (1976) (specific operations or specialized equipment directly related to investigation or detection of crime). Also, this office has concluded that section 552.108 excepts from public disclosure information that relates to the security or operation of a law enforcement agency. *See, e.g.*,

Open Records Decision No. 531 (1989) (holding that predecessor to section 552.108 excepts detailed guidelines regarding a police department's use of force policy).

However, in demonstrating the applicability of subsection 552.108(b)(1), a governmental body must meet its burden of explaining how and why release of the requested information would interfere with law enforcement and crime prevention. *See* Open Records Decision No. 562 at 10 (1990). To prevail on its claim that subsection 552.108(b)(1) excepts information from disclosure, a law-enforcement agency must do more than merely make a conclusory assertion that releasing the information would interfere with law enforcement. Open Records Decision No. 409 at 2 (1984). Furthermore, a governmental body may not withhold commonly known policies and techniques under section 552.108. *See, e.g.*, Open Records Decision Nos. 531 at 2-3 (1989) (Penal Code provisions, common-law rules, and constitutional limitations on use of force are not protected under predecessor to section 552.108), 252 at 3 (1980) (governmental body did not meet its burden because it did not indicate why investigative procedures and techniques requested were any different from those commonly known). The determination of whether the release of particular records would interfere with law enforcement is made on a case-by-case basis. *Id.*

After reviewing your arguments and the documents at issue, we conclude that you have established the applicability of subsection 552.108(b)(1) to the submitted key logs and shift rosters. Thus, TDCJ may withhold the information we have marked under subsection 552.108(b)(1) of the Government Code.

With respect to the remaining submitted information, we address your arguments under subsection 552.108(a)(1). This provision states that 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 release of the information would interfere with the detection, investigation, or prosecution of crime." Gov't Code § 552.108(a)(1). A governmental body that raises section 552.108 must reasonably explain how and why section 552.108 is applicable to the information. *See* Gov't Code § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986) (law enforcement agency must explain how release of particular records or parts thereof will interfere with law enforcement or prosecution). You inform us, and the submitted material reveals, that the information pertains to a pending criminal investigation by the Office of the Inspector General. Based on our review of your representations and the information at issue, we find that you have established that release of the information "would interfere with the detection, investigation, or prosecution of crime." *See* Gov't Code § 552.108(a)(1); *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) (court delineates law enforcement interests that are present in active cases).

However, section 552.108 does not except from disclosure 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 Company 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). See Open Records Decision No. 127 (1976) (summarizing types of information considered basic information). Thus, with the exception of basic information, we conclude that TDCJ may withhold the remaining information, which we have marked under subsection 552.108(a)(1) of the Government Code.¹

In summary, TDCJ must withhold sections two through five of the custodial death report in accordance with article 49.18(b) of the Code of Criminal Procedure. TDCJ must release the the information we have marked only in accordance with the MPA, chapter 258 of the Occupations Code, or chapter 611 of the Health and Safety Code. With the exception of basic information, TDCJ may withhold the remainder of the submitted information, which we have marked, under section 552.108 of the Government Code.²

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

¹ We note that you also assert section 552.134 of the Government Code, which is explicitly made subject to section 552.029. Under section 552.029, basic information regarding the death of an inmate in custody, an alleged crime involving an inmate, and an incident involving the use of force is subject to required disclosure. See Gov't Code § 552.029(8). Accordingly, basic information as contemplated by section 552.108(c) is not excepted from disclosure by section 552.134.

² As we reach this conclusion, we need not address your arguments under section 552.117 of the Government Code.

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,



Christen Sorrell
Assistant Attorney General
Open Records Division

CHS/seg

Ref: ID# 190467

Enc: Submitted documents

c: Mr. Glen Grasham
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(w/o enclosures)