



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 28, 2009

Ms. Myrna S. Reingold
Galveston County Legal Department
County Courthouse
722 Moody, 5th Floor
Galveston, Texas 77550-2317

OR2009-18255

Dear Ms. Reingold:

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# 365620.

The Galveston County Sheriff's Office (the "sheriff") received a request for specific information related to the deaths of four named individuals in the custody of Galveston County Jail. You state that you have released a portion of the requested information. You claim that the submitted information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, we note, and you acknowledge, that the sheriff failed to comply with section 552.301 of the Government Code in seeking an open records decision from this office. Gov't Code § 552.301(b),(e). A governmental body's failure to comply with section 552.301 results in the legal presumption that the information is public and must be released unless a governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *City of Dallas v. Abbott*, 279 S.W.3d 806, 811 (Tex. App.—Amarillo 2007, pet. granted); *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *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); *see also* Open Records Decision No. 319 (1982). The

presumption that information is public under section 552.302 can generally be overcome by demonstrating that 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). Because the sheriff's claim under section 552.101 can provide a compelling reason for non-disclosure under section 552.302, we will consider the applicability of this exception to the submitted information.

We note, and you acknowledge, the submitted documents include custodial death reports. 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 report was revised in May 2006 and now consists of four pages and an attached summary of how the death occurred. The attorney general 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). In this instance, you state that the sheriff has released the four-page portions and summaries of three of the submitted custodial death reports. You seek to withhold the remaining custodial death report under section 552.101 in conjunction with common-law privacy. However, section 49.18 provides a statutory right of access to custodial death reports. A statutory right of access generally prevails over the common law. *See Gallagher Headquarters Ranch Dev., Ltd. v. City of San Antonio*, 269 S.W.3d 628, 637 (Tex. App.—San Antonio 2008) (when statute directly conflicts with common-law principle or claim, statutory provision controls and preempts common law; legislature may enact legislation that preempts or supersedes common-law privacy). We conclude, therefore, the requestor's statutory right of access prevails over common-law privacy, and the submitted custodial death report and summary may not be withheld on that basis. Thus, the sheriff must release the remaining submitted custodial death report and summary, which we have marked, pursuant to article 49.18(b) of the Code of Criminal Procedure.

You claim the remaining submitted information consists of attachments to the custodial death reports and that this information is therefore confidential under article 49.18(b). We note that article 49.18(b) does not make confidential all information held by the facility where the individual was incarcerated simply because the information is also included in extraneous documents attached to a custodial death report submitted to the Attorney General. If a governmental body receives a request for information otherwise generated or maintained by the facility 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. Open Records Decision No. 521 at 7 (1989). Here, the requestor specifically requests "information regarding deaths of persons in custody." Because it appears the sheriff created some of the information at issue as part of its ordinary responsibilities, we conclude it does not come within the protection of article 49.18. Therefore, the sheriff may only withhold the information we have marked under section 49.18(b). However, as you also raise additional arguments

section 552.101 of the Government Code for the remaining information, we next address your remaining arguments.

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 protected by other statutes. Access to medical records is governed by the Medical Practices Act (the "MPA"), Occ. Code §§ 151.001-165.160. 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.

Id. § 159.002(b)-(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 Nos. 487 (1987), 370 (1983), 343 (1982). We have marked the medical records in the documents submitted by the sheriff that are confidential under the MPA. We note, however, this information pertains to deceased individuals. Medical records pertaining to a deceased patient may only be released upon the signed consent of the deceased's personal representative. Occ. Code § 159.005(a)(5). The consent must specify (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. 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). Thus, the marked medical records may only be released in accordance with the MPA. *See* ORD 598.

Section 552.101 of the Government Code also encompasses section 773.091 of the Health and Safety Code. Section 773.091 provides in relevant part:

(b) Records of the identity, evaluation, or treatment of a patient by emergency medical services personnel or by a physician providing medical supervision that are created by the emergency medical services personnel or physician or maintained by an emergency medical services provider are confidential and privileged and may not be disclosed except as provided by this chapter.

...

(g) The privilege of confidentiality under this section does not extend to information regarding the presence, nature of injury or illness, age, sex, occupation, and city of residence of a patient who is receiving emergency medical services.

Health & Safety Code § 773.091(b), (g). You state that a portion of the submitted information consists of communications and records of emergency medical services ("EMS") personnel for the identity, evaluation, and treatment of a patient. Based on your representation and our review, we conclude that the submitted documents, which we have marked, constitute an EMS record that is confidential under section 773.091. We note, however, records that are confidential under section 773.091 may be disclosed to "any person who bears a written consent of the patient or other persons authorized to act on the patient's behalf for the release of confidential information." *Id.* §§ 773.092(e)(4), .093. Section 773.093 provides that a consent for release of EMS records must specify: (1) the information or records to be covered by the release; (2) the reasons or purpose for the release; and (3) the person to whom the information is to be released. *Id.* § 773.093. We understand the sheriff has not received adequate consent for release of this information. Therefore, the sheriff must withhold the submitted EMS record that we have marked pursuant to section 773.091 of the Health and Safety Code, except as specified by section 773.091(g).

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"). 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." Gov't Code § 411.082(2). Federal law governs the dissemination of CHRI obtained from the National Crime Information Center network. Federal regulations prohibit the release to the general public of CHRI maintained in state and local CHRI systems. *See* 28 C.F.R. § 20.21(c)(1) ("Use of criminal history record information disseminated to noncriminal justice agencies shall be limited to the purpose for which it was given.") and (c)(2) ("No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself."). The federal regulations allow each state to follow its own individual law with respect to CHRI that it generates. *See* Open Records Decision No. 565 at 10-12 (1990); *see generally* Gov't Code ch. 411 subch. F. Although sections 411.083(b)(1) and 411.089(a) of the Government Code authorize a criminal justice agency to obtain CHRI, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *See id.* § 411.089(b). However, information that relates to an individual's current involvement in the criminal justice system, including active warrant information, does not constitute CHRI. *See id.* § 411.081(b) (police department allowed to disclose information pertaining to person's current involvement in the criminal justice system). Upon review, we find no portion of the submitted information constitutes CHRI

for the purposes of chapter 411 of the Government Code. Therefore, none of the submitted information may be withheld under section 552.101 on that basis.

Section 552.101 of the Government Code also encompasses chapter 560 of the Government Code, which governs the public availability of fingerprints. Section 560.003 of the Government Code provides that “[a] biometric identifier in the possession of a governmental body is exempt from disclosure under [the Act].” Gov’t Code § 560.003; *see id.* § 560.001 (“biometric identifier” means retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry). We note that the fingerprints you have marked belong to deceased individuals. Laws making this type of information confidential are intended to protect an individual’s privacy. *See id.* Because the right of privacy is purely personal and lapses at death, the fingerprints of a deceased individual may not be withheld on the basis of sections 560.001, 560.002, and 560.003. *See Moore v. Charles B. Pierce Film Enters. Inc.*, 589 S.W.2d 489 (Tex. Civ. App.—Texarkana 1979, writ ref’d n.r.e.) (right of privacy is purely personal and lapses upon death); *see also Justice v. Belo Broadcasting Corp.*, 472 F. Supp. 145, 146-67 (N.D. Tex. 1979); Attorney General Opinions JM-229 (1984); H-917 (1976); Open Records Decision No. 272 at 1 (1981) (privacy rights lapse upon death). Therefore, the sheriff may not withhold the fingerprints you have marked that belong to a deceased individual under section 552.101 in conjunction with section 560.003 of the Government Code.

Section 552.101 encompasses the doctrine of common-law privacy, which 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* include 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. 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 Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Upon review, we find that the information we have marked is highly intimate or embarrassing and not of legitimate public concern. Therefore, the sheriff must withhold the information we have marked under section 552.101 of the Government Code pursuant to common-law privacy.

In summary: (1) the sheriff must release the custodial death report and summary we have marked under section 49.18(b) of the Code of Criminal Procedure; (2) the sheriff must withhold the custodial death report attachments that we have marked pursuant to section 49.18(b) of the Code of Criminal Procedure; (3) the sheriff may only release the marked medical records in accordance with the MPA; (4) the sheriff may only release the EMS records we have marked in accordance with chapter 773 of the Health and Safety Code;

and (5) the sheriff must withhold the information we have marked under section 552.101 of the Government Code pursuant to common-law privacy. The remaining information must be released.¹

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, 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,



Andrea L. Caldwell
Assistant Attorney General
Open Records Division

ALC/eeg

Ref: ID# 365620

Enc. Submitted documents

c: Requestor
(w/o enclosures)

¹We note the remaining information includes social security numbers. 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.