



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 25, 2011

Ms. Janie L. Johnson
Criminal District Attorney
Gregg County
101 East Methvin, Suite 333
Longview, Texas 75601

OR2011-04144

Dear Ms. Johnson:

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# 412350.

The Gregg County Sheriff's Office (the "sheriff") received two requests from different requestors and the Gregg County District Attorney's Office (the "district attorney") (collectively the "county") received a duplicate request for all information pertaining to a specified individual's death in custody. You have released some of the requested information. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, and 552.108 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

We note the Act does not require a governmental body to release information that did not exist when it was received or create responsive information. *See Econ. Opportunities Dev.*

¹Although you have marked some of the submitted information under section 552.111 of the Government Code, you have provided no arguments regarding the applicability of this section. Therefore, we assume you no longer assert section 552.111. *See Gov't Code §§ 552.301(b), (e), .302.*

²We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See Open Records Decision Nos. 499 (1988), 497 (1988).* This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Corp. v. Bustamante, 562 S.W.2d 266 (Tex. App.—San Antonio 1978, writ dismissed). In this instance, some of the submitted information was created after the sheriff received the first request. Thus, that information, which we have marked, is not responsive to the first request received by the sheriff and need not be released to the first requestor in response to that request. However, the information at issue is responsive to the second request received by the sheriff and the request received by the district attorney. Therefore, we will address your arguments for this information in regards to the second request received by the sheriff and the request received by the district attorney.³

Next, we note the county has redacted the driver's license number of the deceased individual under section 552.130 of the Government Code pursuant to the previous determination issued by this office in Open Records Decision No. 684 (2009).⁴ See Gov't Code § 552.301(a); Open Records Decision No. 673 (2001). Section 552.130 of the Government Code excepts from disclosure information relating to a motor vehicle operator's or driver's license issued by an agency of this state. See Gov't Code § 552.130(a)(1). We note the purpose of section 552.130 is to protect the privacy interests of individuals. Because the right of privacy lapses at death, the Texas driver's license of a deceased individual may not be withheld under section 552.130. See *Moore v. Charles B. Pierce Film Enters., Inc.*, 589 S.W.2d 489, 491 (Tex. Civ. App.—Texarkana 1979, writ refused n.r.e.); see also Attorney General Opinion JM-229 (1984); H-917 (1976); Open Records Decision No. 272 at 1 (1981) (privacy rights lapse upon death). Thus, the driver's license of the deceased individual you have marked may not be withheld under section 552.130 of the Government Code.

We next note the county has redacted the social security number of the deceased individual under section 552.147(b) of the Government Code.⁵ Section 552.147 of the Government Code provides the social security number of a *living* individual is excepted from required public disclosure under the Act. Gov't Code § 552.147. Thus, this exception is not applicable to the social security number of a deceased individual and the county may not withhold that information under this section.

Next, we note the submitted documents include a custodial death report. Article 49.18(b) of the Code of Criminal Procedure provides that the attorney general shall make the custodial

³We note the county informs us the sheriff received its first request on January 3, 2011, and the sheriff received its second request, and the district attorney its first request, on January 10, 2011.

⁴This office issued Open Records Decision No. 684, a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including Texas driver's license numbers under section 552.130 of the Government Code, without the necessity of requesting an attorney general decision.

⁵Section 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. Gov't Code § 552.147(b).

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). Although you claim this report is excepted under sections 552.103 and 552.108, information specifically made public by statute may not be withheld under the general exceptions to public disclosure in the Act. *See, e.g.,* Open Records Decision Nos. 544 (1990), 378 (1983), 161 (1977), 146 (1976). Therefore, the county must release the custodial death report, which we have marked, pursuant to article 49.18(b) of the Code of Criminal Procedure.

Next, we note some of the submitted information is subject to section 552.022 of the Government Code, which states, in relevant part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108; [and]

...

(17) information that is also contained in a public court record[.]

Gov't Code § 552.022(a)(1), (17). The remaining information contains completed investigations and court-filed documents. Pursuant to section 552.022(a)(1), a completed investigation is expressly public unless it is either excepted under section 552.108 of the Government Code or is expressly confidential under other law. The county may only withhold the information subject to section 552.022(a)(1) if it is excepted from disclosure under section 552.108 of the Government Code or is expressly made confidential under other law. The county may only withhold the information subject to subsection 552.022(a)(17) if it is confidential under other law. Although you seek to withhold the court-filed documents under sections 552.103 and 552.108 of the Government Code, these sections are discretionary exceptions that protect a governmental body's interest and are, therefore, not "other law" for purposes of section 552.022. *See 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 section 552.103); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 542 at 4 (1990) (statutory predecessor to section 552.103 subject to waiver), 177 at 3 (1977) (statutory predecessor to section 552.108

subject to waiver). Therefore, the county may not withhold the court-filed documents, which we have marked, under section 552.103 or section 552.108 of the Government Code. As you raise no further exception to the disclosure of the court-filed documents, they must be released pursuant to section 552.022(a)(17). You raise section 552.103 of the Government Code for the completed investigations. However, as noted above, this section is a discretionary exception that protects a governmental body's interests and is, therefore, not "other law" for purposes of section 552.022. *See* Gov't Code § 552.007; *Dallas Area Rapid Transit*, 4 S.W.3d at 475-76 (governmental body may waive section 552.103); *Open Records Decision No. 665 at 2 n.5 (2000)* (discretionary exceptions generally). Therefore, the county may not withhold the completed investigations under section 552.103 of the Government Code. However, information subject to section 552.022(a)(1) may be withheld under section 552.108 of the Government Code. Additionally, section 552.101 of the Government Code is considered "other law" for purposes of section 552.022 of the Government Code. Thus, we will consider your arguments under these sections for the completed investigations, as well as your arguments against disclosure of the remaining information.

We next note the submitted information contains medical records that are subject to the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. *See* Occ. Code § 151.001. 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. This section encompasses information other statutes make confidential, such as the MPA. 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.

Occ. Code § 159.002(a)-(c). 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)*. Information taken directly from medical records and contained in other documents can be withheld in accordance with the MPA. *See* *Open Records Decision No. 598 (1991)*.

Medical records pertaining to a deceased patient may only be released upon the signed consent of the deceased's personal representative. *See* 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. *Id.* §§ 159.004, .005. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Medical records may be released only as provided under the MPA. ORD 598. We find the information we have marked constitutes medical records. We note, however, this information pertains to the deceased individual, and you state the first requestor represents the children of the deceased and the second requestor states he represents the deceased individual's estate. If a requestor provides proper consent in accordance with the MPA, the marked medical records must be released because a statutory right of access prevails over a claim under section 552.103 or section 552.108 of the Government Code. *See* Open Records Decision Nos. 613 at 4 (1993) (exceptions in Act cannot impinge on statutory right of access to information), 451 (specific statutory right of access provisions overcome general exceptions to disclosure under the Act). If the requestors do not provide proper consent, the marked medical records must be withheld under section 552.101 of the Government Code in conjunction with the MPA.

Next, we note a portion of the remaining information is excepted from public disclosure on the basis of section 773.091 of the Health and Safety Code, which is also encompassed by section 552.101 of the Government Code. Section 773.091 provides in part:

(b) Records of the identity, evaluation, or treatment of a patient by emergency medical services [("EMS")] personnel or by a physician providing medical supervision that are created by the [EMS] personnel or physician or maintained by an [EMS] 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). Upon review, we find the information we have marked constitutes EMS records that are generally confidential under section 773.091. We note 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. Among the individuals authorized to act on the patient's behalf in providing written consent is a "personal representative" if the patient is deceased. *Id.* § 773.093(a); *see also* Open Records

Decision No. 632 (1995) (defining "personal representative" for purposes section 773.093). Section 773.093 provides that a consent for release of EMS records must be written and signed by the patient, authorized representative, or personal representative and 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. We also note that a specific statutory right of access provision prevails over general exceptions to disclosure under the Act. *See* ORD 451 at 4. Thus, if a requestor is the authorized representative of the deceased individual and the county receives proper consent, the EMS records we marked must be released in their entirety in accordance with chapter 773 of the Health and Safety Code. Otherwise, with the exception of information subject to section 773.091(g), the EMS records we marked must be withheld under section 552.101 of the Government Code in conjunction with section 773.091(b) of the Health and Safety Code.

We next note the remaining information includes the deceased individual's fingerprints. Section 560.003 of the Government Code, which is also encompassed by section 552.101 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(1) ("biometric identifier" means retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry). Section 560.002 of the Government Code 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). Although you seek to withhold the fingerprints under sections 552.103 and 552.108 of the Government Code, we note the requestors may have a right of access to the fingerprints as representatives of the deceased individual. *See id.* § 560.002(1); *id.* § 552.023(b) (governmental body may not deny access to person to whom information relates or person's agent on grounds that information is considered confidential by privacy principles). Thus, if a requestor is a representative of the deceased individual's estate, then that requestor has a right of access to the marked fingerprints pursuant to section 560.002(1)(A) of the Government Code, and the marked fingerprints must be released to that requestor. *See* Open Records Decision Nos. 613 at 4 (1993) (exceptions in Act cannot impinge on statutory right of access to information), 451 (specific statutory right of access provisions overcome general exceptions to disclosure under the Act). If a requestor is not a representative of the deceased individual's estate, then the county must dispose of the fingerprints in accordance with the rest of this decision.

You claim the remaining information is excepted from disclosure under section 552.108 of the Government Code. 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: (1) release of the information would interfere with the detection, investigation, or prosecution of crime." Gov't Code § 552.108(a)(1). Generally, a governmental body claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* § 552.301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). Section 552.108

is generally not applicable to records of an administrative investigation that did not result in a criminal investigation or prosecution. *See Morales v. Ellen*, 840 S.W.2d 519, 525-26 (Tex. Civ. App.—El Paso, writ denied) (addressing statutory predecessor to Gov't Code § 552.108). You state the remaining information relates to a pending criminal investigation being conducted by the county. Further, we understand the information you seek to withhold concerns a criminal investigation separate from the internal affairs investigation. Based upon this representation, we conclude the release of this information would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975) (court delineates law enforcement interests that are present in active cases), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976).

However, 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). Basic information refers to the information held to be public in *Houston Chronicle*. *See* 531 S.W.2d at 186-88; Open Records Decision No. 127 (1976) (summarizing types of information considered to be basic information). Thus, with the exception of the basic information, the county may withhold the remaining information under section 552.108(a)(1) of the Government Code, including the information subject to section 773.091(g) if the county does not receive consent.

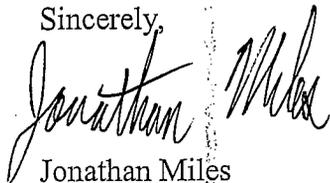
In summary, the county must release the custodial death report we have marked pursuant to article 49.18(b) of the Code of Criminal Procedure. The county must release the court-filed documents we have marked pursuant to section 552.022(a)(17) of the Government Code. If a requestor provides proper consent, the marked medical records must be released to that requestor pursuant to the MPA. Otherwise, the marked medical records must be withheld under section 552.101 of the Government Code in conjunction with the MPA. If a requestor provides proper consent, the EMS records we marked must be released in their entirety in accordance with chapter 773 of the Health and Safety Code. Otherwise, with the exception of information subject to section 773.091(g), the EMS records we marked must be withheld under section 552.101 of the Government Code in conjunction with section 773.091(b) of the Health and Safety Code. If a requestor is a representative of the deceased individual's estate, the marked fingerprints must be released to that requestor pursuant to section 560.002(1)(A) of the Government Code. With the exception of the basic information, the county may withhold the remaining information under section 552.108(a)(1) of the Government Code including the information subject to section 773.091(g) if the county does not receive consent.⁶

⁶As our ruling is dispositive, we need not address your remaining argument against disclosure, except to note basic information held to be public in *Houston Chronicle* is generally not excepted from public disclosure under section 552.103 of the Government Code. Open Records Decision No. 597 (1991).

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,



Jonathan Miles
Assistant Attorney General
Open Records Division

JM/em

Ref: ID# 412350

Enc. Submitted documents

c: Requestors
(w/o enclosures)