



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

March 30, 2011

Ms. Ashley D. Fourt  
Assistant District Attorney  
Tarrant County  
401 West Balknap, 9th Floor  
Fort Worth, Texas 76196

OR2011-04372

Dear Ms. Fourt:

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# 413149.

The Tarrant County Sheriff's Department (the "sheriff") received a request for all information related to the circumstances of the death of a named individual. You claim that the requested information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note some of the information you have submitted is not responsive to the request at issue because it was created after the date the present request was received. This ruling does not address the public availability of any non-responsive information, and the sheriff need not release any non-responsive information in response to this request.

We next note the submitted information includes a court-filed document. Section 552.022(a)(17) of the Government Code provides for required public disclosure of "information that is also contained in a public court record," unless the information is expressly confidential under other law. Gov't Code § 552.022(a)(17). We have marked the document subject to section 552.022(a)(17). Although you seek to withhold this document under section 552.108 of the Government Code, that section is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See id.*

§ 552.007; Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 177 at 3 (1977) (statutory predecessor to Gov't Code § 552.108 subject to waiver). As such, section 552.108 is not other law that makes information expressly confidential for the purposes of section 552.022(a)(17). Therefore, the sheriff may not withhold the court-filed document under section 552.108 of the Government Code. However, because section 552.101 of the Government Code constitutes "other law" that makes information confidential for purposes of section 552.022, we will consider the applicability of this section to the court-filed document as well as the other responsive information.

You raise section 552.101 of the Government Code in conjunction with article 49.18(b) of the Code of Criminal Procedure for Exhibit B. 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 protected by other statutes, such as article 49.18(b), which 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 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 the four-page report and summary must be released to the public but any other documents submitted with the revised report are confidential under article 49.18(b).

You assert "the documents sought to be withheld relate to and are part of the in-custody death investigation required by law and should therefore, be withheld under section 552.101 of the Texas Government Code" as supporting documents of the custodial death report. We note that article 49.18(b) does not make confidential 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). The instant request was made on January 14, 2011, and documents were submitted to this office on January 20, 2011. However, we note the custodial death report was completed on January 25, 2011. Thus, the responsive documents submitted to this office were not submitted as attachments to the completed custodial death report. Accordingly, the sheriff may not withhold any of the responsive information under article 49.18 of the Code of Criminal Procedure.

The remaining information contains fingerprints whose public availability is governed by sections 560.001, 560.002, and 560.003 of the Government Code. Section 552.101 of the Government Code also encompasses section 560.003 of the Government Code, which provides, "[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, “[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). The sheriff seeks to withhold the fingerprints under section 552.108 of the Government Code. However, as noted above, the general exceptions found in the Act cannot impinge on a statutory right of access to information. *See* Open Records Decision Nos. 623 at 3 (1994), 523 at 3 (1989). Therefore, if the requestor is a representative of the deceased individual’s estate, then she has a right of access to his fingerprints under section 560.002(1)(A) of the Government Code and the sheriff must release the marked fingerprints to this requestor. *See* Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning himself). If the requestor is not a representative of the deceased individual’s estate, then the sheriff must dispose of the fingerprints in accordance with the rest of this decision.

Section 552.101 also encompasses information protected by other statutes, including the Medical Practice Act (the “MPA”), subtitle B of title 3 of the Occupations Code. *See* Occ. Code §§ 151.001-165.160. Section 159.002 of the MPA provides in part the following:

(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). 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 have also found that when a file is created as the result of a hospital stay, all the documents in the file relating to diagnosis and treatment constitute physician-patient communications or “[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician.” Open Records Decision No. 546 (1990). Medical records must be released upon the governmental body’s receipt of 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. *See* Occ. Code §§ 159.004, .005. When a patient is deceased, as is the case here, medical records pertaining to the deceased patient may only

be released on the signed written consent of the decedent's personal representative. *See id.* § 159.005(a)(5). Although you claim the medical records at issue are excepted under section 552.108 of the Government Code, the MPA's specific right of access provision prevails over the Act's general exceptions to disclosure. *See* ORD No. 451 at 4. Accordingly, the submitted medical records may only be released in accordance with the MPA.

Section 552.101 also encompasses chapter 611 of the Health and Safety Code, which provides for the confidentiality of records created or maintained by a mental health professional. Section 611.002(a) states "[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. *Id.* § 611.001(b). Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals. *See* Open Records Decision No. 565 (1990). A portion of the submitted information constitutes a mental health record of the deceased inmate. Access to mental health records is governed by the provisions of sections 611.004 and 611.0045, rather than by the Public Information Act. Open Records Decision Nos. 598 (1991), 451 at 4. Therefore, the sheriff may only release this mental health record, which we have marked, in accordance with sections 611.004 and 611.0045. *See* Health & Safety Code § 611.004(a)(5) (professional may disclose confidential information to patient's personal representative if patient is deceased).

You assert the remaining information is excepted under section 552.108 of the Government Code. Section 552.108(a)(1) excepts from disclosure information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime if 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.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You indicate the remaining information relates to a pending criminal investigation. Based on 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). Thus, section 552.108(a)(1) of the Government Code is applicable to the remaining information.

We note, 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; *see*

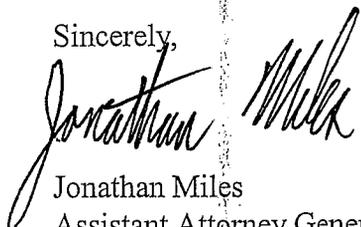
also Open Records Decision No. 127 at 3-4 (1976) (summarizing types of information deemed public by *Houston Chronicle*). Therefore, with the exception of basic information, the sheriff may withhold the remaining information under section 552.108(a)(1) of the Government Code.

In summary, the sheriff must release the marked court document pursuant to section 552.022(a)(17) of the Government Code. To the extent the requestor is a representative of the deceased individual's estate, the sheriff must release the fingerprints we have marked pursuant to section 560.002 of the Government Code. The sheriff may only release the marked medical records in accordance with the MPA and the marked mental health record in accordance with sections 611.004 and 611.0045 of the Occupations Code. With the exception of basic information, the sheriff may withhold the remaining information under section 552.108(a)(1) of the Government Code, including the deceased individual's fingerprints if the requestor is not a representative of his estate.

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,



Jonathan Miles  
Assistant Attorney General  
Open Records Division

JM/em

Ref: ID# 413149

Enc. Submitted documents

c: Requestor  
(w/o enclosures)