



September 5, 2002

Mr. Duncan R. Fox
Assistant General Counsel
Texas Department of Public Safety
P.O. Box 4087
Austin, Texas 78773-0001

OR2002-4975

Dear Mr. Fox:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 168160.

The Texas Department of Public Safety (the "department") received a request for several categories of information about an automobile accident and an individual who died as a result of the accident. You state that you will release most of the requested information but claim that other information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information.¹

You assert that the documents that you have submitted as Exhibit A constitute medical records, the release of which is governed by the Medical Practice Act (the "MPA"). Occ. Code §§ 151.001-165.160. 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.
- (c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in

¹We assume that the representative sample of records you have submitted 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.

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.

When a patient is deceased, his personal representative may consent to the release of his records. Occ. Code § 159.005(a)(5). This consent must be written and signed by the personal representative and 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. Occ. Code §§ 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. Open Records Decision No. 598 (1991).

In this instance, it is unclear whether the alleged medical records in Exhibit A were created before or after the individual in question died. The Occupations Code defines a "patient" as a person who consults with or is seen by a physician to receive medical care. Occ. Code § 159.001. Based on this definition, a deceased individual cannot be a "patient" under section 159.001 of the Occupations Code. Section 159.002 of the Occupations Code protects only the medical records of people who were alive at the time the records were created. Accordingly, if the marked documents in Exhibit A were created before the individual died, then they may only be released in accordance with the MPA. If, however, these documents were created after the individual died, they are not subject to the MPA, and, as you have raised no other exception for these documents, they must be released. In either case, the subpoena contained in Exhibit A is not a medical record and must be released to the requestor.

We now address your arguments regarding criminal history record information. The third category of the request seeks "[i]nformation regarding the past criminal history" of a specified individual. Criminal history record information ("CHRI") is confidential and not subject to disclosure. Section 552.101 excepts from disclosure "information deemed confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Federal regulations prohibit the release of CHRI maintained in state and local CHRI systems to the general public. See 28 C.F.R. § 20.21(c)(1) ("Use of criminal history record information disseminated to noncriminal justice agencies shall be limited to the purpose for which it was given."), (2) ("No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself."). Section 411.083 provides that any CHRI maintained by the department is confidential and limits the circumstances when and persons to whom the department may provide such information. Gov't Code § 411.083. None of those release provisions appears to apply here. We note that section 411.083 does not distinguish between the CHRI of a person who is living and one who has died. Furthermore, we do not believe that section 411.083 is intended solely to protect the privacy interest of the subject individual. See *Houston*

Chronicle Publ'g Co. v. City of Houston, 531 S.W.2d 177, 187 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (maintenance of criminal history record information essential for investigation of crime). Therefore, assuming that you have CHRI pertaining to the deceased individual and that it falls within the ambit of these state and federal regulations, you must withhold the CHRI from the requestor pursuant to section 552.101 of the Government Code as information that is made confidential by law.

Finally, in Open Records Letter No. 2001-2047 (2001), this office issued a previous determination related to CHRI maintained by the department. At this time, you ask that we grant a previous determination regarding CHRI for individuals who are deceased. Therefore, as per your request, this letter ruling shall serve as a previous determination under section 552.301(a) that criminal history record information (“CHRI”), as defined in section 411.082 of the Government Code and as maintained by the Department of Public Safety under section 411.083 of the Government Code, is excepted from disclosure in conjunction with section 552.101 of the Government Code for deceased individuals as well as for those who remain alive. However, we note that the department must grant access to CHRI to a living individual who is the subject of the CHRI. Gov’t Code § 411.083(b)(3).

This previous determination applies only to the following type of information requested of the Department of Public Safety: criminal history report information (“CHRI”), as defined in section 411.082 of the Government Code and as maintained by the Department of Public Safety under section 411.083 of the Government Code. *See* Open Records Decision No. 673 at 7 (2001). Moreover, so long as the elements of law, fact and circumstances do not change so as to no longer support the findings set forth above, the Department of Public Safety need not ask for a decision from this office again with respect to this type of information requested of the Department of Public Safety. *See id.*

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;

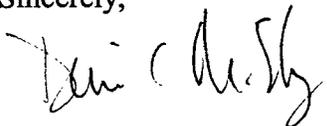
2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things 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).

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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



Denis C. McElroy
Assistant Attorney General
Open Records Division

DCM/seg

Ref: ID# 168160

Enc. Submitted documents

c: Mr. Steven Brown
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(w/o enclosures)