



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

April 14, 2003

Mr. Ronald D. Stutes
Brown & Hofmeister, L.L.P.
1717 Main Street, Suite 4300
Dallas, Texas 75201

OR2003-2516

Dear Mr. Stutes:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 179320.

The Highland Village Police Department (the "department"), which you represent, received a request for a specified incident report. You state that some responsive information has been released to the requestor. You claim that the remainder of the requested information is excepted from disclosure under sections 552.101 and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception encompasses information that other statutes make confidential. The submitted information includes medical records, access to which is governed by the Medical Practice Act ("MPA"), chapter 159 of the Occupations Code. Section 159.002 of the MPA provides:

(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 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.

In this case, the patient at issue is deceased. Medical records pertaining to a deceased individual may be released only on the signed consent of the personal representative of the deceased. 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. 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). We have marked medical records that may be released only as provided under the MPA. Open Records Decision No. 598 (1991).

Next, access to Emergency Medical Services (“EMS”) records is governed by section 773.091 of the Health and Safety Code. Open Records Decision No. 598 (1991). Section 773.091, the Emergency Medical Services Act, provides:

(a) A communication between certified emergency medical services personnel or a physician providing medical supervision and a patient that is made in the course of providing emergency medical services to the patient is confidential and privileged and may not be disclosed except as provided by this chapter.

(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.

....

(g) The privilege of confidentiality under this section 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. . . .

The submitted documents include an EMS record, and it does not appear that any of the exceptions to confidentiality set forth in section 773.092 apply in this instance.¹

¹You cite to section 774.091 of the Health and Safety Code in your comments to this office. We understand you to assert the confidentiality provision found in section 773.091 of the Health and Safety Code. See Health & Safety Code § 773.091.

Accordingly, the department must withhold the EMS record, which we have marked, under section 552.101 of the Government Code, except for information listed in section 773.091(g).

You also contend that portions of the submitted information are protected by privacy. Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy. Common-law privacy protects information if (1) the information 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. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683.

As you acknowledge, a person's common-law right of privacy terminates upon death. *Moore v. Charles B. Pierce Film Enters., Inc.*, 589 S.W.2d 489, 491 (Tex. App.—Texarkana 1979, writ ref'd n.r.e.); *see also Justice v. Belo Broadcasting Corp.*, 472 F. Supp. 145, 146-47 (N.D. Tex. 1979) (“action for invasion of privacy can be maintained only by a living individual whose privacy is invaded”) (quoting Restatement of Torts 2d); *See* Attorney General Opinions JM-229 (1984) (“the right of privacy lapses upon death”), Open Records Decision No. 272 (1981) (“the right of privacy is personal and lapses upon death”). Thus, the information at issue may not be withheld on the basis of the decedent's common-law right of privacy. You contend, however, that release of the responsive incident report would implicate the common-law privacy rights of the decedent's surviving family. Texas courts have held that the right of privacy may only be asserted by the person to whom private facts refer. *See Moore*, 589 S.W.2d at 491 (right of privacy is purely personal and belongs to “person about whom” private facts have been published). We note that the documents at issue contain information about the decedent's family members. Upon review, however, we determine that the information that makes reference to the family members is not protected by common-law privacy. Accordingly, the department may not withhold any portion of the submitted information pursuant to section 552.101 in conjunction with common-law privacy.

Finally, you indicate that the submitted documents contain motor vehicle information that is excepted from disclosure under section 552.130 of the Government Code. Section 552.130 provides in relevant part:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

(1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]

(2) a motor vehicle title or registration issued by an agency of this state[.]

This office has determined that section 552.130 does not encompass motor vehicle information that pertains exclusively to a deceased individual. *See* Open Records Decision No. 272 (1981). Furthermore, section 552.130 only applies to driver's license numbers "issued by an agency of this state." Gov't Code § 552.130(a)(1). We note that some of the submitted driver's license numbers were issued by other states and may not be withheld under 552.130. If the department determines that the remaining driver's license numbers are Texas driver's license numbers, the department must withhold the numbers under section 552.130.

In summary, medical records may be released only as provided under the MPA. The department must withhold the marked EMS record under section 552.101 of the Government Code in conjunction with section 773.091(b) of the Health and Safety Code, except for information required to be released under section 773.091(g). If the marked driver's license numbers are Texas driver's license numbers, the department must withhold the numbers under section 552.130 of the Government Code. The remainder of the submitted information must be released to the requestor.

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,



David R. Saldivar
Assistant Attorney General
Open Records Division

DRS/seg

Ref: ID# 179320

Enc: Submitted documents

c: Ms. Holly Curtner
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(w/o enclosures)