



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 6, 2004

Mr. Kevin D. Pagan
Deputy City Attorney
City of McAllen
P.O. Box 220
McAllen, Texas 78505-0220

OR2004-2778

Dear Mr. Pagan:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 198829.

The City of McAllen (the "city") received a request for the personnel file of a particular deceased individual, "the OSHA report of the death" of the named individual, "[a]ll federal investigation reports" regarding the individual's death, and "[a]ll emails transmitted from Fire Department Personnel regarding" the individual's death. We understand you to claim that portions of the submitted information are excepted from disclosure under sections 552.101, 552.117, and 552.130 of the Government Code. We have considered these exceptions and reviewed the submitted information.

Initially, we note that you have submitted only the requested personnel file for our review. As you have not submitted the other requested information, we assume you have released it to the extent that it existed on the date the city received this request. If you have not released any such records, you must do so at this time. *See* Gov't Code §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

We turn now to the submitted information. You claim that the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 42 U.S.C. §§ 1320d-1320d-8, governs some of the submitted documents. Section 552.101 of the Government Code excepts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision" and encompasses information protected by another statute.

At the direction of Congress, the Secretary of Health and Human Services (“HHS”) promulgated regulations setting privacy standards for medical records, which HHS issued as the Federal Standards for Privacy of Individually Identifiable Health Information. *See* Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 1320d-2 (Supp. IV 1998) (historical & statutory note); Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. Pts. 160, 164 (“Privacy Rule”); *see also* Attorney General Opinion JC-0508 at 2 (2002). These standards govern the releasability of protected health information by a covered entity. *See* 45 C.F.R. pts. 160, 164. Under these standards, a covered entity may not use or disclose protected health information, except as provided by parts 160 and 164 of the Code of Federal Regulations. 45 C.F.R. § 164.502(a).

This office recently addressed the interplay of the Privacy Rule and the Public Information Act (the “Act”), chapter 552 of the Government Code. *See* Open Records Decision No. 681 (2004). In that decision, we noted that section 164.512 of title 45 of the Code of Federal Regulations provides that a covered entity may use or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law. *See* 45 C.F.R. § 164.512(a)(1). We further noted that the Act “is a mandate in Texas law that compels Texas governmental bodies to disclose information to the public.” *See* Open Records Decision No. 681 at 8 (2004); *see also* Gov’t Code §§ 552.002, .003, .021. We therefore held that disclosures under the Act come within section 164.512(a) of title 45 of the Code of Federal Regulations. Consequently, the Privacy Rule does not make information confidential for the purpose of section 552.101 of the Government Code. *Open Records Decision No. 681 at 9 (2004); see also* Open Records Decision No. 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). Because the Privacy Rule does not make confidential information that is subject to disclosure under the Act, the city may withhold requested protected health information from the public only if an exception in subchapter C of the Act applies.

We note that some of the submitted documents constitute 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.

Occ. Code § 159.002(b), (c). Information subject to the MPA includes both medical records and information obtained from those medical records. *See* Open Records Decision Nos. 598 (1991). In addition, because hospital treatment is routinely conducted under the supervision of physicians, documents relating to diagnosis and treatment during a hospital stay also constitute protected medical records. *See* Open Decision Nos. 598 (1991), 546 (1990).

Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). 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). We have reviewed the submitted information and marked those documents that constitute medical records and may only be released in accordance with the MPA.

Next we note that some of the submitted information may be confidential by law. Section 552.101 also encompasses information made confidential by Texas statutes. We understand that the city is a civil service city under chapter 143 of the Local Government Code. Section 143.089 contemplates two different types of personnel files, a fire fighter's civil service file that a city's civil service director is required to maintain, and an internal file that the fire department may maintain for its own use. Local Gov't Code § 143.089(a), (g).

The civil service file must contain all records of a fire fighter's commendations, misconduct that resulted in disciplinary action under chapter 143, and supervisor evaluations.¹ *See id.* § 143.089(a); *see also Abbott v. City of Corpus Christi*, 109 S.W.3d 113, 122 (Tex. App.—Austin 2003, no pet.) (holding that all investigatory materials in case resulting in disciplinary action are "from the employing department" and must be forwarded for inclusion in civil service file when such records are held by or in possession of department because of its investigation into misconduct). However, a document relating to a fire fighter's alleged misconduct may not be placed in his civil service personnel file if there is insufficient evidence to sustain the charge of misconduct. Local Gov't Code § 143.089(b). Information contained in the civil service file generally must be released, unless it is shown that some provision of chapter 552 of the Government Code permits the information to be withheld from public disclosure. *See* Local Gov't Code § 143.089(f); Gov't Code §§ 552.006, .021; Open Records Decision No. 562 at 6 (1990).

¹Chapter 143 prescribes the following types of disciplinary actions: removal, suspension, demotion, and uncompensated duty. *See id.* §§ 143.051-.055.

Section 143.089 also allows, but does not require, a fire department to maintain its own personnel file concerning the fire fighter for the department's own internal use. *See* Local Gov't Code § 143.089(g). Information that reasonably relates to a fire fighter's employment relationship with the fire department and that is maintained in a fire department's internal file pursuant to section 143.089(g) is confidential and must be withheld pursuant to section 552.101 of the Government Code. *See id.*; *see also City of San Antonio v. Texas Attorney General*, 851 S.W.2d 946, 949 (Tex. App.—Austin 1993, writ denied) (“the legislature intended to deem confidential the information maintained by the . . . department for its own use under subsection (g)”); *City of San Antonio v. San Antonio Express-News*, 47 S.W.3d 556 (Tex. App.—San Antonio 2000, pet. denied) (restricting confidentiality under section 143.089(g) to “information reasonably related to a police officer's or fire fighter's employment relationship”); Attorney General Opinion JC-0257 at 6-7 (2000) (addressing functions of section 143.089(a) and (g) files).

In this instance the city received a request for a fire fighter's “personnel file.” Because the request is broadly worded and was directed to the city, it encompasses both the civil service file maintained by the city's civil service commission and the personnel file that the city's fire department maintains for its internal use. You have not informed us whether the submitted documents represent records maintained by the city's civil service commission, the fire department, or both. As noted above, section 143.089(a) requires that the city maintain copies of some of the submitted documents, such as periodic personnel evaluations and letters of commendation, in the civil service commission file regarding this fire fighter. However, section 143.089 does not specifically dictate where other submitted documents, such as the fire fighter's driving record and payroll records, are to be maintained, and such records could be maintained in either the civil service commission file or the fire department's confidential internal file. Because you have not informed us where or how the submitted records are maintained, we must rule conditionally. To the extent the submitted documents are records maintained in the fire department's internal personnel file, they are confidential under section 143.089(g) and must be withheld under section 552.101. However, to the extent these records are maintained by the city's civil service commission, they are subject to disclosure under the Act and may only be withheld if an exception to disclosure applies. Because you have not informed us where or how these documents are maintained, we must consider whether any other exception to disclosure applies.

Section 552.101 also encompasses the common law right to privacy, which protects information that is 1) highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, *and* 2) of no legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976). Common law privacy encompasses the specific types of information that the Texas Supreme Court held to be intimate or embarrassing in *Industrial Foundation*. *See* 540 S.W.2d at 683 (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). This office has since concluded that other types of information

are also excepted from disclosure under section 552.101 on the basis of common law privacy. *See* Open Records Decision Nos. 659 at 4-5 (1999) (summarizing information attorney general has determined to be private), 470 at 4 (1987) (illness from severe emotional job-related stress), 455 at 9 (1987) (prescription drugs, illnesses, operations, and physical handicaps), 343 at 1-2 (1982) (references in emergency medical records to drug overdose, acute alcohol intoxication, obstetrical/gynecological illness, convulsions/seizures, or emotional/mental distress). However, the right of privacy is purely personal and lapses at death. *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). On the other hand, if the release of information about a deceased person reveals highly intimate or embarrassing information about living persons, the information must be withheld to protect the living individuals' privacy. *See* Attorney General Opinion JM-229. We have reviewed the submitted documents and marked the information that must be withheld under section 552.101 in conjunction with common law privacy.

You also contend that the submitted records include information that is protected by section 552.117 of the Government Code. Section 552.117(a)(1) excepts from public disclosure the present and former home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who timely request that such information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989).

This office has interpreted the reference in section 552.117(a)(1) to “former official or employee” to mean that the protection afforded by section 552.117 generally includes information pertaining to a deceased individual who is a former official or employee of a governmental body who timely elected to keep his or her information confidential under section 552.024. However, we have also concluded that the protection afforded by section 552.117 does not extend to the social security number of a deceased employee. *Cf.* Attorney General Opinions JM-229 (1984) (“the right of privacy lapses upon death”), H-917 (1976) (“We are . . . of the opinion that the Texas courts would follow the almost uniform rule of other jurisdictions that the right of privacy lapses upon death.”); Open Records Decision No. 272 (1981) (“the right of privacy is personal and lapses upon death”).

In this instance, you state that “[a]s permitted by the Section 552.024 of the Act, [the named fire fighter] chose not to allow public access to information in the custody of the City of McAllen that relates to his home address, telephone number, social security number, or that reveals whether he has family members.” However, you also inform us that this individual “did not designate to the City of McAllen whether he wanted to release his home address, telephone number, social security number or information that reveals whether he has family members.” If the deceased employee did in fact elect to keep his home address, telephone number, and family member information confidential, section 552.117 requires the city to

withhold this information, which we have marked. If, however, he did not make such an election, this information may not be withheld pursuant to section 552.117.

In addition, you contend that driver's license information is excepted from disclosure. Section 552.130 of the Government Code requires the city to withhold information that "relates to . . . a motor vehicle operator's or driver's license or permit issued by an agency of this state." We note, however, that section 552.130 is designed to protect individuals' privacy. Because privacy lapses at death, the driver's license number of a deceased individual may not be withheld under section 552.130.

Finally, we note that the submitted information includes bank account numbers. Section 552.136 of the Government Code states that "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136. This provision was enacted to protect individuals' privacy, and therefore, the protection extinguishes at the individual's death. *See Moore*, 589 S.W.2d at 491. Thus, pursuant to section 552.136, the city must withhold the marked account numbers only if a living person has an interest in the accounts. Otherwise, the city must release the account numbers.

In summary, we have marked medical records, which may only be released in accordance with the MPA. To the extent the submitted information is maintained in the fire department's internal file concerning the deceased individual, it is confidential under section 143.089(g) and must be withheld under section 552.101. To the extent the submitted information is maintained in the city's civil service commission file concerning this individual, it is subject to release with the following exceptions: 1) information we have marked as being protected by common law privacy must be withheld under section 552.101; 2) information we have marked as being subject to section 552.117 must be withheld to the extent that the deceased employee elected to keep such information confidential; 3) bank account numbers in which living individuals maintain an interest must be withheld under section 552.136.

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).

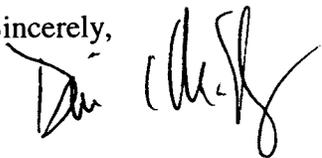
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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# 198829

Enc. Submitted documents

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(w/o enclosures)