



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 12, 2004

Mr. David R. Sorola
City Attorney
City of Del Rio
109 West Broadway
Del Rio, Texas 78840-5527

OR2004-5684

Dear Mr. Sorola:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 204921.

The City of Del Rio (the "city") received a request for information regarding the death of a named individual and any criminal history of the named individual. You claim that the requested 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.

Initially, we must address the city's procedural obligations under the Public Information Act (the "Act"). Section 552.301 of the Government Code requires a governmental body that receives a request for information that it wishes to withhold to ask for the attorney general's decision and state the exceptions that apply within ten business days after receiving the request. *See* Gov't Code § 552.301(a), (b). Although you state the city asked for a determination from this office on April 29, 2004, our review of our records does not indicate that any such request was received by this office. Accordingly, we determine that the city failed to request this ruling within ten business days of receiving this request.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision

No. 319 (1982). Normally, a compelling reason for non-disclosure exists where some other source of law makes the information confidential or where third party interests are at stake. Open Records Decision No. 150 at 2 (1977). Thus, we will address your arguments under section 552.101 of the Government Code.

We first address your arguments regarding criminal history information. Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This section encompasses information made confidential by other statutes. You raise section 552.101 in conjunction with sections 411.083 and 411.084 of the Government Code. Criminal history record information (“CHRI”) is confidential and not subject to disclosure. CHRI “means information collected about a person by a criminal justice agency that consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions” but does not include “driving record information maintained by [the Department of Public Safety (“DPS”)] under Subchapter C, Chapter 521, Transportation Code.” Gov’t Code § 411.082(2).

Federal regulations prohibit the release of CHRI maintained in state and local CHRI systems to the general public. *See* 28 C.F.R. § 20.21(c)(1) (“Use of criminal history record information disseminated to noncriminal justice agencies shall be limited to the purpose for which it was given.”), (2) (“No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself.”). Under chapter 411 of the Government Code, a criminal justice agency may obtain CHRI from DPS or from another criminal justice agency. Gov’t Code §§ 411.083(b)(1), .087(a)(2), .089(a). However, CHRI so obtained is confidential and may only be disclosed in very limited instances. Gov’t Code § 411.084; *see also* Gov’t Code § 411.087 (restrictions on disclosure of CHRI obtained from DPS also apply to CHRI obtained from other criminal justice agencies).

We note that section 411.083 does not distinguish between the CHRI of a person who is living and one who has died. Furthermore, we do not believe that section 411.083 is intended solely to protect the privacy interest of the subject individual. *See Houston Chronicle Publ’g Co. v. City of Houston*, 531 S.W.2d 177, 187 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref’d n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (maintenance of criminal history record information essential for investigation of crime). Therefore, assuming that you have CHRI pertaining to the deceased individual and that it falls within the ambit of these state and federal regulations, you must withhold the CHRI from the requestor pursuant to section 552.101 of the Government Code as information that is made confidential by law.

You also assert that some of the submitted information is excepted from disclosure under section 552.101 in conjunction with section 159.002(c) of the Occupations Code. Access to medical records is governed by the Medical Practice Act (“MPA”), subtitle B of title 3 of the Occupations Code. Section 159.002 of the MPA provides in pertinent part:

- (a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.
- (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. Upon review, we note that none of the records at issue consist of medical records for purposes of the MPA. Thus, we determine that the city may not withhold any of the submitted information pursuant to the MPA.

Next, you assert that the remaining information is excepted from disclosure under section 552.101 based on the privacy rights of both the deceased individual and the deceased individual's family. We first note that the right of privacy is a personal right that lapses at death; thus information may not be withheld on the basis of the privacy interests of a deceased individual. *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 Justice v. Belo Broadcasting Corp.*, 472 F. Supp. 145, 146-47 (N.D. Tex. 1979); Attorney General Opinions JM-229 (1984); H-917 (1976); Open Records Decision No. 272 at 1 (1981). *But see* Attorney General Opinion JM-229 (1984) (if release of information about deceased person reveals highly intimate or embarrassing information about living persons, that information must be withheld under common-law privacy). However, as you acknowledge, the United States Supreme Court recently recognized that surviving family members can have a privacy interest in information relating to their deceased relatives. *See Nat'l Archives & Records Admin. v. Favish*, 124 S. Ct. 1570 (2004).

In order for information to be protected under common law privacy, it must both (1) contain highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person and (2) not be of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). 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. In addition, this office has found that the following types of information are excepted from required public disclosure under common law privacy: an individual's criminal history when compiled by a governmental body, *see*

Open Records Decision No. 565 (citing *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989)); personal financial information not relating to a financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990); some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps); and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982).

We have reviewed the submitted records and conclude that although this information arguably contains highly intimate facts, the publication of which would be highly objectionable to a reasonable person, this information relates solely to a deceased individual and does not reveal highly intimate or embarrassing facts about a living individual. Further, this information pertains to the death of an individual and subsequent police investigation. We find that such information is of legitimate public interest. Therefore, we find that the remaining submitted information may not be withheld pursuant to section 552.101 in conjunction with common law privacy.

In summary, any CHRI pertaining to the deceased individual that falls within the ambit of the state and federal regulations must be withheld from the requestor pursuant to section 552.101 of the Government Code as information that is made confidential by law. Any remaining 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,



Sarah I. Swanson
Assistant Attorney General
Open Records Division

SIS/krl

Ref: ID# 204921

Enc. Submitted documents

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