OFFICE OF THE ATTORNEY GENERAL · STATE OF TEXAS
JOHN CORNYN

February 2, 2000

Mr. Leonard W. Peck, Jr.
Assistant General Counsel
Texas Department of Criminal Justice
P.O. Box 4004
Huntsville, Texas 77342

OR2000-0350

Dear Mr. Peck:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 131307.

The Texas Department of Criminal Justice (the "department") received a request for a copy of the internal report regarding an inmate's death.[1] You claim that the requested information is excepted from required disclosure under sections 552.101 and 552.107(2) of the Government Code.[2] We have considered the exceptions you claim and have reviewed the submitted information.

As you noted, section 552.131 of the Government Code is not applicable in this matter. Section 552.131 of the Government Code excepts from disclosure information obtained or maintained by the department which relates to an inmate who is confined in a facility operated by or under contract with the department. Gov't Code § 552.131(a). However, section 552.131(b) states that the provisions of section 552.131(a) are not applicable to information related to an inmate who has been sentenced to death. Gov't Code § 552.131(b)(2). The inmate who is the subject of the investigation at issue was sentenced to death. We agree that the information before us is not subject to section 552.131(a).

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[1]You indicate that you have released the autopsy report to the requestor. *See* Crim. Proc. Code art. 49.25 § 11.

[2]You have notified our office that you have withdrawn your claims for exception pursuant to section 552.108 of the Government Code. Therefore, we do not consider this exception.

Accordingly, we will address your assertion that section 552.101 of the Government Code excepts the submitted information.[3]

You claim that the submitted information is excepted from disclosure pursuant to section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses information protected by other statutes. An individual's medical records are protected from disclosure under the Medical Practice Act (the "MPA"). The MPA protects from disclosure "[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician." Occ. Code § 159.002(b); *see* Open Records Decision No. 546 (1990) (because hospital treatment is routinely conducted under supervision of physicians, documents relating to diagnosis and treatment during hospital stay would constitute protected MPA records). We have marked the documents that may only be released as provided by the MPA. Open Records Decision No. 598 (1991); *see* Occ. Code §§ 159.002(c), 159.004, 159.005.

Additionally, it appears that some of the records you submitted as responsive to the request were prepared by emergency medical service paramedics. Section 773.091 of the Health and Safety Code provides in 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.

Therefore, you must withhold most of the information contained in the EMS records. However, subsection (g) of section 773.091 specifically provides that information as to "the presence, nature of injury or illness, age, sex, occupation, and city of residence of a patient receiving emergency medical services" is not protected by the confidentiality provisions of section 773.091. Thus, this information must be released unless it is confidential under other law.

Section 552.101 also encompasses constitutional privacy. The constitutional right to privacy protects two interests. Open Records Decision No. 600 at 4 (1992) (citing *Ramie v. City of*

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[3]You assert that section 552.107(2) of the Government Code excepts the information from disclosure. However, this ruling does not consider the applicability and effect of the Final Judgment in the case of *Ruiz v. Collins*, No. H-78-987 (S.D. Tex., filed Dec. 11, 1992), to the information at issue. We note that *Ruiz* is still in effect and it prohibits the release of certain "sensitive information." We remind you that section 552.107(2) of the Government Code requires you to withhold information that is made confidential by court order, and that section 552.352 prescribes criminal penalties for the disclosure of confidential information.

Hedwig Village, 765 F.2d 490 (5th Cir. 1985), *cert. denied*, 474 U.S. 1062 (1986)). The first is the interest in independence in making certain important decisions related to the "zones of privacy" recognized by the United States Supreme Court. Open Records Decision No. 600 at 4 (1992). The zones of privacy recognized by the United States Supreme Court are matters pertaining to marriage, procreation, contraception, family relationships, and child rearing and education. *See id.*

The second interest is the interest in avoiding disclosure of personal matters. The test for whether information may be publicly disclosed without violating constitutional privacy rights involves a balancing of the individual's privacy interests against the public's need to know information of public concern. *See* Open Records Decision No. 455 at 5-7 (1987) (citing *Fadjo v. Coon*, 633 F.2d 1172, 1176 (5th Cir. 1981)). The scope of information considered private under the constitutional doctrine is far narrower than that under the common law; the material must concern the "most intimate aspects of human affairs." *See* Open Records Decision No. 455 at 5 (1987) (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490, 492 (5th Cir. 1985), *cert. denied*, 474 U.S. 1062 (1986)). In Open Records Decision No. 430 (1985), our office determined that the list of inmate visitors is protected by the constitutional privacy of both the inmate and of the visitors. Thus, you must withhold the visitors' log in its entirety.

Finally, we note that the information you submitted contains social security numbers of TDCJ employees. These numbers must be withheld under section 552.117(3) of the Government Code regardless of whether the employee has elected to have the information withheld.

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

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the

statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.– Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

Carla Gay Dickson
Assistant Attorney General
Open Records Division

CGD/ch

Ref: ID# 131307

Encl. Submitted documents

cc: Ms. Diane Jennings
Dallas Morning News
P.O. Box 655237
Dallas, Texas 75265
(w/o enclosures)