



ATTORNEY GENERAL OF TEXAS  
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OR2008-10537

Dear Mr. DeFriend 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# 317834.

The Texas Department of Criminal Justice (the "department") received a request for all prison and parole records pertaining to the requestor's client. 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 states that it will release some of its responsive information. The OGC claims that the inmate records it has submitted are excepted from disclosure under sections 552.101 and 552.134 of the Government Code. The OIG states that it will release some of its responsive information to the requestor with redactions pursuant to the previous

determination issued by this office in Open Records Letter No. 2005-01067 (2005).<sup>1</sup> The OIG also states that it is withholding social security numbers under section 552.147 of the Government Code.<sup>2</sup> The OIG further states that some of its responsive information has been destroyed according to the OIG's record retention guidelines.<sup>3</sup> The OIG claims that the inmate records it has submitted are excepted from disclosure under sections 552.101, 552.108, and 552.134 of the Government Code. We have considered the exceptions claimed and reviewed the submitted information.

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information that other statutes make confidential. Medical records are confidential under the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. *See* Occ. Code § 151.001. 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.

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<sup>1</sup> Open Records Letter No. 2005-01067 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.

<sup>2</sup> 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.

<sup>3</sup> The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983).

*Id.* § 159.002(a)-(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). 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). 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. *Id.* §§ 159.004, .005. We have marked documents in the OGC's submitted inmate records that constitute medical records. We note that as the authorized representative of the inmate whose medical records are at issue, the requestor may have a right of access to the marked medical records under the MPA. *See id.* § 159.005(a)(2). The marked medical records may only be released in accordance with the MPA. *See* ORD 598.

The OGC and OIG assert that portions of their submitted records are confidential under section 611.002(a) of the Health and Safety Code, which pertains to mental health records. Section 552.101 also encompasses section 611.002(a), which provides that "[c]ommunications 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(a). 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. *See id.* § 611.001(2). Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals. *See* Open Records Decision No. 565 (1990). These sections permit disclosure of mental health records to a patient, a person authorized to act on the patient's behalf, or a person who has the written consent of the patient. Health & Safety Code §§ 611.004, .0045. We have marked information in the OGC's and OIG's submitted documents that is confidential under section 611.002 of the Health and Safety Code. However, as the authorized representative of the person whose mental health records are at issue, the requestor may have a right of access to the marked information. *See id.* §§ 611.004, .0045. Thus, the department may only release the mental health records we have marked in accordance with sections 611.004 and 611.0045 of the Health and Safety Code.

The OGC contends that a portion of its remaining submitted information is exempt under section 552.101 in conjunction with section 560.003 of the Government Code. The public availability of fingerprints is governed by chapter 560 of the Government Code. *See* Gov't Code §§ 560.001(1) ("biometric identifier" means retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry), .003 (biometric identifier in possession of governmental body is exempt from disclosure under Act). Section 560.002 provides, however, that "[a] governmental body that possesses a biometric identifier of an individual . . . may not sell, lease, or otherwise disclose the biometric identifier to another person unless . . . the individual consents to the disclosure[.]" *Id.* § 560.002(1)(A). Therefore, as the authorized

representative of the individual whose fingerprints are contained in the OGC's remaining submitted documents, the requestor has a right of access to that information under section 560.002(1)(A). *See* Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning himself). Therefore, the department must release the submitted fingerprints, which we have marked, under section 560.002 of the Government Code.

The OGC and OIG assert that the remaining submitted inmate records are excepted under section 552.134 of the Government Code. Section 552.134 (a) relates to inmates of the department and provides:

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:

Notwithstanding Section 508.313 or 552.134, the following information about an inmate who is confined in a facility operated by or under a contract with the Texas Department of Criminal Justice is subject to required disclosure under Section 552.021:

(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(8). Upon review of the remaining submitted inmate records, we conclude that section 552.134(a) is generally applicable to this information. Although section 552.023 of the Government Code gives a person a "special right of access, beyond the right of the general public, to information held by a governmental body that relates to the person and that is protected from public disclosure by laws intended to protect that person's privacy interests," we note that section 552.134 does not protect only the inmate's privacy interest. *See id.* § 552.023. Therefore, section 552.023 does not provide the requestor a special right of access to the remaining submitted information. We also find that the exceptions in section 552.029 are not applicable to the OGC's remaining submitted records. We note, however, that the OIG's remaining records include information regarding an alleged crime involving the inmate. Consequently, the department must release basic information from the OIG's information about the alleged crime pursuant to section 552.029. 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. Therefore, the department must withhold the OGC's remaining inmate records under section 552.134 of the Government Code. Additionally, with the exception of basic information, which the OIG states it will release, the department must withhold the OIG's remaining inmate records pursuant to section 552.134 of the Government Code.<sup>4</sup>

In summary, the marked medical records may only be released in accordance with the MPA. The department must release the mental health records we have marked pursuant to section 552.101 of the Government Code in conjunction with sections 611.004 and 611.0045 of the Health and Safety Code. The department must release the submitted fingerprints we have marked under section 552.101 of the Government Code in conjunction with section 560.002 of the Government Code. The department must withhold the OGC's remaining inmate records under section 552.134 of the Government Code. With the exception of basic information, the department must withhold the OIG's remaining inmate records 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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3). If the governmental body does not file suit over 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).

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<sup>4</sup> As our ruling is dispositive for this information, we need not address the OGC's and OIG's remaining arguments against disclosure.

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can challenge 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,



Leah B. Wingerson  
Assistant Attorney General  
Open Records Division

LBW/ma

Ref: ID# 317834

Enc. Submitted documents

c: Ms. Kelcey Nichols  
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(w/o enclosures)