



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 17, 2007

Mr. Robert J. Davis
Matthews, Stein, Shiels, Pearce, Knott, Eden & Davis, L.L.P.
8131 LBJ Freeway, Suite 700
Dallas, Texas 75251

OR2007-13604

Dear Mr. Davis:

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# 292152.

The Collin County Sheriff's Office (the "sheriff"), which you represent, received two requests from the same requestor for (1) jail records relating to the death of the requestor's son and (2) a copy of an escape warrant. You claim that the requested information is excepted from disclosure under sections 552.103 and 552.108 of the Government Code. We have considered the exceptions you claim and have reviewed the information you submitted.

Initially, we must address the sheriff's obligations under section 552.301 of the Government Code. Section 552.301 prescribes procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(e) requires the governmental body to submit to the attorney general, not later than the fifteenth business day after the date of its receipt of the request, (1) written comments stating why the governmental body's claimed exceptions apply to the information that it seeks to withhold; (2) a copy of the written request for information; (3) a signed statement of the date on which the governmental body received the request or evidence sufficient to establish that date; and (4) the specific information that the governmental body seeks to withhold or representative samples if the information is voluminous. *See* Gov't Code § 552.301(e)(1)(A)-(D). If a governmental body fails to comply with section 552.301, the requested information is presumed to be subject to required public disclosure and must be released, unless there is a compelling reason to withhold any

of the information. *See id.* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ).

In this instance, the submitted information includes information stored on CDs and a DVD (collectively “the storage discs”). The cover sheets for the storage discs reflect that they contain photographs, “recorded images,” Commission on Jail Standards policies and procedures, and policies and procedures of the sheriff’s office. However, the sheriff has submitted only photocopies of the storage discs; he has not submitted to this office the storage disks themselves, any of the information that the storage discs contain, or representative samples of that information. Under section 552.301(e)(1)(D), a governmental body must submit requested information in a form that enables this office to determine whether the information comes within an exception to disclosure under the Act. Moreover, section 552.303 of the Government Code authorizes this office to determine whether a governmental body’s submission of information under section 552.301 is sufficient for our rendition of a decision under the Act. *See Gov’t Code* § 552.303(b). We find that in failing to submit either any of the information contained in the storage discs or representative samples of that information, the sheriff has failed to comply with section 552.301(e)(1)(D). Therefore, the information contained in the storage discs is presumed to be public under section 552.302. This statutory presumption can generally be overcome when the information is confidential by law or third-party interests are at stake. *See Open Records Decision Nos.* 630 at 3 (1994), 325 at 2 (1982).

Although the sheriff raises sections 552.103 and 552.108 of the Government Code, those sections are discretionary exceptions to disclosure that protect a governmental body’s interests and may be waived. *See Gov’t Code* § 552.007; *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 Gov’t Code § 552.103); *Open Records Decision Nos.* 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 177 at 3 (1977) (statutory predecessor to Gov’t Code § 552.108 subject to waiver). The sheriff’s claims under sections 552.103 and 552.108 are not compelling reasons for non-disclosure under section 552.302. In failing to comply with section 552.301, the sheriff has waived his claims under sections 552.103 and 552.108. We note that the interests under these exceptions of a governmental body other than the one that failed to comply with section 552.301 can provide compelling reasons for non-disclosure under section 552.302. *See Open Records Decision Nos.* 586 at 2-3 (1991), 469 (1987). You inform us that the Collin County District Attorney’s Office (the “district attorney”) asserts an interest in the submitted information. However, because the sheriff has not submitted any of the information contained in the storage discs, we have no means of determining whether there is any compelling reason for the sheriff to withhold any of that information on behalf of the district attorney under section 552.103 or section 552.108. Therefore, the sheriff must release all of the information contained in the storage discs pursuant to section 552.302.

We next note that the submitted documents include a custodial death report. Article 49.18(b) of the Code of Criminal Procedure provides that with the exception of any portion of the custodial death report that the Office of the Attorney General (the "OAG") determines is privileged, the attorney general shall make the report public. *See* Crim. Proc. Code art. 49.18(b). The report was revised in May 2006 and now consists of four pages and an attached summary of how the death occurred. The OAG has determined that the four-page report and summary must be released to the public but that any other documents submitted with the revised report are confidential under article 49.18(b). However, article 49.18(b) does not make confidential all information held by a local law enforcement agency simply because the information is also included in extraneous documents attached to a custodial death report submitted to the OAG. If a governmental body receives a request for information otherwise generated or maintained by the law enforcement agency as part of its ordinary responsibilities, those documents may be withheld only if one of the Act's exceptions or another specific law protects them. *See* Open Records Decision No. 521 at 7 (1989). In this instance, you have submitted a four-page custodial death report with an attached summary. The sheriff must release that information, which we have marked, pursuant to article 49.18(b) of the Code of Criminal Procedure.

We also note that section 552.022 of the Government Code is applicable to some of the remaining information. Section 552.022(a)(1) provides for required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body[,]" unless the information is expressly confidential under other law or excepted from disclosure under section 552.108 of the Government Code. Gov't Code § 552.022(a)(1). Section 552.022(a)(17) provides for required public disclosure of "information that is also contained in a public court record[,]" unless the information is expressly confidential under other law. *Id.* § 552.022(a)(17). In the instance, the submitted information includes completed reports that are subject to section 552.022(a)(1) and court records that are subject to section 552.022(a)(17). Sections 552.103 is not other law that makes information expressly confidential for the purposes of section 552.022(a)(1) and section 552.022(a)(17). *See id.* § 552.007; *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d at 475-76; ORD 665 at 2 n.5. Likewise, section 552.108 is not other law that makes information confidential for the purposes of section 552.022(a)(17). *See* ORD 177 at 3. Therefore, the court records that we have marked may not be withheld under section 552.103 or section 552.108, and the sheriff must release that information pursuant to section 552.022(a)(17). However, we will consider the sheriff's claim under section 552.108 with respect to the remaining information, including the information that is subject to section 552.022(a)(1). We also will consider the sheriff's claim under section 552.103 with respect to the remaining information that is not subject to section 552.022(a)(1).

We first note, however, that section 552.101 of the Government Code is applicable to some of the submitted information.¹ Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision,” and encompasses information that other statutes make confidential. Gov’t Code § 552.101. Medical records are confidential under the Medical Practice Act (the “MPA”), subtitle B of title 3 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). 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 also have determined that the MPA ordinarily 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, we have concluded that 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 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.

After the death of a patient, medical records may be released only on the signed written consent of the decedent’s personal representative. *See id.* § 159.005(a)(5). The consent must specify (1) the information to be covered by the release, (2) the 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 medical records that are confidential under

¹Unlike other exceptions to disclosure, this office will raise section 552.101 on behalf of a governmental body, because the Act prescribes criminal penalties for the release of confidential information. *See id.* §§ 552.007, .352; Open Records Decision No. 325 at 2 (1982).

the MPA. The sheriff must withhold those records unless the deceased inmate's personal representative provides the sheriff with written consent that meets the requirements of section 159.005(a)(5) of the MPA.

You seek to withhold the remaining information under section 552.108. Section 552.108(a)(1) excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]” Gov’t Code § 552.108(a)(1). A governmental body that claims an exception to disclosure under section 552.108 must reasonably explain how and why this exception is applicable to the information at issue. *See id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state that the rest of the submitted information is related to the death of an inmate of the county jail. You have provided a letter from an assistant district attorney stating that the remaining information is related to a pending criminal investigation and should not be released at this time. We note that section 552.108 may be invoked by any proper custodian of information relating to an incident involving allegedly criminal conduct that is still under active investigation or prosecution. *See* Open Records Decision No. 372 at 4 (1983) (addressing statutory predecessor). Therefore, based on your representations and the assistant district attorney’s letter, we conclude that section 552.108(a)(1) is generally applicable to the remaining information. *See Houston Chronicle Publ’g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref’d n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases).

We note that section 552.108 does not except from disclosure “basic information about an arrested person, an arrest, or a crime.” Gov’t Code § 552.108(c). Section 552.108(c) refers to the basic front-page information held to be public in *Houston Chronicle*. *See* 531 S.W.2d at 186-88. The sheriff must release basic information, even if the information does not literally appear on the front page of an offense or arrest report. *See* Open Records Decision No. 127 at 3-4 (1976) (summarizing types of information deemed public by *Houston Chronicle*). The sheriff may withhold the rest of the submitted information on behalf of the district attorney under section 552.108(a)(1).

In summary: (1) the sheriff must release all of the information contained in the storage discs pursuant to section 552.302 of the Government Code; (2) the sheriff must release the marked custodial death report and attached summary pursuant to article 49.18(b) of the Code of Criminal Procedure; (3) the sheriff must release the marked court records pursuant to section 552.022(a)(17) of the Government Code; (4) the sheriff must withhold the marked medical records under the MPA unless the deceased inmate’s personal representative provides the sheriff with written consent that meets the requirements of section 159.005(a)(5) of the MPA; and (5) the sheriff may withhold the rest of the submitted information under

section 552.108(a)(1) of the Government Code, except for the basic information that must be released under section 552.108(c).²

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).

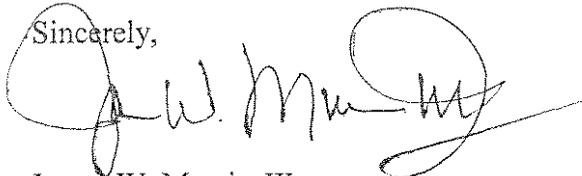
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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.

²As we are able to make this determination, we do not address your claim under section 552.103 of the Government Code, except to note that section 552.103 generally does not except from disclosure the same basic information that must be released under section 552.108(c). *See* Open Records Decision No. 597 (1991).

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 black ink, appearing to read "J.W. Morris, III". The signature is fluid and cursive, with a large loop at the end.

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

JWM/ma

Ref: ID# 292152

Enc: Submitted documents

c: Ms. Marcia Riley
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(w/o enclosures)