



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 26, 2007

Mr. Tom Rugg
First Assistant, Civil Division
Jefferson County
1001 Pearl Street, 3rd Floor
Beaumont, Texas 77701-3545

OR2007-02246

Dear Mr. Rugg:

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# 272132.

The Jefferson County Sheriff's Department (the "county") received a request for a copy of "the findings of an [sic] the internal investigation" by the county on the death of a named individual. You claim that the submitted information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, you inform this office that although the county has no responsive "findings," the county has made a good-faith effort to relate the request to information that it holds. *See* Open Records Decision No. 561 at 8 (1990) (construing statutory predecessor). Accordingly, we will address your arguments against disclosure of the submitted information.

Next, we note that a portion of the information you submitted to this office as responsive to the request constitutes information that is subject to section 552.022 of the Government Code. Section 552.022(a) enumerates categories of information that are public information and not excepted from required disclosure under chapter 552 of the Government Code unless they are expressly confidential under other law. *See* Gov't Code § 552.022(a)(1) ("completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108"). The information subject to section 552.022

must therefore be released unless the information is expressly made confidential under other law.¹ You claim that the submitted information is excepted from disclosure under section 552.103. Section 552.103 of the Government Code is a discretionary exception to disclosure that protects the governmental body's interests and is therefore not other law that makes information expressly confidential for purposes of section 552.022(a). *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 663 (1999) (governmental body may waive section 552.103), 586 (1991) (governmental body may waive section 552.108). Therefore, the county may not withhold any of the information subject to section 552.022 under section 552.103. We will now address the applicability of section 552.103 to the remaining submitted information.

Section 552.103 of the Government Code provides in relevant part as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You state that the requested information "relates directly to a pending civil action in the United States District Court for the Eastern District of Texas" in which the county is a named

¹ You do not raise section 552.108 as an exception to disclosure of the information subject to section 552.022(a)(1).

party. However, you did not inform us of other relevant information regarding this litigation, specifically, whether the litigation was pending on the date the county received the request for information. Accordingly, we find that the county has not satisfied its burden of showing that section 552.103 is applicable in this instance. Thus, the county may not withhold the remaining submitted information under section 552.103 of the Government Code.

We note that the submitted information contains medical records subject to the Medical Practice Act (“MPA”), chapter 159 of the Occupations Code. Section 159.002 of the Occupations Code provides in pertinent 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). Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 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).

Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). 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). We have marked the information that consists of medical records for purposes of the MPA. Absent the applicability of an MPA access provision, the county must withhold these medical records pursuant to the MPA.

Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Section 552.101 also encompasses the Emergency Medical Services Act, sections 773.091 through 773.173 of the Health and Safety Code, which governs access to emergency medical service (“EMS”) records. *See* Open Records Decision No. 598 (1991). Section 773.091 of the Emergency Medical Services Act provides in part:

(b) Records of the identity, evaluation, or treatment of a patient by emergency medical services personnel or by a physician providing medical supervision that are created by the emergency medical services personnel or physician or maintained by an emergency medical services provider are confidential and privileged and may not be disclosed except as provided by this chapter.

...

(g) The privilege of confidentiality under this section does not extend to information regarding the presence, nature of injury or illness, age, sex, occupation, and city of residence of a patient who is receiving emergency medical services.

Health & Safety Code § 773.091(b), (g). We have marked the information that constitutes an EMS record pursuant to section 773.091. We note, however, that records that are confidential under section 773.091 may be disclosed to “any person who bears a written consent of the patient or other persons authorized to act on the patient’s behalf for the release of confidential information.” Health & Safety Code §§ 773.092(e)(4), .093. Among the individuals authorized to act on the patient’s behalf in providing written consent is a “personal representative” if the patient is deceased. *Id.* Section 773.093 provides that a consent for release of EMS records must specify: (1) the information or records to be covered by the release; (2) the reasons or purpose for the release; and (3) the person to whom the information is to be released. Thus, the county must withhold the marked EMS records under section 552.101 of the Government Code in conjunction with section 773.091 of the Health and Safety Code, except as specified by section 773.091(g). However, the county must release these EMS records on receipt of proper consent under section 773.093(a). *See id.* §§ 773.092,.093.

Next, we note that the submitted information may include information protected from disclosure by section 552.130 of the Government Code. Section 552.130 excepts from disclosure information that relates to a driver’s license or motor vehicle title or registration issued by an agency of this state. Gov’t Code § 552.130. We observe, however, that section 552.130 protects the privacy interest of the individual, and because that right of privacy is purely personal, it 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.)

(Texas does not recognize relational or derivative right of privacy); *see also* Attorney General Opinions JM-229 (1984); H-917 (1976); Open Records Decision No. 272 at 1 (1981). Thus, motor vehicle information pertaining to deceased persons may not be withheld under section 552.130. However, if the Texas motor vehicle information at issue pertains to a vehicle in which any living individual has an ownership interest, then the county must withhold this information under section 552.130. If no living individual has an ownership interest in this vehicle, then the information at issue is not excepted from disclosure under section 552.130 and must be released to the requestor along with the remaining submitted information.

In summary: (1) the county may only release the marked medical record in accordance with the MPA; (2) the county must withhold the marked EMS information that is confidential under section 552.101 of the Government Code in conjunction with section 773.091 of the Health and Safety Code, except as specified by section 773.091(g); and (3) to the extent the Texas motor vehicle record information, which we have marked, pertains to a vehicle in which a living individual has an ownership interest, it must be withheld under section 552.130 of the Government Code. The remaining 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, 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,



Heather Pendleton Ross
Assistant Attorney General
Open Records Division

HPR/sdk

Ref: ID# 272132

Enc: Submitted documents

c: Ms. Michelle McCalope
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(w/o enclosures)