



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 30, 2007

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Mr. John C. West
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Texas Department of Criminal Justice
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OR2007-11296

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# 287907.

The Texas Department of Criminal Justice (the "department") received a request for all information in the personal file of a named former department inmate. The department's Office of the General Counsel (the "OGC") and its Office of the Inspector General (the "OIG") have submitted separate briefs as well as separate documents that each seeks to withhold from disclosure. The OGC claims that the information it has submitted is excepted from disclosure under sections 552.101, 552.107, 552.130, and 552.134 of the Government Code. The OIG states that some of the requested information, including a custodial death report, has been released 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 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, 552.115 and 552.134 of the Government Code. We have considered the submitted arguments and have reviewed the submitted information.

Initially, we address the department's obligations under section 552.301 of the Government Code, which prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(b) requires the governmental body to ask for the attorney general's decision and state the exceptions to disclosure that it claims not later than the tenth business day after the date of its receipt of the written request for information. *See* Gov't Code § 552.301(b). Section 552.301(e-1) provides the following:

A governmental body that submits written comments to the attorney general under Subsection (e)(1)(A) shall send a copy of those comments to the person who requested the information from the governmental body. If the written comments disclose or contain the substance of the information requested, the copy of the comments provided to the person must be a redacted copy.

Id. § 552.301(e-1). The OGC did not raise section 552.130 within the period prescribed by section 552.301(b). Furthermore, while the OGC and OIG each sent to the requestor a copy of its written comments submitted to this office pursuant to section 552.301(e)(1)(A), the OIG redacted its entire discussion of the exceptions asserted from the copy. After review of the copy of the OIG's brief sent to the requestor, we conclude that the OIG redacted information from the copy that does not disclose or contain the substance of the information requested; therefore, we conclude that the OIG failed to comply with the procedural requirements of section 552.301(e-1) of the Government Code.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption

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.

²Section 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.

that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). This office has held that a compelling reason exists to withhold information when third party interests are at stake or when information is made confidential by another source of law. *See* Open Records Decision No. 150 (1977) (construing predecessor statute). The OIG contends that some of the information it has submitted is excepted under section 552.108 of the Government Code. However, the department has not demonstrated a compelling reason for withholding the information at issue under section 552.108. *See* Open Records Decision Nos. 473 at 2 (1987) (discretionary exceptions under Act can be waived), 177 (1977) (statutory predecessor to section 552.108 subject to waiver); *but see* Open Records Decision No. 586 (1991) (when governmental body fails to timely seek attorney general decision under the Act, need of another governmental body may provide compelling reason for withholding requested information). Therefore, the department may not withhold any portion of the information submitted by the OIG under section 552.108. However, the applicability of sections 552.101, 552.115, and 552.134 can provide compelling reasons to withhold information. We will therefore consider the OIG's claims under these sections with respect to the information that was submitted by the OIG. In addition, section 552.130 can also provide a compelling reason to withhold information, and we will address this exception for the information submitted by the OGC. We will also consider the OGC's arguments under sections 552.101, 552.107, and 552.134, which were raised in compliance with section 552.301 by the OGC.

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. Section 552.101 encompasses information made confidential by other statutes. Some of the submitted information constitutes medical records, access to which is governed by the Medical Practice 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 treatment of a patient by a physician that are created or maintained by a physician. *See* Open Records Decision No. 546 (1990). The MPA defines a "patient" as "a person who, to receive medical care, consults with or is seen by a physician." Occ. Code § 159.001. Based on this definition, a deceased individual is not a "patient" under section 159.001 of the Occupations Code. Thus, the MPA protects only the medical records of people who were alive at the time of diagnosis, evaluation, or treatment.

Medical records must be released on 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 id.* §§ 159.004, .005. When a patient is deceased, as is the case here, medical records pertaining to the deceased patient may only be released upon the signed consent of the deceased's personal representative. *See id.* §§ 159.005(a)(5). 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). 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). We have marked the medical records that are confidential under the MPA. The department must not release that information unless it has authorization under the MPA to do so. *See* Open Records Decision No. 598 (1991).

Section 552.101 also encompasses chapter 411 of the Government Code, which deems confidential criminal history information ("CHRI") generated by the National Crime Information Center or by the Texas Crime Information Center. 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." *Id.* § 411.082(2). Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* Section 411.083 of

the Government Code deems confidential CHRI that the Department of Public Safety (“DPS”) maintains, except that the DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See* Gov’t Code § 411.083. Upon review of the submitted information, we find that the information we have marked constitutes CHRI for the purposes of chapter 411. Therefore, the department must withhold the information we have marked under section 552.101 of the Government Code.

Section 552.101 of the Government Code also encompasses section 611.002 of the Health and Safety Code, which 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); *see also id.* § 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 information that is confidential under section 611.002 of the Health and Safety Code, and that may only be released in accordance sections 611.004 and 611.0045. *See* Health & Safety Code § 611.004(a)(5) (professional may disclose confidential information to patient’s personal representative if patient is deceased). If the requestor does not have a right of access to the mental health records we have marked, they must be withheld from disclosure under section 552.101 of the Government Code.

Section 552.134(a) relates to inmates of the department and provides the following:

Except 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 552.134 is explicitly made subject to section 552.029, which provides in relevant part the following:

Notwithstanding . . . 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). On review, we agree that most of the remaining records constitute information about an inmate for purposes of section 552.134. We note, however, that the submitted information includes a department photograph of an inmate. Under section 552.029(1), the photograph we have marked may not be withheld under section 552.134. Furthermore, the remaining department records contain information relating to the death of an inmate in custody and a crime involving an inmate in custody. Basic information concerning these incidents is also subject to section 552.029 and may not be withheld under section 552.134. *See id.* § 552.029(8). Basic information includes the time 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. In addition, some of the remaining information, which we have marked, does not relate to an inmate, and it may not be withheld under section 552.134. Thus, except for basic information, which the OIG states has already been released, and the information we have marked, the department must withhold the remaining information pursuant to section 552.134 of the Government Code.

We note that the remaining information includes Texas motor vehicle record information. Section 552.130 of the Government Code excepts from disclosure information that relates to a driver's license issued by an agency of this state. *See Gov't Code* § 552.130(a)(2). We have marked Texas motor vehicle record information that the department must withhold under section 552.130 of the Government Code.

In summary, the department may only release the marked medical documents in accordance with the MPA. The department must withhold the CHRI that we have marked under section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code. The information that constitutes mental health records under chapter 611 of the Health and Safety Code may only be released in accordance with sections 611.004 and 611.0045 of the Health and Safety Code. Except for basic information which the OIG states has already been released, and the information that we have marked, the department must withhold the remaining submitted information pursuant to section 552.134 of the

Government Code. The department must withhold the Texas motor vehicle record information that we have marked under section 552.130 of the Government Code.³ 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.

³As our ruling is dispositive, we do not address your other arguments for exception of this information.

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,

A handwritten signature in cursive script that reads "L. Joseph James".

L. Joseph James
Assistant Attorney General
Open Records Division

LJJ/eeg

Ref: ID# 287907

Enc. Submitted documents

c: Mr. John W. Morris
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(w/o enclosures)