



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 26, 2004

Ms. Myrna Reingold
Galveston County
4127 Shearn Moody Plaza
123 Rosenberg
Galveston, Texas 77550

OR2004-9134

Dear Ms. Reingold:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 210848.

The Galveston County Sheriff's Department (the "department") received a request for all records regarding a named individual's confinement in the Galveston County Jail from October 6, 2001 to November 2, 2003. You state that you have released some information to the requestor. However, you claim that some of the requested information is excepted from disclosure under sections 552.101, 552.108, 552.115, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also reviewed comments submitted by the requestor. *See Gov't Code § 552.304* (providing that interested party may submit comments stating why information should or should not be released).

Initially, the requestor asserts that the department failed to comply with section 552.301(d) of the Government Code. Under section 552.301(d), a governmental body must provide the requestor with a written statement that the governmental body has asked for a decision from the attorney general, and a copy of the governmental body's written communication to the attorney general, within ten business days of receiving a request. *Gov't Code § 552.301(d)(1), (2)*. You state that the department received the written request for information on July 19, 2004. The submitted information indicates that on August 2, 2004, the department mailed to the requestor both a written statement which notified her that it wished to withhold some of the requested information from disclosure and a copy of the

department's letter to this office. This office is unable to resolve disputes of fact in the open records ruling process. Accordingly, we must rely upon the facts alleged to us by the governmental body requesting our opinion, or upon those facts that are discernable from the documents submitted for our inspection. *See* Open Records Decision No. 522 at 4 (1990). Based on the submitted information, we find that the department complied with section 552.301(d) by mailing the required information to the requestor on August 2, 2004. *See* Gov't Code § 552.308 (time requirement met if notice bears post office cancellation mark indicating time within ten-day period, or if the governmental body furnishes satisfactory proof that the notice was deposited in the mail within that time period).

The requestor also indicates that grievance documents and photographs should have been submitted to this office in response to her request. These items were not submitted for our review. Therefore, to the extent such information exists and is responsive to the request, it must be released at this time. *See* Gov't Code §§ 552.006, 552.301, 552.302; *see also* Open Records Decision No. 664 (2000) (noting that if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible under circumstances).

We turn now to your claims under section 552.101 of the Government Code. Section 552.101 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. You claim that the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 42 U.S.C. §§ 1320d-1320d-8, excepts a portion of the submitted information from disclosure. At the direction of Congress, the Secretary of Health and Human Services ("HHS") promulgated regulations setting privacy standards for medical records, which HHS issued as the Federal Standards for Privacy of Individually Identifiable Health Information. *See* HIPAA, 42 U.S.C. § 1320d-2 (Supp. IV 1998) (historical & statutory note); Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. Pts. 160, 164 ("Privacy Rule"); *see also* Attorney General Opinion JC-0508 at 2 (2002). These standards govern the releasability of protected health information by a covered entity. *See* 45 C.F.R. pts. 160, 164. Under these standards, a covered entity may not use or disclose protected health information, except as provided by parts 160 and 164 of the Code of Federal Regulations. 45 C.F.R. § 164.502(a).

This office recently addressed the interplay of the Privacy Rule and the Public Information Act (the "Act"), chapter 552 of the Government Code. *See* Open Records Decision No. 681 (2004). In that decision, we noted that section 164.512 of title 45 of the Code of Federal Regulations provides that a covered entity may use or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law. *See* 45 C.F.R. § 164.512(a)(1). We further noted that the Act "is a mandate in Texas law that compels Texas governmental bodies to disclose information to the public." *See* Open Records Decision No. 681 at 8 (2004); *see also* Gov't Code §§ 552.002, .003, .021. We therefore held that disclosures

under the Act come within section 164.512(a) of title 45 of the Code of Federal Regulations. Consequently, the Privacy Rule does not make information confidential for the purpose of section 552.101 of the Government Code. Open Records Decision No. 681 at 9 (2004); *see also* Open Records Decision No. 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). Because the Privacy Rule does not make confidential information that is subject to disclosure under the Act, the department may withhold requested protected health information from the public only if an exception in subchapter C of the Act applies. Therefore, we will next consider the exceptions you have raised under the Act.

Section 552.101 incorporates the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. *See* Occ. Code § 151.001 *et seq.* The MPA governs the disclosure of medical records. Section 159.002 of the MPA provides in 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.

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). Medical records must be released upon the patient's signed, written consent, provided that the consent specifies (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* Occ. Code §§ 159.004, .005. When a patient is deceased medical records may be released only on the signed consent of the deceased's personal representative. *See id.* §§ 159.005(a)(5). The consent in that instance 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). We have marked the medical records that are subject to the

MPA.¹ The department may only disclose these records in accordance with the access provisions of the MPA. Absent the applicability of an MPA access provision, the department must withhold these records pursuant to the MPA. *See* Open Records Decision No. 598 (1991).²

You also contend that some of the submitted documents must be withheld under section 552.101 in conjunction with 81.103 of the Health and Safety Code. Section 81.103(a) makes certain test result information confidential and 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 have marked the test results that are confidential under section 81.103(a) and may be released only in accordance with section 81.103.

Additionally, section 611.002 of the Health and Safety Code applies to “[c]ommunications 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.” *See also* Health & Safety Code § 611.001 (defining “patient” and “professional”). Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals. *See* Open Records Decision No. 565 (1990). We have marked the mental health records that are confidential under section 611.002 and may not be released except in accordance with sections 611.004 and 611.0045 of the Health and Safety Code. Health & Safety Code § 611.002(b); *see id.* §§ 611.004, 611.0045.

¹The MPA defines “patient” as a person who consults with or is seen by a physician to receive medical care. Occ. Code § 159.001 of the MPA. Thus, section 159.002 protects only the medical records of people who were alive at the time the records were created. Although the named individual is deceased, the marked medical records were created when the named individual was alive.

²We need not address the department’s other arguments against disclosure of records subject to the MPA.

We also note that portions of the information at issue constitute dental records that are subject to chapter 258 of the Occupations Code. Section 258.102 provides:

(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* Occ. Code § 258.101. We have marked documents created or maintained by a dentist which relate to the history or treatment of the patient. Absent the applicability of a dental record access provision, the department must withhold this information pursuant to chapter 258 of the Occupations Code.

You also argue that the submitted fingerprints are excepted from disclosure under section 552.101 in conjunction with chapter 560 of the Government Code. However, the laws making such information confidential are intended to protect an individual’s privacy. *See* Gov’t Code § 559.002(1)(A) (individual whose biometric identifier is at issue may consent to its release). Because the right of privacy is purely personal and lapses at death, the fingerprints of the deceased inmate may not be withheld on the basis of section 560.003. *See Moore v. Charles B. Pierce Film Enters. 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). As you claim no other exceptions for this information and it is not otherwise confidential by law, it must be released.

You also contend that the inmate visitor logs maintained by the department and the correspondence used to obtain permission to visit the named inmate are confidential under section 552.101 and constitutional privacy. Constitutional privacy protects two kinds of interests. *See* Open Records Decision Nos. 600 at 3-5 (1992), 478 at 4 (1987), 455 at 3-7 (1987); *see also Whalen v. Roe*, 429 U.S. 589, 599-600 (1977). The first is the interest in independence in making certain important decisions related to the “zones of privacy,” pertaining to marriage, procreation, contraception, family relationships, and child rearing and education, that have been recognized by the United States Supreme Court. *See* Open Records Decision No. 455 at 3-7 (1987); *see also Fadjo v. Coon*, 633 F.2d 1172 (5th Cir. 1981). The second constitutionally protected privacy interest is in freedom from public disclosure of certain personal matters. *See* Open Records Decision No. 455 at 6-7 (1987);

see also Ramie v. City of Hedwig Village, Tex., 765 F.2d 490 (5th Cir. 1985), *reh'g denied*, 770 F.2d 1081 (1985), cert. denied, 474 U.S. 1062 (1986). This type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)). We have previously found that lists of inmate visitors and correspondents are confidential under the second type of constitutional privacy. *See* Open Records Decision Nos. 430 (1985), 428 (1985), 185 (1978). Therefore, you must withhold the inmate visitor log and correspondence we have marked under section 552.101.

Section 552.101 also encompasses state and federal laws relating to the confidentiality of criminal history record information (CHRI). Federal regulations prohibit the release of CHRI maintained in state and local CHRI systems to the general public. *See* 28 C.F.R. § 20.21(c)(1) ("Use of criminal history record information disseminated to noncriminal justice agencies shall be limited to the purpose for which it was given."), (2) ("No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself."). Section 411.083 of the Government Code provides that any CHRI maintained by the Department of Public Safety ("DPS") is confidential. Gov't Code § 411.083(a). Similarly, CHRI obtained from the DPS pursuant to statute is also confidential and may only be disclosed in very limited instances. *Id.* § 411.084; *see also id.* § 411.087 (restrictions on disclosure of CHRI obtained from DPS also apply to CHRI obtained from other criminal justice agencies). We have marked CHRI that must be withheld from disclosure under section 552.101 in conjunction with chapter 411 of the Government Code.

Next, we turn to your argument under section 552.108 of the Government Code. Section 552.108 of the Government Code provides, in part:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of Section 552.021 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. You state that the submitted offense report pertains to an investigation that did not result in a conviction or deferred adjudication. Consequently, we agree that section 552.108(a)(2) applies to the offense report. We note, 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 submitted offense report 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 in the offense report that is not otherwise confidential by law. Gov't Code § 552.007.

We now address the custodial death report. In 2003, the Office of the Attorney General (“OAG”) revised the format of this report. Previously, the report consisted of five sections. In Open Records Decision No. 521 at 5 (1989), we concluded that under article 49.18(b) of the Code of Criminal Procedure, in conjunction with a directive issued by the OAG, section one of a custodial death report filed with this office is public information and must be released, but sections two through five of the report, as well as attachments to the report, are confidential. *See* Code Crim. Proc. art. 49.18(b) (attorney general shall make report, with exception of any portion of report that attorney general determines is privileged, available to any interested person). Currently, the report consists of two pages and an attached summary of how the death occurred. The OAG has determined that the two-page report and summary must be released to the public; however, any other documents submitted with the revised report are confidential under article 49.18 of the Code of Criminal Procedure.³ Article 49.18(b) of the Code of Criminal Procedure, however, does not make confidential all information held by a local law enforcement agency simply because the information is also included in extraneous documents attached to a custodial death report submitted to the OAG. 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 Act's exceptions or another specific law protects them. ORD 521 at 7 (1989). In this instance, you indicate that the two-page report and attached summary are “the only information as to a Custodial Death Report created and held by the [department].” Pursuant to article 49.18(b) and the enclosed OAG letter, the department must release the two-page report and attached summary.

You assert that the submitted death certificate is excepted under section 552.115. This section provides that a death record maintained by the bureau of vital statistics of the Texas Department of Health or a local registration official is excepted from required public disclosure except that “a death record is public information and available to the public on and after the 25th anniversary of the date of death as shown on the record filed with the bureau of vital statistics or local registration official.” Since section 552.115 only applies to a death certificate maintained by the bureau of vital statistics or local registration official, the

³Please see the enclosed letter from the Criminal Law Enforcement Division of the Office of the Attorney General.

department may not withhold the certificate of death pursuant to this provision. *See* Open Records Decision No. 338 (1982).

Finally, you contend that the deceased's driver's license number is excepted from disclosure under section 552.130 of the Government Code. This section states that "[i]nformation is excepted from [required public disclosure] if the information relates to: (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state[.]" However, section 552.130 is designed to protect individuals' privacy interests, and the right to privacy expires at death. *See Moore*, 589 S.W.2d 489; *see also* Attorney General Opinion H-917 at 3-4 (1976); Open Records Decision No. 272 at 1 (1981). Accordingly, the deceased's driver's license number may not be withheld under section 552.130.

In summary, the following records are confidential under the noted provisions of law and may be released only in accordance with those provisions: 1) the marked health records under the MPA; 2) the marked test results under section 81.103 of the Health and Safety Code; 3) the marked mental health records under section 611.002 of the Health and Safety Code; and 4) the marked dental records under section 258.102 of the Occupations Code. In conjunction with section 552.101 of the Government Code, the department must withhold: 1) the inmate visitor log and correspondence under constitutional privacy and 2) the marked CHRI under chapter 411 of the Government Code. Finally, with the exception of basic front page offense and arrest information, the department may withhold the submitted offense report under section 552.108(a)(2). The remaining 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 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,



Tamara L. Harswick
Assistant Attorney General
Open Records Division

TLH/sdk

Ref: ID# 210848

Enc. 1) Submitted documents
2) OAG letter regarding revised custodial death report

c: Ms. Linda Billingsley
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(w/o 1st enclosure)