



OFFICE *of the* ATTORNEY GENERAL  
GREG ABBOTT

June 4, 2003

Ms. Pamela Smith  
Assistant General Counsel  
Texas Department of Public Safety  
P. O. Box 4087  
Austin, Texas 78773-0001

OR2003-3807

Dear Ms. Smith:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 182181.

The Department of Public Safety (the "department") received a request for any and all documents pertaining the investigation of a specified individual's death. You claim that the requested information may be excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information. We have also considered the comments submitted by the requestor. *See* Gov't Code § 552.304 (providing for submission of public comments).

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 information another statute makes confidential. You assert that the submitted documents may constitute medical records, access to which is governed by the Medical Practice Act (the "MPA"), Occ. Code §§ 151.001-165.160, which provides in 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 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.

Occ. Code § 159.002. You state that it is unclear when the patient in this instance died, and the documents themselves are unclear as to when they were created. You refer to Open Records Letter No. 2002-4975 (2002), in which this office concluded that if the records in question were created before the individual died, then the documents could only be released in accordance with the MPA, but that if the records were created after the individual died, the records were not subject to the MPA and as such, would have to be released to the public. Upon further consideration, we think the proper analysis for determining whether documents are subject to the MPA is to consider when the treatment was given to the patient. The MPA 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 a patient, a person who was alive at the time of receipt of medical treatment. You state, and the documents reflect, that these records "clearly refer to treatment that was provided before [the named individual] was pronounced dead." Because the MPA focuses on treatment given a patient, not the time the records were created, we conclude that these documents, therefore, constitute medical records which must be released only in accordance with the MPA. *See* Open Records Decision Nos. 598 (1991), 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 subject to the MPA.

As the patient is now deceased, the medical records may be released only on the signed consent of the deceased's personal representative. Occ. Code §§ 159.005(a)(5). That 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). Unless the deceased individual's personal representative provides the department with a consent that meets the requirements of section 159.005(a)(5), the department must withhold the medical records that we have marked.

We note, however, that one of the documents you have submitted to this office is not a medical record. This document, which we have marked, is an Emergency Medical Services ("EMS") record. Access to EMS records is governed by the provisions of section 773.091

of the Health and Safety Code. Open Records Decision No. 598 (1991). Section 773.091 of the Health and Safety Code, 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. . . .

Health & Safety Code § 773.091(a), (b), (g). The Emergency Medical Services Act also refers to the provision of medical services to a "patient." As with the MPA, a deceased individual cannot be a "patient." We note, however, that the submitted EMS record refers to medical treatment given to a patient before he was pronounced dead. This record, therefore, is subject to the Emergency Medical Services Act.

Confidential EMS records may be released on the signed, written consent of the deceased's personal representative. Health & Safety Code § 773.092(e)(4). That consent must specify 1) the information to be covered by the release, 2) reasons or purpose of the release, and 3) the person to whom the information is to be released. If the department receives such a consent, the department must release the EMS record in accordance with section 773.093 of the Health and Safety Code. Otherwise, the department must withhold the EMS record except for that information made public under section 773.093(g). We have marked the submitted EMS record.

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.

Ms. Pamela Smith - Page 5

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,



Sarah I. Swanson  
Assistant Attorney General  
Open Records Division

SIS/lmt

Ref: ID# 182181

Enc. Submitted documents

c: Ms. Beth Huddleston  
Texas Civil Rights Project  
1405 Montopolis Drive  
Austin, Texas 78741-3438  
(w/o enclosures)