



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 29, 2006

Ms. Rebecca Brewer
Abernathy, Roder, Boyd & Joplin, P.C.
Attorneys at Law
P. O. Box 1210
McKinney, Texas 75070-1210

OR2006-14000

Dear Ms. Brewer:

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# 265594.

The Frisco Police Department (the "department"), which you represent, received two requests from the same requestor for information pertaining to a specified accident. You claim that the requested information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code, as well as the *Health Insurance Portability and Accountability Act of 1996* ("HIPAA"). We have considered your arguments and reviewed the submitted information.

Initially, we note the submitted information contains an accident report form, ST-3, governed by chapter 550 of the Transportation Code. *See* Transp. Code § 550.064 (officer's accident report). Section 550.065(b) states that except as provided by subsection (c), accident reports are privileged and confidential. Section 550.065(c)(4) provides for the release of accident reports to a person who provides two of the following three pieces of information: (1) date of the accident; (2) name of any person involved in the accident; and (3) specific location of the accident. Transp. Code § 550.065(c)(4). Under this provision, the Department of Public Safety or another governmental entity is required to release a copy of an accident report to a person who provides the agency with two or more pieces of information specified by the statute. *Id.* In this instance, the requestor has provided the department with two of the three requisite pieces of information. Therefore, the department must release the ST-3 accident

report, which we have marked, in its entirety, to the requestor in accordance with section 550.065(c)(4) of the Transportation Code. *See Open Records Decision No. 525 (1989)* (exceptions found in Act generally do not apply to information made public by other statutes).

Next, we note that the remaining submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides that “a completed report, audit, evaluation, or investigation made of, for, or by a governmental body” may not be withheld from the public unless the information is excepted from disclosure under section 552.108 of the Government Code or expressly confidential under other law. Gov’t Code § 552.022(a)(1). The remaining information is a completed investigation made of, for, or by the department, which is made expressly public by section 552.022(a)(1), unless it is expressly made confidential under other law or is excepted from disclosure under section 552.108. The department seeks to withhold the remaining information under section 552.103. We note, however, that this section is a discretionary exception to public disclosure that protects the governmental body’s interests and may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); *Open Records Decision No. 665 at 2 n.5 (2000)* (discretionary exceptions generally). As such, section 552.103 does not qualify as other law that makes information confidential for the purposes of section 552.022. Therefore, the department may not withhold any portion of the remaining information under section 552.103. However, section 552.101 is “other law” for purposes of section 552.022, and we will address your arguments under this exception.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision[,]” and encompasses information made confidential by statute. Gov’t Code § 552.101. You assert that the Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. §§ 1320d-1320d-8, governs the release of the remaining information. 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, excepted as provided by parts 160 and 164 of the Code of Federal Regulations. 45 C.F.R. § 164.502(a).

This office has addressed the interplay of the Privacy Rule and the Act. *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 the disclosures under the Act come within section 164.512(a). 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); *Abbott v. Tex. Dep’t of Mental Health & Mental Retardation*, No. 03-04-00743-CV, 2006 WL 1649003 (Tex. App.–Austin, June 16, 2006, no. pet. h.) (disclosures under the Act fall within section 164.512(a)(1) of the Privacy Rule); *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 protected health information from the public only if the information is confidential under other law or an exception in subchapter C of the Act applies.

You claim that some of the remaining information is protected under the Medical Practices Act (“MPA”). Section 552.101 of the Government Code encompasses information protected by other statutes such as the MPA, chapter 159 of the Occupations Code. Section 159.002 of the MPA provides in part:

(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.

Occ. Code § 159.002 (b)-(c). Upon review, we conclude that none of the information at issue consists of medical records subject to the MPA. Thus, the department may not withhold any portion of this information under the MPA.

Finally, you claim that the remaining information is excepted from disclosure under section 552.101 of the Government Code in conjunction with common law and constitutional privacy. Common law privacy protects information if it (1) contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently

and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). 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"). Thus, the deceased individual to whom some of the submitted information pertains does not have a privacy right in this information. Furthermore, we understand from the department's comments that the requestor is a representative of the deceased's estate. Accordingly, the requestor has a special right of access to the deceased's information under section 552.023 of the Government Code.¹ See Gov't Code § 552.023. We also find that the information that pertains to living individuals does not implicate their privacy rights. Consequently, the department may not withhold any of the remaining information based on section 552.101 in conjunction with the common law or constitutional right to privacy. In conclusion, the department must release the submitted information 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

¹We note that the information that the department must release in this instance may be confidential by law. See *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157 (2004). Thus, should the department receive another request for this same information from a person who would not have a special right of access to it, the department should resubmit the same information and request another ruling.

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); *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 Office of the Attorney General 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. 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/krl

Ref: ID# 265594

Enc. Submitted documents

c: Mr. Danny L. Russell
2712 Hunter's Creek
Plano, Texas 75075
(w/o enclosures)