



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

December 18, 2009

Lieutenant Carol Taylor  
Public Information Officer  
Taylor County Sheriff's Department  
450 Pecan Street  
Abilene, Texas 79602-1692

OR2009-17946

Dear Lieutenant Taylor:

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# 364852.

The Taylor County Sheriff's Department (the "sheriff") received a request for information regarding the death of three named individuals in custody of the Taylor County Jail, expressly including the individuals' manner of death, medical cause of death, whether death was the result of pre-existing conditions, whether the individuals had received medical treatment, and any medical records or grievances filed. You indicate the sheriff does not have any records pertaining to two of the individuals.<sup>1</sup> You state the sheriff released the requested grievances pertaining to the third individual. You claim the submitted records are excepted from disclosure under section 552.101 of the Government Code. You also state that some the submitted records may be subject to third party privacy interests. Thus, pursuant to section 552.304 of the Government Code, you have notified the individual's family of the request and of their right to submit arguments to this office as to why the information should not be released. *See* Gov't Code § 552.304 (interested party may submit

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<sup>1</sup>The Act does not require a governmental body to release information that did not exist when a request for information was received, create responsive information, or obtain information that is not held by or on behalf of the governmental body. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

comments stating why information should or should not be released). We have considered the exception you claim and reviewed the submitted information.

The submitted records include a custodial death report. Article 49.18(b) of the Code of Criminal Procedure provides that the attorney general shall make the custodial death report available to any interested person, with the exception of any portion of the report that the attorney general determines is privileged. *See* Code Crim. Proc. art. 49.18(b). The Office of the Attorney General has determined that the report and summary of how death occurred must be released to the public but that any other documents submitted with the report are confidential under article 49.18(b). In this instance, you have submitted a custodial death report that includes a summary. We find this report and summary, which we have marked, are public pursuant to article 49.18(b) of the Code of Criminal Procedure and must be released.

You assert the remaining information is subject to section 552.101 of the Government Code, which 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 the Medical Practice Act ("MPA"). Medical records are confidential under 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), (b), (c). Information 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). This office has concluded 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). You claim the remaining records are medical records subject to the MPA. Upon review, we marked the medical records in the submitted information, which may only be

released in accordance with the MPA. However, you have not shown the remaining records you marked under the MPA constitute a communication between a physician and a patient, or contain the identity, diagnosis, evaluation, or treatment of a patient by a physician. Thus, these records do not constitute medical records for purposes of the MPA, and they may not be withheld on that basis.

Section 552.101 also encompasses the doctrine of common-law privacy, which protects information if (1) the information contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex.1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be demonstrated. *Id.* at 681-82. The remaining information includes some personal medical information. This office has found that some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See* Open Records Decision No. 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). We note, however, that the right of privacy lapses at death. *See Moore v. Charles B. Pierce Film Enters. Inc.*, 589 S.W.2d 489, 491 (Tex. Civ. App.—Texarkana 1979, writ ref'd n.r.e.); *see also Justice v. Belo Broadcasting Corp.*, 472 F. Supp. 145, 146-47 (N.D. Tex. 1979); Attorney General Opinions JM-229 (1984), H-917 (1976); Open Records Decision No. 272 at 1 (1981). Thus, information that would otherwise be confidential under common-law privacy may not be withheld if it pertains to a deceased individual. All of the medical information in the submitted records pertains to a deceased individual, and therefore may not be withheld on the basis of that individual's privacy interests. However, the United States Supreme Court has determined that surviving family members can have a privacy interest in information relating to their deceased relatives. *See Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157 (2004). As noted above, you notified the decedent's family of their right to assert a privacy interest in the information at issue. However, as of the date of this decision, we have received no correspondence from the decedent's family asserting any privacy interests. Accordingly, the sheriff may not withhold any of the decedent's medical information on the basis of privacy.

Some of the remaining information may be subject to section 552.137, which excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov't Code § 552.137(a)-(c). The e-mail address we marked is not a type excluded by subsection (c). Accordingly, unless the owner of the e-mail address we marked has consented to its release, the sheriff must withhold this e-mail address under section 552.137.

In summary, the marked medical records may only be released in accordance with the MPA. The sheriff must withhold the e-mail address we marked unless the owner of the address has consented to its release. The remaining information must be released.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, appearing to read "Bob Davis", with a long horizontal flourish extending to the right.

Bob Davis  
Assistant Attorney General  
Open Records Division

RSD/cc

Ref: ID# 364852

Enc. Submitted documents

cc: Requestor  
(w/o enclosures)