



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 25, 2003

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

OR2003-8551

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# 191541.

The Texas Department of Criminal Justice (the "department") received a request for the investigation into the death of a named inmate. You indicate that a copy of Part I of the Custodial Death Report and basic information about the death of the inmate in custody will be released to the requestor.¹ You claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.108, 552.117, and 552.134 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

First, we note that the requested investigation records are specifically made public under section 552.022 of the Government Code. Section 552.022(a) provides in pertinent part as follows:

¹ In Open Records Decision No. 521(1989), this office concluded that under article 49.18(b) of the Code of Criminal Procedure, in conjunction with a directive issued by the attorney general, section one of a custodial death report filed with this office is public information, but sections two through five of the report are confidential. See 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).

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). In this instance, the submitted information consists of a completed investigation made of, for, or by the Office of the Inspector General. Therefore, the department may withhold these records only if they are made confidential under other law or are excepted from public disclosure pursuant to section 552.108. Because the department claims exceptions under sections 552.101, 552.108, 552.117 and 552.134 of the Government Code for this information, we will address your arguments under these provisions.

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 deemed confidential by statute. You state that the submitted information contains medical records, access to which is governed by the Medical Practice Act, (the "MPA"), chapter 159 of the Occupations Code. Open Records Decision No. 565 at 7 (1990). Section 159.002 of the MPA 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 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 ordinarily encompasses only records created either by a physician or by someone acting under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). However, when a file is created as the result of a hospital stay, this office has determined that all of the documents in the file that relate to diagnosis and treatment constitute either physician-patient communications or records of the identity, diagnosis, evaluation, or treatment of a patient by a physician, created or maintained by a physician, for purposes of the MPA. *See* Open Records Decision No. 546 (1990). Medical records pertaining to a deceased patient may only be released upon the signed consent of the personal representative of the deceased. *See* Occ. Code §159.005(a)(5). Medical records must be released upon signed, written consent, provided that the consent specifies (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. The MPA requires that any subsequent release of medical records be consistent with the purposes for which a governmental body obtained the records. Open Records Decision No. 598 (1991). We have marked the medical records that may be released only as provided under the MPA.

We note that the submitted information also contains mental health records. Section 611.002 of the Health and Safety Code applies to “[c]ommunications 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.” *See also* Health & Safety Code § 611.001 (defining “patient” and “professional”). We have marked the information in the submitted documents that is within the scope of section 611.002 and may not be released except in accordance with sections 611.004 and 611.0045 of the Health and Safety Code. Health & Safety Code § 611.002(b); *see id.* §§ 611.004, 611.0045.

We also note that the submitted information contains an Emergency Medical Services (“EMS”) record. Access to the EMS record at issue 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 in part:

(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 and Safety Code 773.091(b), (g). Thus, the EMS Activity Report, except for the information specified in subsection (g), is deemed confidential by section 773.091 and, therefore, may be released only in accordance with chapter 773 of the Health and Safety Code. *See* Health & Safety Code §§ 773.091-.094. We note that records that are confidential under section 773.091 may be disclosed to “any person who bears a written consent of the patient or other persons authorized to act on the patient’s behalf for the release of confidential information.” Health & Safety Code §§ 773.092(e)(4), .093. Section 773.093 provides that a consent for release of EMS records must specify: (1) the information or

records to be covered by the release; (2) the reasons or purpose for the release; and (3) the person to whom the information is to be released. Therefore, if section 773.092 applies, the department must release the EMS record to the requestor. *See* Health & Safety Code §§ 773.092, .093; Open Records Decision No. 632 (1995). Otherwise, except as provided by section 773.091(g), the department must withhold the EMS record under section 773.091(b) of the Health and Safety Code in conjunction with section 552.101 of the Government Code.

We next address your claim under section 552.134 of the Government Code with respect to the remaining information, including information under section 773.091(g). Section 552.134 of the Government Code relates to information about inmates of the department and provides in 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.

Section 552.029 of the Government Code states:

Notwithstanding Section 508.313 or 552.134, the following information about an inmate who is confined in a facility operated by or under a contract with the Texas Department of Criminal Justice is subject to required disclosure under Section 552.021:

....

(8) basic information regarding the death of an inmate in custody, an incident involving the use of force, or an alleged crime involving the inmate.

Section 552.134 is explicitly made subject to section 552.029. Under section 552.029(8), basic information regarding the death of an inmate in custody, an alleged crime involving an inmate, and an incident involving the use of force is subject to required disclosure. The submitted documents consist of information about the death of an inmate of the department. The department states that it has released basic information pertaining to the death of the inmate pursuant to section 552.029(8) of the Government Code. We determine that the remainder of the submitted information must be withheld under section 552.134 of the Government Code.

In summary, the department must release section one of the submitted custodial death report, and must withhold sections two through five, pursuant to article 49.18(b) of the Code of Criminal Procedure. The marked medical records may only be released as provided under

the MPA. The marked mental health records may not be released except in accordance with sections 611.004 and 611.0045 of the Health and Safety Code. The marked EMS record must be released if section 773.092 of the Health and Safety Code applies. Otherwise, except as provided by section 773.091(g), the department must withhold the EMS record under section 773.091(b) of the Health and Safety Code in conjunction with section 552.101 of the Government Code. With the exception of basic information regarding the death of the named inmate, which must be released pursuant to section 552.029(8) of the Government Code, the remainder of the submitted information must be withheld pursuant to section 552.134 of the Government Code. Based on this finding, we do not address your other arguments against disclosure.

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,



Debbie K. Lee
Assistant Attorney General
Open Records Division

DKL/seg

Ref: ID# 191541

Enc. Submitted documents

c: Ms. Jane Ramsey
6328 SPID #A
Corpus Christi, Texas 78412
(w/o enclosures)