



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

August 22, 2014

Mr. Randall Miller  
Assistant District Attorney  
County of Dallas  
411 Elm Street  
Dallas, Texas 75202

OR2014-13520A

Dear Mr. Miller:

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# 529757.

We understand you have asked this office to reconsider Open Records Letter No. 2014-13520 (2014), which we issued on August 4, 2014. We note a governmental body is prohibited from asking this office to reconsider a decision issued under section 552.306 of the Government Code. *See* Gov't Code § 552.301(f). Furthermore, you have not demonstrated this office made an error in issuing the prior ruling. Nevertheless, we have determined the prior ruling should be corrected for purposes of due process. *See id.* §§ 552.306, .352. Accordingly, we hereby withdraw the prior ruling. This decision is substituted for Open Records Letter No. 2014-13520 and serves as the correct ruling.

Dallas County (the "county") received four requests for information pertaining to the autopsy of a specified individual, including reports; photographs; the preliminary and final autopsy reports; any hospital, medical center, private physician, prison, execution, and resuscitative records associated with the autopsy; and communications with officials of the State of Oklahoma ("Oklahoma") concerning the specified individual or his autopsy. You state a final autopsy report was not complete at the time of the request.<sup>1</sup> You claim portions of the

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<sup>1</sup>We note the Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dism'd); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

submitted information may be excepted from disclosure under section 552.101 of the Government Code. Additionally, you state the county has notified Oklahoma and the family of the decedent of the request. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have received comments from Oklahoma. We have considered the submitted arguments and reviewed the submitted information, a portion of which constitutes a representative sample.<sup>2</sup>

As background, the specified individual was executed by the Oklahoma Department of Corrections on April 29, 2014. Following the execution, the Governor of Oklahoma ordered an independent review of the events leading up to and during the execution. As part of the independent review, it was determined an autopsy should be performed on the deceased by an independent entity; Oklahoma selected the county to perform the autopsy. The deceased was transported to the county and we understand Oklahoma remitted various pieces of information to the county, including photographs of the deceased and other documentation.

Oklahoma argues some of the submitted information must be withheld pursuant to the doctrine of constitutional privacy. 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 the doctrine of constitutional privacy, which consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village*, Texas, 765 F.2d 490 (5th Cir. 1985)).

However, we note the right to privacy is a personal right that "terminates upon the death of the person whose privacy is invaded"; therefore, it may not be asserted solely on behalf of a deceased individual. *Moore v. Charles B. Pierce Film Enters.*, 589 S.W.2d 489, 491 (Tex. App.—Texarkana 1979, writ ref'd n.r.e.); *see also* Attorney General Opinions JM-229 (1984) ("the right of privacy lapses upon death"), H-917 (1976) ("We are . . . of the opinion that the Texas courts would follow the almost uniform rule of other jurisdictions that the right of privacy lapses upon death."); Open Records Decision No. 272 at 1 (1981) (privacy rights lapse upon death). The United States Supreme Court, however, has determined that surviving family members can have a privacy interest in information relating

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<sup>2</sup>We 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.

to their deceased relatives. *See Nat't Archives & Records Admin, v. Favish*, 541 U.S. 157 (2004). You inform us you have notified the deceased individual's family of the request for information and of their right to assert a privacy interest in the information at issue. As of the date of this decision, we have not received any correspondence from the deceased individual's family. Thus, we have no basis for determining the family's privacy interest in the submitted information. Therefore, the county may not withhold any portion of the submitted information under section 552.101 in conjunction with constitutional privacy.

Oklahoma also seeks to withhold some of the submitted information under section 552.101 of the Government Code in conjunction with section 24A.5 of Title 51 of the Oklahoma Statutes. This statute provides that "The Oklahoma Open Records Act ... does not apply to records specifically required by law to be kept confidential including ... information in the files of the Board of Medicolegal Investigations . . . that may be hearsay, preliminary unsubstantiated investigation-related findings, or confidential medical information." *See OKLA. STAT. tit. 51, § 25A.5(1)(d)*. Oklahoma states it will determine the manner and cause of death for the individual at issue, and the death certificate will be issued by Oklahoma. Additionally, Oklahoma states the investigative narrative and autopsy report created by the county are hearsay and will consist of preliminary unsubstantiated investigation-related findings, which would be confidential under section 24A.5 of Title 51 of the Oklahoma Statutes. Further, Oklahoma asserts any medical records it provided to the county are also confidential under Oklahoma law.

In Open Records Decision No. 661 (1999), this office concluded whether a governmental entity may release information to another governmental entity is not a question under the Act as the Act is concerned with the required release of information to the *public*. Gov't Code §§ 552.001, .002, .021; *see* Attorney General Opinions H-683 (1975), H-242 (1974), M-713 (1970); Open Records Decision No. 655 (1997). For many years, this office has recognized it is the public policy of this state that governmental bodies should cooperate with each other in the interest of the efficient and economical administration of statutory duties. *See, e. g.*, Attorney General Opinion H-836 (1976); Open Records Decision No. 655 (1997). *But see* Attorney General Opinions DM-353 at 4 n. 6 (1995) (interagency transfer prohibited where confidentiality statute enumerates specific entities to which release of confidential information is authorized and where receiving agency is not among statute's enumerated entities), JM-590 (1986) (same); Open Records Decision No. 655 (1997) (same), 650 (1996) (transfer of confidential information to federal agency impermissible unless federal law requires its disclosure). In adherence to this policy, this office has acknowledged that information may be transferred between governmental bodies within the state without violating its confidential character on the basis of a recognized need to maintain an unrestricted flow of information between governmental bodies. *See* Attorney General Opinions H-836 (1976), H-242 (1974), M-713 (1970); Open Records Decision Nos. 655 (1997), 561 (1990), 414 (1984). Moreover, the release of information by one state agency to another state agency is not a release to the public for the purposes of section 552.007 of the Government Code, which prohibits the selective disclosure of information, or for

purposes of section 552.352, which provides criminal penalties for the release of information that is considered to be confidential. Open Records Decision No. 516 (1989).

In this case, the public policy that encourages the exchange of information between Oklahoma and the county is as strong as when the exchange is between Texas agencies. *See* Open Records Decision No. 561 at 7 (1990). Public policy advocates continued cooperation between governmental bodies, particularly under the circumstances present here. *See id.* You inform us the information submitted as Exhibit D consists of documents received by the county from Oklahoma officials, and that Exhibit F consists of Oklahoma Medical Examiner autopsy photographs, which we understand were also received from Oklahoma officials.<sup>3</sup> Accordingly, we find the confidentiality of medical information was not waived when transferred from Oklahoma to the county. However, other than generally asserting the confidentiality of “medical records provided to the [county] by Oklahoma state officials,” Oklahoma has not identified any specific information contained in Exhibits D or F as constituting confidential medical information for purposes of section 24A.5 of Title 51 of the Oklahoma Statutes. Accordingly, we must rule conditionally: to the extent Oklahoma determines the information contained in Exhibits D and F constitutes confidential medical information under section 24A.5 of Title 51 of the Oklahoma Statutes, the county must withhold such information under section 552.101 in conjunction with that provision. To the extent Oklahoma determines the information contained in Exhibits D and F does not constitute confidential medical information under Oklahoma law, it may not be withheld under section 552.101 on that basis.

Furthermore, the information submitted as Exhibits 1 - 7A also consists of information received from Oklahoma officials. Oklahoma seeks to withhold information in these exhibits that reveals the identities of the pharmacy and pharmacist who supplied the drugs, the attending physician, and department of corrections personnel who participated in the execution process under section 552.101 of the Government Code in conjunction with section 1015(B) of Title 22 of the Oklahoma Statutes. This statute provides “The identity of all persons who participate in or administer the execution process and persons who supply the drugs, medical supplies or medical equipment for the execution shall be confidential.” *See* OKLA. STAT. tit. 22, § 1015(B). Upon review of Exhibits 1 - 7A, we agree the information in these exhibits that reveals the identities of the pharmacy and pharmacist who supplied the drugs, the attending physician, and department of corrections personnel who participated in the execution process is confidential under section 1015(B) of Title 22 of the Oklahoma Statutes, and the county must withhold such information pursuant to section 552.101 of the Government Code and release the remainder of the photographs submitted as Exhibits 1 - 7A.

As noted above, Oklahoma also seeks to withhold under Oklahoma law certain autopsy information created by the county. However, the Act generally does not incorporate the

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<sup>3</sup>We note, when referring to Exhibits D and F, we are referring to the information as labeled in the June 9, 2014, request you submitted to this office.

confidentiality provisions of other states' statutes and regulations because those laws only govern the disclosure of information held by those states. *But see* Open Records Decision No. 561 at 6-7 (1990) (noting that if agency of federal government shares its information with Texas governmental entity, Texas entity must withhold information that federal agency determined to be confidential under federal law). Thus, unlike the information described in Exhibits D and F above that the county obtained directly from Oklahoma officials and which is still maintained by Oklahoma, we determine the autopsy information created by the county in the remaining submitted exhibits is not subject to section 24A.5 of Title 51 of the Oklahoma Statutes. Therefore, no portion of the remaining submitted information, that is, information created by the county, may be withheld on the basis of Oklahoma's confidentiality provision.

We now address the county's question regarding the autopsy photographs taken by the county. Section 552.101 encompasses information protected by other statutes, such as section 11 of article 49.25 of the Code of Criminal Procedure, which provides in part as follows:

(a) The medical examiner shall keep full and complete records properly indexed, giving the name if known of every person whose death is investigated, the place where the body was found, the date, the cause and manner of death, and shall issue a death certificate. . . . The records may not be withheld, subject to a discretionary exception under [the Act], except that a photograph or x-ray of a body taken during an autopsy is excepted from required public disclosure in accordance with [the Act], but is subject to disclosure:

- (1) under a subpoena or authority of other law; or
- (2) if the photograph or x-ray is of the body of a person who died while in the custody of law enforcement.

Crim. Proc. Code art. 49.25, § 11(a). You state the photographs at issue are autopsy photographs. We note some of the photographs at issue do not depict a body. As such, the photographs at issue that do not depict a body are not confidential under section 11 of article 49.25 of the Code of Criminal Procedure. Further, we note the photographs that do depict a body are photographs of the body of an individual who died while in the custody of Oklahoma law enforcement. Photographs taken of the body of a person who died while in custody of law enforcement are not confidential. *Id.* art. 49.25, § 11(a)(2). Therefore, none of the photographs taken by the county are confidential under section 552.101 in conjunction with section 11 of article 49.25 of the Code of Criminal Procedure. Accordingly, the photographs taken by the county may not be withheld on that basis.

To summarize, to the extent Oklahoma determines the information contained in Exhibits D and F constitutes confidential medical information under section 24A.5 of Title 51 of the

Oklahoma Statutes, the county must withhold such information under section 552.101 of the Government Code in conjunction with that provision. The information in Exhibits 1 - 7A that reveals the identities of the pharmacy and pharmacist who supplied the drugs, the attending physician, and department of corrections personnel who participated in the execution process is confidential under section 1015(B) of Title 22 of the Oklahoma Statutes, and the county must withhold such information pursuant to section 552.101 of the Government Code and release the remainder of the photographs submitted as Exhibits 1 - 7A. The remaining submitted information must be released to the respective requestors.

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.texasattorneygeneral.gov/open/orl\\_ruling\\_info.shtml](http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml), 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Joseph Behnke  
Assistant Attorney General  
Open Records Division

JB/sdk

Ref: ID# 529757

Enc. Submitted documents

c: 4 Requestors  
(w/o enclosures)

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