



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 19, 2003

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

OR2003-5810

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# 186204.

The Texas Department of Public Safety (the "department") received a request for information pertaining to the death of an individual in the Gillespie County Jail. You state that you will release most of the requested information but claim that other responsive 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.

You assert that some of the submitted information constitutes medical records, access to which is governed by the Medical Practice Act (the "MPA"), Occ. Code §§ 151.001-165.160. Section 159.002 of the MPA 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.

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 MPA. Section 159.002 protects only the medical records of people who were alive at the time the records were created. Following the death of a patient, 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).

In this instance, the information at issue contains records that were created both before and after the individual died. We have reviewed these documents and marked those that constitute medical records, which may only be released 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). 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. Because the remaining documents do not constitute "record[s] of the identity, diagnosis, evaluation, or treatment of a patient by a physician," they are not subject to the MPA. As you have not claimed any other exception for these documents and they are not otherwise confidential by law, they must be released.

You contend that other submitted information is confidential by statute. 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 confidentiality provisions such as article 49.18(b) of the Code of Criminal Procedure, which concerns custodial death reports. In Open Records Decision No. 521, this office addressed the confidentiality of custodial death reports and their attachments. Specifically, this office concluded that under article 49.18(b) of the Code of Criminal Procedure, in conjunction with a directive issued by the Office of the Attorney General, Part I of a custodial death report filed with this office is public information but Parts II through V of the report, including any attachments, are confidential. *See* Open Records Decision No. 521 at 4-5 (1989); *see also* Code Crim. Proc. art. 49.18(b) (attorney general shall make report, with exception of any portion of report that attorney general determines is privileged, available to any interested person). We therefore agree that, in accordance with section 552.101, the department must withhold Parts II through V of the submitted custodial death report as information made confidential by law.

You also contend that the fingerprints of the deceased individual are confidential under sections 559.002 and 559.003 of the Government Code and must therefore be withheld under

section 552.101. However, the laws making such information confidential are intended to protect individuals' privacy. See Gov't Code § 559.001(1)(A) (individual whose biometric identifier is at issue may consent to its release). Because the right of privacy is purely personal and lapses at death, the fingerprints of the deceased individual may not be withheld on the basis of sections 559.002 and 559.003. See *Moore v. Charles B. Pierce Film Enters. Inc.*, 589 S.W.2d 489 (Tex. Civ. App.—Texarkana 1979, writ ref'd n.r.e.); see also Attorney General Opinions JM-229 (1984); H-917 (1976). As you claim no other exception for this information and it is not otherwise confidential by law, it must be released.

In summary, the records we have marked as being subject to the MPA may only be released in accordance with that statute. Parts II through V of the submitted custodial death report must be withheld pursuant to section 552.101 and article 49.18(b). The remaining submitted information must be released.

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).

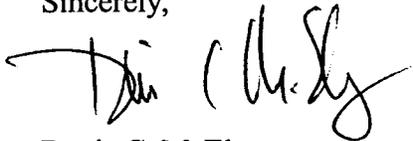
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental

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,



Denis C. McElroy
Assistant Attorney General
Open Records Division

DCM/lmt

Ref: ID# 186204

Enc. Submitted documents

c: Mr. Roger Enriquez
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(w/o enclosures)