



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 14, 2007

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Mr. John C. West
OIG General Counsel
Texas Department of Criminal Justice
P. O. Box 13084
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OR2007-02844

Dear Mr. Frazier and Mr. West:

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# 273318.

The Texas Department of Criminal Justice (the "department") received a request for any and all records pertaining to the requestor's son, including medical records and death report. The department and the Office of the Inspector General (the "OIG") have submitted separate briefs, as well as separate documents that each seeks to withhold from disclosure. The OIG indicates that it is releasing some of the requested information to the requestor with redactions pursuant to the previous determination issued by this office in Open Records Letter No. 2005-01067 (2005).¹ The OIG also states that it is withholding social security

¹Open Records Letter No. 2005-01067 (2005) serves as a previous determination that the present and former home addresses and telephone numbers, social security numbers, and family member information of current or former employees of the department, regardless of whether the current or former employee complies with section 552.1175 of the Government Code, are excepted from disclosure under section 552.117(a)(3) of the Government Code.

numbers under section 552.147 of the Government Code.² The OIG claims that the remaining information it has submitted is excepted from disclosure under sections 552.101, 552.108 and 552.134 of the Government Code. The department indicates that it will make some information available to the requestor. However, the department claims that the information it has submitted is excepted from disclosure under sections 552.101, 552.108 and 552.134 of the Government Code.³ We have considered the claimed exceptions and reviewed the submitted information.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This section encompasses information protected by other statutes. A portion of the information submitted by the OIG consists of medical records, access to which is governed by the Medical Practices Act (“MPA”). Occ. Code §§ 151.001-165.160. 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 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). Furthermore, we have concluded that 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

²We note that section 552.147(b) of the Government Code authorizes a governmental body to redact a living person’s social security number from public release without the necessity of requesting a decision from this office under the Act. Gov’t Code § 552.147(b).

³We note that the department has withdrawn its assertions of sections 552.103, 552.107, 552.111, and 552.130 of the Government Code for the information it submitted.

treatment of a patient by a physician that are created or maintained by a physician. *See Open Records Decision No. 546 (1990)*. 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. §§ 159.005*. 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. The OIG may only disclose these records in accordance with the access provisions of the MPA. Absent the applicability of an MPA access provision, the OIG must withhold these records pursuant to the MPA. *See Open Records Decision No. 598 (1991)*.

Another portion of the information submitted by the OIG is subject to section 552.101 of the Government Code in conjunction with chapter 611 of the Health and Safety Code, which provides for the confidentiality of records created or maintained by a mental health professional. Section 611.002(a) reads as follows:

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. *Id.* § 611.001(b). Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals. *See Open Records Decision No. 565 (1990)*. Accordingly, we have marked the information submitted by the OIG that is subject to chapter 611 of the Health and Safety Code and may only be released 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.

Section 508.313(a)(2) of the Government Code makes confidential "[a]ll information obtained or maintained" by the department that relates to a "releasee," meaning a person released on parole or to mandatory supervision. *See Gov't Code § 508.001(a)(9)*. The department states that the submitted parole records, which have been marked, are "held by the Parole Division of [the department] as part of its file on an inmate of the institutional division." Based on the department's representations and our review, we conclude that this information is made confidential by section 508.313(a)(2) of the Government Code and that none of the release provisions of that statute apply in this instance. *See id.* §§ 508.313(c)-(f).

Accordingly, the department must withhold the marked parole records pursuant to section 552.101 of the Government Code.

Both the OIG and the department claim the remaining submitted information is subject to section 552.134 of the Government Code. Section 552.134 states that:

[e]xcept as provided by Subsection (b) or by Section 552.029 [of the Government Code], information obtained or maintained by the Texas Department of Criminal Justice is excepted from [required public disclosure] if it is information about an inmate who is confined in a facility operated by or under a contract with the department.

Gov't Code § 552.134(a). Section 552.029 of the Government Code provides that

[n]otwithstanding . . . Section 552.134, the following information about an inmate who is confined in a facility operated by or under a contract with the [department] is subject to required disclosure under Section 552.021:

(1) the inmate's name, identification number, age, birthplace, department photograph, physical description, or general state of health or the nature of an injury to or critical illness suffered by the inmate;

...

(8) basic information regarding the death of an inmate in custody, an incident involving the use of force, or an alleged crime involving the inmate.

Id. § 552.029(1), (8).⁴ Thus, the legislature explicitly made section 552.134 subject to section 552.029.

We find that section 552.134(a) is generally applicable to the submitted information. We note, however, that the information submitted by the department includes a department photograph of an inmate to whom the information pertains. The department must release the photograph of the inmate we have marked under section 552.029(1). Also, as the OIG and department acknowledge, some of these records concern the death of an inmate in custody and incidents involving the use of force. Thus, the OIG and department must release basic information concerning the death in custody and use-of-force incidents, which each indicates has been released, pursuant to section 552.029(8). *Id.* Basic information includes the time

⁴As amended by Act of May 25, 2005, 79th Leg., R.S., H.B. 2197, §1 (effective June 18, 2005).

and place of the incident, names of inmates and department officials directly involved, a brief narrative of the incident, a brief description of any injuries sustained, and information regarding criminal charges or disciplinary actions filed as a result of the incident. The OIG and department must withhold the remaining submitted information pursuant to section 552.134 of the Government Code.⁵

In summary, we have marked the records that may only be disclosed in accordance with the access provisions of the MPA. We have also marked the records that may only be released in accordance with sections 611.004 and 611.0045 of the Health and Safety Code. The department must withhold the marked parole records under section 552.101 of the Government Code in conjunction with section 508.313 of the Government Code. With the exception of basic information, which the OIG and department state has been released, and the marked photographs, the OIG and department must withhold the remaining submitted information under section 552.134 of the Government Code.

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

⁵As our ruling is dispositive, we do not address the remaining arguments against disclosure, except to note that the information that is subject to section 552.029(8) corresponds to the basic front-page information that is made public under section 552.108(c). See Gov't Code § 552.108(c); *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177, 186-188 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e.*, 536 S.W.2d 559 (Tex. 1976) (per curiam); Open Records Decision No. 127 at 3-4 (1976) (summarizing types of information deemed public in *Houston Chronicle*).

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,



Ramsey A. Abarca
Assistant Attorney General
Open Records Division

RAA/eb

Ref: ID# 273318

Enc. Submitted documents

c: Ms. Mary Daniels
11513 Lockport
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(w/o enclosures)