



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 24, 2008

Mr. John C. West
Office of the Inspector General
Texas Department of Criminal Justice
P.O. Box 13084
Austin, Texas 78711

OR2008-13133

Dear 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# 322651.

The Texas Department of Criminal Justice's Office of the Inspector General (the "OIG") received a request for all information on the investigation into the death of an inmate on death-row. You state that the OIG will release some information to the requestor with redactions pursuant to section 552.147 and the previous determination issued to the Texas Department of Criminal Justice (the "department") by this office in Open Records Letter No. 2005-01067 (2005).¹ You claim that the submitted information is excepted from disclosure under section 552.101, 552.108, and 552.134 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

¹ Open Records Letter No. 2005-01067 authorizes the OIG to withhold the present and former home addresses and telephone numbers, social security numbers, and family member information of current or former employees of the Texas Department of Criminal Justice (the "department") under section 552.117(a)(3) of the Government Code without the necessity of requesting an attorney general decision with regard to the applicability of that exception. See Gov't Code § 552.301(a); Open Records Decision No. 673 at 7-8 (2001). 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.

Initially, you state that a portion of the submitted information is subject to Open Records Letter No. 2004-6370 (2004), which serves as a previous determination under section 552.301(a) of the Government Code for the department with respect to shift rosters. Therefore, pursuant to that previous determination, the OIG may withhold the submitted shift rosters under section 552.108(b)(1) of the Government Code. *See* Open Records Decision No. 673 at 7-8 (2001) (establishing criteria for previous determinations).

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 statute. Medical records are governed by 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.

Id. § 159.002(a)-(c). Information subject to the MPA includes both medical records and information obtained from those medical records. *See* 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 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 diagnosis, evaluation, or treatment.

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. Occ. Code

§§ 159.004, .005. Medical records pertaining to a deceased patient may only be released upon the signed consent of the deceased's personal representative. *See id.* § 159.005(a)(5). 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 may only be released in accordance with the MPA.

You also raise section 552.101 in conjunction with section 611.002 of the Health and Safety Code, which governs the public availability of mental health records and 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 id.* § 611.001 (defining "patient" and "professional"). Sections 611.004 and 611.0045 of the Health and Safety Code provide for access to information that is made confidential by section 611.002 only by certain individuals. *See id.* §§ 611.004, 611.0045; ORD 565. Upon review, we find that none of the submitted information falls within the scope of section 611.002 of the Health and Safety Code, and therefore the OIG may not withhold any of this information on that basis under section 552.101 of the Government Code.

Section 552.101 also encompasses criminal history record information ("CHRI") generated by the National Crime Information Center ("NCIC") or by the Texas Crime Information Center ("TCIC"). 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. *See* Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *See* Gov't Code § 411.083. 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 id.* Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090-.127. We note that because the laws that govern the dissemination of information obtained from NCIC and TCIC are based on both law enforcement and privacy interests, the CHRI of a deceased individual that is obtained from a criminal justice agency may be disseminated only as permitted by subchapter F of chapter 411 of the Government Code. *See* ORD 565

at 10-12. The OIG must withhold the CHRI that we have marked under section 552.101 of the Government Code in conjunction with federal law and chapter 411 of the Government Code.

Section 552.101 also encompasses the doctrines of common-law and constitutional privacy. Common-law privacy protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The types of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. Generally, only highly intimate information that implicates the privacy of an individual is withheld.

Constitutional privacy protects two kinds of interests. See *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); Open Records Decision Nos. 600 (1992), 478 (1987), 455 (1987). The first is the interest in independence in making certain important decisions related to the "zones of privacy," pertaining to marriage, procreation, contraception, family relationships, and child rearing and education, that have been recognized by the United States Supreme Court. See *Fadjo v. Coon*, 633 F.2d 1172 (5th Cir. 1981); ORD 455 at 3-7. The second constitutionally protected privacy interest is in freedom from public disclosure of certain personal matters. See *Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5th Cir. 1985); ORD 455 at 6-7. This aspect of constitutional privacy balances the individual's privacy interest against the public's interest in the information. See ORD 455 at 7. Constitutional privacy under section 552.101 is reserved for "the most intimate aspects of human affairs." *Id.* at 8 (quoting *Ramie*, 765 F.2d at 492).

This office has applied privacy to protect certain information about incarcerated individuals. See Open Records Decision Nos. 430 (1985), 428 (1985), 185 (1978). Citing *State v. Ellefson*, 224 S.E.2d 666 (S.C. 1976), as authority, this office has held that those individuals who correspond with inmates possess a "first amendment right . . . to maintain communication with [the inmate] free of the threat of public exposure;" and that this right would be violated by the release of information that identifies those correspondents, because such a release would discourage correspondence. ORD 185 at 2. The information at issue in Open Records Decision No. 185 was the identity of individuals who had corresponded with inmates. This office found that "the public's right to obtain an inmate's correspondence list is not sufficient to overcome the first amendment right of the inmate's correspondents to maintain communication with him free of the threat of public exposure." *Id.* Implicit in this holding is the fact that an individual's association with an inmate may be intimate or embarrassing. In Open Records Decision Nos. 428 and 430, this office determined that inmate visitor and mail logs which identify inmates and those who choose to visit or correspond with inmates are protected by constitutional privacy because people who

correspond with inmates have a First Amendment right to do so that would be threatened if their names were released. ORD 430 at 6. Further, we recognized that inmates had a constitutional right to visit with outsiders and could also be threatened if their names were released. *See also* ORD 185. The outsider's rights to anonymity were found to outweigh the public's interest in this information. *Id.*; *see* ORD 430 (list of inmate visitors protected by constitutional privacy of both inmate and visitors).

Some of the responsive information is subject to section 552.101 of the Government Code in conjunction with constitutional privacy. Thus, the OIG must withhold the information we have marked under section 552.101 of the Government Code in conjunction with the constitutional right to privacy.

You also assert that the photographs of the deceased inmate are protected by common-law privacy under section 552.101. We note that the right of privacy lapses at death; thus information may not be withheld on the basis of the privacy interests of a deceased individual. However, the United States Supreme Court recognized that surviving family members can have a privacy interest in information relating to their deceased relatives. *See Nat'l Archives & Records Admin. v. Favish*, 124 S. Ct. 1570 (2004). As of the date of this letter, we have not received any correspondence from the family of the deceased individual. Thus, because we do not have a representation from the family of the deceased individual, we have no basis for determining that the family has any privacy interest in the submitted photographs. Therefore, common-law privacy is not applicable to the photographs at issue. You also seek to withhold information relating to the inmate's family members under section 552.101 in conjunction with constitutional privacy. However, you have failed to demonstrate how any portion of the remaining information falls within the zones of privacy or implicates an individual's privacy interests for purposes of constitutional privacy. Therefore, no portion of the remaining information may be withheld under section 552.101 in conjunction with constitutional privacy.

Section 552.108(b)(1) excepts from disclosure "[a]n internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution... if... release of the internal record or notation would interfere with law enforcement or prosecution[.]" Gov't Code § 552.108(b)(1); *see also City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet.) (section 552.108(b)(1) protects information that, if released, would permit private citizens to anticipate weaknesses in police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate state laws). The statutory predecessor to section 552.108(b)(1) protected information that would reveal law enforcement techniques. *See, e.g.*, Open Records Decision Nos. 531 (1989) (release of detailed use of force guidelines would interfere with law enforcement), 456 (1987) (release in advance of information regarding location of off-duty police officers would interfere with law enforcement), 413 (1984) (release of sketch showing security measures to be used at next execution would interfere with law enforcement), 409 (1984) (information regarding certain burglaries

protected if it exhibits pattern that reveals investigative techniques), 341 (1982) (release of certain information from Department of Public Safety would hamper departmental efforts to detect forgeries of drivers' licenses), 252 (1980) (statutory predecessor was designed to protect investigative techniques and procedures used in law enforcement), 143 (1976) (disclosure of specific operations or specialized equipment directly related to investigation or detection of crime may be excepted). The statutory predecessor to section 552.108(b)(1) was not applicable, however, to generally known policies and procedures. *See, e.g.*, Open Records Decision Nos. 531 at 2-3 (1989) (Penal Code provisions, common law rules, and constitutional limitations on use of force not protected), 252 at 3 (1980) (governmental body failed to indicate why investigative procedures and techniques requested were any different from those commonly known).

You state that release of portions of the submitted information would interfere with ongoing law enforcement activities. You state that this information "was gathered and/or constructed by OIG to further the detection and investigation of a crime and could be used by others in the planning and execution of a crime" and that knowledge of this information could compromise prison security by being "used to facilitate an escape plan." Based on your representations and our review, we find that the release of a portion of the information, which we have marked, would interfere with law enforcement. The OIG may withhold the information we have marked under section 552.108(b)(1) of the Government Code. However, we find you have not demonstrated how release of the remaining information would interfere with law enforcement. Further, although you state that "throughout the Investigative Report, Investigative Notes, some statements, and the entire file there are references to the intervals at which security checks are performed and the security activities/procedures that are performed on the Unit on a daily basis," you have not marked or otherwise specifically identified any such information. *See* Gov't Code § 552.301(e)(2) (governmental body must label copy of requested information to indicate which exceptions apply to which parts of the information). Accordingly, none of the remaining information may be withheld under section 552.108(b).

Lastly, the department asserts section 552.134 of the Government Code excepts a portion of the remaining information from public disclosure. Section 552.134 relates to the department's inmates and provides in relevant part the following:

(a) 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.

(b) Subsection (a) does not apply to:

...

(2) information about an inmate sentenced to death.

Gov't Code § 552.134(a), (b)(2). You state a portion of the submitted information concerns non-death-row inmates confined in a facility operated by the department. Based upon your representation and our review of the submitted documents, we conclude that section 552.134 is applicable to the information we have marked. We also find that none of the marked information is subject to release under section 552.029 of the Government Code. Therefore, the OIG must withhold the information we have marked under section 552.134 of the Government Code.

In summary, the marked medical records may only be released in accordance with the MPA. The OIG must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code and federal law. The OIG must withhold the information we have marked under section 552.101 in conjunction with constitutional privacy. The OIG may withhold the information we have marked under section 552.108(b). The OIG must withhold the information we have marked under section 552.134. The remaining information must be released.

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).

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,



Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/eeg

Ref: ID# 322651

Enc. Submitted documents

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