



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 26, 2005

Ms. Ashley D. Fourt
Assistant District Attorney
Tarrant County Criminal District Attorney's Office
401 West Belknap
Fort Worth, Texas 76196-0201

OR2005-03552

Dear Ms. Fourt:

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# 221760.

The Tarrant County Criminal District Attorney's Office (the "district attorney") received a request for (1) any documents relating to jail deaths in Tarrant County facilities in 2004 and 2005; (2) logs maintained by jail personnel of physicians or other medical staff working in the jail for 2004 and 2005; (3) logs or schedules provided to Tarrant County of personnel working in the jail; (4) inmate "kites" filed since October 1, 2004, and their status; and (5) e-mails in 2004 and 2005 regarding jail medical services sent to or from eight named individuals. You state that the district attorney will release some of the requested information. You claim that other responsive information is excepted from disclosure under sections 552.101 and 552.107 of the Government Code.¹ We have considered the exceptions

¹Although you initially claimed no exception with regard to the information that you submitted as Exhibit E, you notified a third party of her right to submit arguments to this office as to why that information should not be released. See Gov't Code §§ 552.304, .305. You have since informed us of your withdrawal of your request for a ruling with regard to that information. You state that the third party has advised the district attorney that she will not be submitting arguments to this office and has expressed her desire that the information in question be released. Therefore, this decision does not address the information submitted as Exhibit E.

you claim and have reviewed the information you submitted.² We note that one of the submitted documents, which we marked, does not appear to responsive to this request; this ruling does not address the public availability of that document, and it need not be released.³

Initially, we address your representation that the district attorney does not have possession of the requested inmate medical “kites.” We note that the Act does not require a governmental body to take affirmative steps to create or obtain information that is not in its possession, unless another individual or entity holds the information on behalf of the governmental body that received the request for it. *See Gov’t Code § 552.002(a)*; *Open Records Decision Nos. 576 at 1-5 (1990), 558 at 1-3 (1990), 534 at 2-3 (1989), 518 at 3 (1989)*. Thus, if another public or private person or entity collected, assembled, or maintains the requested inmate kites on behalf of the district attorney, and the district attorney owns or has a right of access to that information, then the kites must be released, as you have claimed no exception to the disclosure of that information. *See Gov’t Code §§ 552.002, .021, .301, .302*. But if no other person or entity collected, assembled or maintains the kites on behalf of the district attorney, then the Act does not require you to release that information.

Next, we note that the submitted information includes protective custody affidavits. A “warrant of arrest” is a written order from a magistrate, directed to a peace officer or some other person specially named, commanding him to take the body of the person accused of an offense, to be dealt with according to law. *See Crim. Proc. Code art. 15.01*. Based on this definition, a protective custody warrant can constitute an arrest warrant. Article 15.26 of the Code of Criminal Procedure provides that “[t]he arrest warrant, and any affidavit presented to the magistrate in support of the issuance of the warrant, is public information.” *Crim. Proc. Code art. 15.26*. You have provided no explanation as to why the submitted protective custody affidavit are not arrest warrant affidavits subject to article 15.26 of the Code of Criminal Procedure. Because we are not otherwise able to determine whether the submitted affidavits were presented to a magistrate in support of the issuance of an arrest warrant, we must rule in the alternative. Thus, to the extent that the affidavits that we have marked were, in fact, “presented to the magistrate in support of the issuance of an arrest warrant,” they are made public by article 15.26 of the Code of Criminal Procedure and must be released to the requestor. *See Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989)* (exceptions to disclosure found in the Act generally do not apply to information that is made public by other statutes). To the extent that the marked affidavits were not so presented, they are not made

²This letter ruling assumes that the representative-sample information that you have submitted is truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the district attorney to withhold any information that is substantially different from the submitted information. *See Gov’t Code §§ 552.301(e)(1)(D), .302*; *Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988)*.

³We also note that you have redacted some of the submitted information. As we are able in this instance to discern the nature of the redacted information, we will determine whether it is excepted from disclosure. In the future, however, you should refrain from redacting any information that you submit to this office in seeking an open records ruling.

public by article 15.26 and must be disposed of in accordance with the remainder of this ruling.

The submitted information also includes custodial death reports. In 2003, the Office of the Attorney General (the "OAG") revised the format of a custodial death 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 was public information and must be released, but sections two through five of the report, as well as attachments to the report, were confidential. *See* Crim. Proc. Code 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). A custodial death report now 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.⁴ *See also* Open Records Decision No. 623 at 3 (1994) (exceptions to public disclosure under Act generally not applicable to information that another statute expressly makes public).

In this instance, the submitted custodial death reports include both the old format and the revised form. Where the custodial death report is in the old format, the district attorney must release section one of the report and withhold sections two through five, as well as any attachments to the report, under article 49.18 of the Code of Criminal Procedure. Where the custodial death report is in the revised form, the district attorney must release the two-page report and the summary of how the death occurred, but must withhold any other documents that were submitted to the OAG under article 49.18.

We next note that you have failed to fully comply with section 552.301 of the Government Code in requesting this decision. Under section 552.301(b), a governmental body that seeks to withhold requested information from public disclosure must ask for the attorney general's decision and state the exceptions that it claims within ten business days after receiving the request for information. In this instance, you failed to claim section 552.107(1) of the Government Code within the deadline prescribed by section 552.301(b). Section 552.107(1) is a discretionary exception to disclosure that may be waived. *See* Gov't Code § 552.007; Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under Gov't Code § 552.107(1) may be waived), 665 at 2 n.5 (discretionary exceptions generally). In failing to comply with section 552.301, you have waived section 552.107(1) and may not withhold any of the submitted information under this exception.

⁴Please see the enclosed letter from the Criminal Law Enforcement Division of the OAG.

Next, we address your claims under section 552.101 of the Government Code. This section excepts from public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 552.101 encompasses information that other statutes make confidential. Public 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:

- (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 the Act. *See* Open Records Decision No. 598 (1991). Ordinarily, the MPA 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). However, when a file is created as the result of a hospital stay, all of the documents in the file that relate to diagnosis and treatment constitute 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). We note, however, that section 159.001 of the MPA defines “patient” as a person who consults with or is seen by a physician to receive medical care. *See* Occ. Code § 159.001(3). Under this definition, a deceased person cannot be a “patient” under section 159.002 of the MPA. Thus, section 159.002 is applicable only to the medical records of a person who was alive at the time of the creation of the records.

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. Medical records that pertain to a patient who is deceased may only be released upon the signed consent of the decedent’s personal representative. *See id.* §§ 159.005(a)(5). 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 submitted information that is confidential under the MPA. That information may only be released in accordance with the MPA. *See* Open Records Decision No. 598 (1991).

Mental health records are confidential under section 611.002 of the Health and Safety Code. This section provides in part:

(a) 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.

(b) Confidential communications or records may not be disclosed except as provided by Section 611.004 or 611.0045.

Health & Safety Code § 611.002(a)-(b). 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 id.* § 611.001(2). Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals. *See id.* §§ 611.004, 611.0045; Open Records Decision No. 565 (1990). We have marked the submitted information that is confidential under section 611.002 of the Health and Safety Code. The district attorney must not release that information unless the requestor has a right of access to it under sections 611.004 and 611.0045.

Criminal history record information (“CHRI”) obtained from the National Crime Information Center or the Texas Crime Information Center is confidential under federal and state law. CHRI means “information collected about a person by a criminal justice agency that consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions.” Gov’t Code § 411.082(2).⁵ Federal law governs the dissemination of CHRI obtained from the National Crime Information Center network. Federal regulations prohibit the release to the general public of CHRI maintained in state and local CHRI systems. *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”) and (c)(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”). The federal regulations allow each state to follow its own individual law with respect to CHRI that it generates. *See* Open Records Decision No. 565 at 10-12 (1990); *see generally* Gov’t Code

⁵We note that the statutory definition of CHRI does not encompass driving record information maintained by the Texas Department of Public Safety (the “DPS”) under subchapter C of chapter 521 of the Transportation Code. *See* Gov’t Code § 411.082(2).

ch. 411 subch. F. Sections 411.083(b)(1) and 411.089(a) of the Government Code authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *See Gov't Code § 411.089(b)*. We have marked CHRI that the district attorney must withhold under the federal law and subchapter F of chapter 411 of the Government Code.

The public availability of fingerprint information is governed by sections 560.001, 560.002, and 560.003 of the Government Code.⁶ These sections provide as follows:

Sec. 560.001. DEFINITIONS. In this chapter:

- (1) "Biometric identifier" means a retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry.
- (2) "Governmental body" has the meaning assigned by Section 552.003 [of the Government Code], except that the term includes each entity within or created by the judicial branch of state government.

Sec. 560.002. DISCLOSURE OF BIOMETRIC IDENTIFIER. A governmental body that possesses a biometric identifier of an individual:

- (1) may not sell, lease, or otherwise disclose the biometric identifier to another person unless:
 - (A) the individual consents to the disclosure;
 - (B) the disclosure is required or permitted by a federal statute or by a state statute other than Chapter 552 [of the Government Code]; or
 - (C) the disclosure is made by or to a law enforcement agency for a law enforcement purpose; and
- (2) shall store, transmit, and protect from disclosure the biometric identifier using reasonable care and in a manner that is the same as or more protective than the manner in which the governmental body stores, transmits, and protects its other confidential information.

⁶These sections, formerly codified at chapter 559 of the Government Code as sections 559.001, 559.002, and 559.003, were renumbered by the Regular Session of the Seventy-eighth Legislature. *See Act of May 20, 2003, 78th Leg., R.S., ch. 1275, § 2 (78), 2003 Tex. Sess. Law Serv. 4140, 4144.*

Sec. 560.003. APPLICATION OF CHAPTER 552. A biometric identifier in the possession of a governmental body is exempt from disclosure under Chapter 552.

Gov't Code §§ 560.001, 560.002, 560.003. In this instance, the submitted fingerprints are those of deceased individuals. Section 560.003 is intended to protect personal privacy. *See id.* § 560.002(1)(A). Privacy is a purely personal right that lapses at death. *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.); *Justice v. Belo Broadcasting Corp.*, 472 F. Supp. 145 (N.D. Tex. 1979); Attorney General Opinions JM-229 (1984); H-917 (1976); Open Records Decision No. 272 (1981). Therefore, the district attorney may not withhold any of the submitted fingerprints under section 560.003 of the Government Code.

You also raise section 552.101 in conjunction with section 521.142 of the Transportation Code. This section provides in part:

(f) Information supplied to the [Texas Department of Public Safety] relating to an applicant's medical history is for the confidential use of the department and may not be disclosed to any person or used as evidence in a legal proceeding other than a proceeding under Subchapter N. This subsection does not apply to information provided by an applicant under Subsection (h).

Transp. Code § 521.142(f). Section 521.142 is applicable to information provided to the Department of Public Safety. You have not demonstrated, and it is not otherwise clear, how or why this section would be applicable to any of the submitted information. We therefore conclude that you may not withhold any of the submitted information under section 521.142 of the Transportation Code.

You also seek to withhold social security numbers under section 552.101 of the Government Code. The 1990 amendments to the Social Security Act make confidential social security numbers and related records that were obtained or are maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See* 42 U.S.C. § 405(c)(2)(C)(viii)(I); Open Records Decision No. 622 at 2-4 (1994). We have no basis for a conclusion that any social security number contained in the submitted documents is confidential under section 405(c)(2)(C)(viii)(I), so as to be excepted from public disclosure under section 552.101 on the basis of the federal law. Furthermore, because the federal law protects personal privacy, the social security number of a deceased individual may not be withheld from the public under section 552.101 in conjunction with section 405(c)(2)(C)(viii)(I). *Moore v. Charles B. Pierce Film Enters. Inc.*, 589 S.W.2d 489 (Tex. Civ. App.—Texarkana 1979, writ ref'd n.r.e.); *Justice v. Belo Broadcasting Corp.*, 472 F. Supp. 145 (N.D. Tex. 1979); Attorney General Opinions JM-229 (1984); H-917 (1976); Open Records Decision No. 272 (1981). Nevertheless, the Act prescribes criminal penalties for the release of confidential information. *See* Gov't Code

§§ 552.007, .352. Therefore, prior to releasing a living individual's social security number information to a member of the public, you should ensure that the information was not obtained and is not maintained by the district attorney under any provision of law enacted on or after October 1, 1990.

Section 552.101 also encompasses constitutional and common-law privacy. Constitutional privacy protects two kinds of interests. See *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); Open Records Decision Nos. 600 at 3-5 (1992), 478 at 4 (1987), 455 at 3-7 (1987). 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 *Fadjo v. Coon*, 633 F.2d 1172 (5th Cir. 1981); Open Records Decision No. 455 at 3-7 (1987). The second constitutionally protected privacy interest is in freedom from public disclosure of certain personal matters. See *Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5th Cir. 1985); Open Records Decision No. 455 at 6-7 (1987). This aspect of constitutional privacy balances the individual's privacy interest against the public's interest in the information. See Open Records Decision No. 455 at 7. Constitutional privacy is reserved for "the most intimate aspects of human affairs." Open Records Decision No. 455 at 8 (quoting *Ramie*, 765 F.2d at 492). We have marked inmate visitor information that is protected by constitutional privacy and must be withheld under section 552.101. See Open Records Decision No. 430 (1985) (list of inmate's visitors protected by constitutional law); cf. Open Records Decision No. 428 (1985) (list of inmate's correspondents protected by constitutional privacy).

Information must be withheld from the public under the common-law right to privacy when the information is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) of no legitimate public interest. See *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Common-law privacy encompasses the specific types of information that are held to be intimate or embarrassing in *Industrial Foundation*. See 540 S.W.2d at 683 (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). This office has since determined that other types of information also are private under section 552.101. See, e.g., Open Records Decision Nos. 659 at 4-5 (1999) (summarizing information attorney general has held to be private), 470 at 4 (1987) (illness from severe emotional job-related stress), 455 at 9 (1987) (prescription drugs, illnesses, operations, and physical handicaps), 343 at 1-2 (1982) (references in emergency medical records to drug overdose, acute alcohol intoxication, obstetrical/gynecological illness, convulsions/seizures, or emotional/mental distress). However, because privacy is a personal right that lapses at death, common-law privacy is not applicable to information that relates to a deceased individual. *Moore v. Charles B. Pierce Film Enters. Inc.*, 589 S.W.2d 489 (Tex. Civ. App.—Texarkana 1979, writ ref'd n.r.e.); *Justice v. Belo Broadcasting Corp.*, 472 F. Supp. 145 (N.D. Tex. 1979); Attorney General Opinions JM-229 (1984); H-917 (1976); Open Records Decision

No. 272 (1981). We have marked the types of information that the district attorney must withhold under section 552.101 in conjunction with common-law privacy if the information relates to a living individual.

Next, we address section 552.130 of the Government Code.⁷ This section excepts from public disclosure information that relates to “a motor vehicle operator’s or driver’s license or permit issued by an agency of this state[.]” Gov’t Code § 552.130(a)(1). Section 552.130 is applicable to Texas driver’s license information. Because section 552.130 protects personal privacy interests, a deceased individual’s driver’s license information may not be withheld under this exception. *Moore v. Charles B. Pierce Film Enters. Inc.*, 589 S.W.2d 489 (Tex. Civ. App.—Texarkana 1979, writ ref’d n.r.e.); *Justice v. Belo Broadcasting Corp.*, 472 F. Supp. 145 (N.D. Tex. 1979); Attorney General Opinions JM-229 (1984); H-917 (1976); Open Records Decision No. 272 (1981). We have marked Texas driver’s license information that must be withheld under section 552.130.

In summary: (1) the district attorney must release the protective custody affidavits under article 15.26 of the Code of Criminal Procedure if they were submitted to a magistrate in support of the issuance of an arrest warrant; (2) the contents of and attachments to the Custodial Death Reports must be released or withheld in accordance with article 49.18(b) of the Code of Criminal Procedure; (3) the information that is confidential under the MPA may only be released in accordance with the MPA; (4) the district attorney must withhold the information that is confidential under section 611.002 of the Health and Safety Code unless the requestor has a right of access to the information under sections 611.004 and 611.0045 of the Health and Safety Code; (5) CHRI must be withheld under federal law and subchapter F of chapter 411 of the Government Code; (6) the social security number of a living individual may be confidential under section 405(c)(2)(C)(viii)(I) of title 42 of the United States Code; (7) the district attorney must withhold the information that is protected by common-law or constitutional privacy under section 552.101 of the Government Code; and (8) the Texas driver’s license information of living individuals must be withheld under section 552.130. The rest 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

⁷Unlike other exceptions to disclosure, this office will raise section 552.130 on behalf of a governmental body, as it is a mandatory exception to disclosure and may not be waived. See Gov’t Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

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).

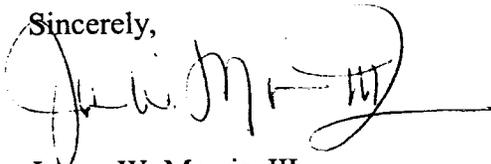
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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); *Tex. 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,



James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 221760

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