



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

March 26, 2003

Mr. James M. Frazier, III
Assistant General Counsel
Texas Department of Criminal Justice
P.O. Box 4004
Huntsville, Texas 77342-4004

OR2003-2059

Dear Mr. Frazier:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 178410.

The Texas Department of Criminal Justice (the "department") received a request for five categories of information pertaining to a deceased inmate. You state that the department is making some responsive information available to the requestor. You claim, however, that the remaining requested information, or portions thereof, is excepted from disclosure pursuant to sections 552.101, 552.117, and 552.134 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that person may submit comments stating why information should or should not be released).

You claim that the information at issue contains medical records that are subject to the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. The MPA provides that "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." Occupations Code § 159.002(b). 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). When a patient is deceased, as here, medical records may be released only on the signed consent of the deceased's personal representative. *See* Occ. Code §§ 159.005(a)(5). The consent 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. *See* 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. *See* Open Records Decision No. 565 at 7 (1990). We have marked some information contained within the

submitted records which is subject to the MPA. The department may only disclose this information in accordance with the access provisions of the MPA. *See* Occ. Code § 159.005(a)(5), (b); *see also* Open Records Decision Nos. 598 (1991), 546 (1990) (finding that because hospital treatment is routinely conducted under supervision of physicians, documents relating to diagnosis and treatment during hospital stay would constitute protected MPA records). Absent the applicability of an MPA access provision, the department must withhold this information pursuant to the MPA.

We note that portions of the information at issue constitute mental health records that are subject to chapter 611 of the Health and Safety Code. Chapter 611 provides for the confidentiality of records created or maintained by a mental health professional. Section 611.002(a) provides:

Communications 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. 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. *See* Health and Safety Code § 611.001. Sections 611.004 and 611.0045 provide for access to mental health records only for certain individuals. *See* Open Records Decision No. 565 (1990). We have marked the submitted information which constitutes mental health records that are subject to chapter 611. The department may only disclose this information as provided by the access provisions of sections 611.004 and 611.0045. Absent the applicability of a mental health record access provision, the department must withhold this information pursuant to chapter 611 of the Health and Safety Code.

We also note that portions of the information at issue constitute dental records that are subject to chapter 258 of the Occupations Code. Section 258.102 provides:

(a) The following information is privileged and may not be disclosed except as provided by this article:

(1) a communication between a dentist and a patient that relates to a professional service provided by the dentist; and

(2) a dental record.

(b) The privilege described by this section applies regardless of when the patient received the professional service from the dentist.

Occ. Code § 258.102. A "dental record" means dental information about a patient that is created or maintained by a dentist and relates to the history or treatment of the patient. *See* Occ. Code § 258.101. When a patient is deceased, as here, dental records may be released

only on the signed consent of the deceased 's personal representative. *See* Occ. Code § 258.104(b)(5). The consent 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. *See id.* Accordingly, we conclude that the dental record information that we have marked may only be disclosed in accordance with the access provisions of section 258.104. Absent the applicability of a dental record access provision, the department must withhold this information pursuant to chapter 258 of the Occupations Code.

We further note that the submitted information includes some information that is subject to section 552.101 of the Government Code in conjunction with section 773.091 of the Health and Safety Code.¹ Section 773.091 provides:

(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.

Health & Safety Code § 773.091(b). This confidentiality provision "does not extend to information regarding the presence, nature of injury or illness, age, sex, occupation, and city of residence of a patient who is receiving emergency medical services." Health & Safety Code § 773.091(g). Accordingly, we conclude that the information that we have marked under section 773.091(b) of the Health and Safety Code is confidential and, thus, excepted from disclosure pursuant to section 552.101 of the Government Code, except for information in these documents pertaining to the presence, nature of injury or illness, age, sex, occupation, and city of residence of the patient.

You claim that the remaining submitted information is excepted from disclosure pursuant to section 552.134 of the Government Code. Section 552.134(a) states in pertinent part:

(a) Except as provided by Subsection (b) or by Section 552.029, information obtained or maintained by the Texas Department of Criminal Justice is excepted from the requirements of Section 552.021 if it is information about an inmate who is confined in a facility operated by or under a contract with the department.

Gov't Code, § 552.134(a). The remaining submitted information concerns an inmate who was confined in a facility operated by the department. However, we note that section 552.134(a) is explicitly made subject to section 552.029 of the Government Code. Basic information regarding the death of an inmate in custody, an incident involving the use

¹ Section 552.101 of the Government Code exempts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. *See* Gov't Code § 552.101. Section 552.101 encompasses information that is protected from disclosure by other statutes.

of force, or an alleged crime involving an inmate must be released in accordance with section 552.029(8) of the Government Code. *See* Gov't Code §§ 552.134(a), 552.029(8). This office has determined that basic information under section 552.029(8) includes the time and place of an incident, names of inmates and department officials directly involved in an incident, a brief narrative of the incident, a brief description of any injuries sustained, and information regarding any criminal charges or disciplinary actions filed as a result of the incident. We note that portions of the remaining submitted information concern alleged crimes involving the deceased inmate and the death of the inmate while in the custody of the department. Therefore, except for basic information regarding the alleged crimes and the inmate's death, the department must withhold the remaining submitted information pursuant to section 552.134 of the Government Code. Because we base our ruling on the above-noted statutory provisions, we need not address your claim regarding section 552.117 of the Government Code.

In summary, absent the applicability of an MPA access provision, the department must withhold some information that we have marked pursuant to the MPA. Absent the applicability of a mental health record access provision, the department must withhold some information that we have marked pursuant to chapter 611 of the Health and Safety Code. Absent the applicability of a dental record access provision, the department must withhold some information that we have marked pursuant to chapter 258 of the Occupations Code. Some information that we have marked is confidential under section 773.091(b) of the Health and Safety Code and, thus, must be withheld pursuant to section 552.101 of the Government Code, except for information in these documents pertaining to the presence, nature of injury or illness, age, sex, occupation, and city of residence of the patient. Except for basic information regarding the deceased inmate's alleged crimes and death in custody, the department must withhold the remaining submitted information pursuant to section 552.134 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); *Texas 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. 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,



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/lmt

Ref: ID# 178410

Enc. Marked documents

c: Pastor Ronald Wright
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(w/o enclosures)