



December 17, 2001

Mr. James L. Hall
Assistant General Counsel
Texas Department of Criminal Justice
P.O. Box 4004
Huntsville, Texas 77342

OR2001-5919

Dear Mr. Hall:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 156221.

The Texas Department of Criminal Justice (the "department") received a written request for records pertaining to an inmate who sexually assaulted a department employee and then committed suicide. You state that certain "basic information" regarding the incident has been released to the requestor. You contend, however, that the remaining requested information is excepted from disclosure under sections 552.108, 552.117, and 552.134 of the Government Code.

We note at the outset that the release of some of the records you submitted to this office as being responsive to the records request is governed by provisions outside the Public Information Act. Among the records you submitted to this office are what appear to be "medical records," the release of which is governed by the Medical Practice Act (the "MPA"), Occ. Code § 151.001 *et. seq.* Section 159.002 of the Occupations Code provides in pertinent 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.

Occ. Code § 159.002(b). We conclude that the department may release the submitted medical records, which we have marked with yellow flags, only in accordance with the MPA.

You also submitted to this office an "Investigator's Report of Custodial Death." Article 49.18(b) of the Code of Criminal Procedure requires that law enforcement agencies complete custodial death reports and file those reports with the Office of the Attorney General, who "shall make the report, with the exception of any portion of the report that the attorney general determines is privileged, available to any interested party." In Open Records Decision No. 521 at 5 (1989), this office held that under article 49.18(b), in conjunction with a directive issued by the Office of the Attorney General, Part I of custodial death reports filed with this office is public information. All remaining portions of the custodial death report, i.e., Parts II through V, including all attachments, are deemed privileged under article 49.18(b) and must be withheld from the public. *Id.*

Because we could not identify any other documentation required under article 49.18, it is not clear that the "Investigator's Report of Custodial Death" you submitted to this office was intended to serve as the "custodial death report" required to be submitted to the Office of the Attorney General in compliance with article 49.18 of the Code of Criminal Procedure. *See* Code Crim. Proc. art. 49.18(c) (department required to submit custodial death report except where inmate died of natural causes or was lawfully executed, as provided by Gov't Code § 501.055(b)). In any event, we conclude that the department must release to the requestor all information required to be submitted to the Office of the Attorney General under Part I of the custodial death report.

We now address the extent to which the remaining records at issue are excepted from public disclosure. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses common law privacy and excepts from disclosure private facts about an individual. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information is excepted from required public disclosure by a common law right of privacy if the information 1) contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and 2) the information is not of legitimate concern to the public. *Industrial Found.*, 540 S.W.2d 668.

In Open Records Decision No. 393 (1983), this office concluded that although, generally, only information that either identifies or tends to identify a victim of sexual assault or other sex-related offense may be withheld under common law privacy, because the identifying information in that instance was inextricably intertwined with other releasable information, the governmental body was required to withhold the entire offense report. Open Records Decision No. 393 (1983) at 2; *see also* Open Records Decision No. 339 (1982). In this instance, it appears that the requestor in this case knows the identity of the alleged sexual assault victim. We believe that, in this instance, withholding only the victim's identifying information from the requestor would not preserve the victim's common law right to privacy. We therefore conclude that the department must withhold all of the remaining information at issue pursuant to section 552.101. Because section 552.101 is dispositive, we do not address your claims under sections 552.108 and 552.134.

In summary, the department may release the medical records contained in the records at issue only in accordance with the MPA. The department must release all information typically found in Part I of the custodial death report submitted to the Office of the Attorney General pursuant to article 49.18 of the Code of Criminal Procedure. The department must withhold all of the remaining records at issue pursuant to section 552.101 of the Government Code

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).

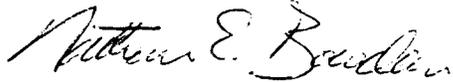
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

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,



Nathan E. Bowden
Assistant Attorney General
Open Records Division

NEB/RWP/sdk

Ref: ID# 156221

Enc: Submitted documents

c: Mr. Richard Ayers
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(w/o enclosures)