



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 23, 2004

Mr. James L. Hall
Assistant General Counsel
Texas Department of Criminal Justice
P. O. Box 4004
Huntsville, Texas 77342-4004

OR2004-8139

Dear Mr. Hall:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 209644.

The Texas Department of Criminal Justice (the "department") received a request for information related to the death of a named inmate. You claim that the requested information is excepted from disclosure under sections 552.101, 552.108, and 552.134 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that the submitted information includes a custodial death report. Section 552.101 of the Government Code 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 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). Article 49.18(b) requires that a custodial death report must be filed "with the attorney general no later than the 30th day after the date on which the person in custody or the incarcerated person died." Code Crim. Proc. art. 49.18(b). More than thirty days passed between the death of the inmate at issue and the date the department received this request. Thus, the department must release the entirety of Part I of the submitted custodial death report as

information that is made public by statute. *See generally* Open Records Decision No. 525 (1989) (exceptions found in statutory predecessor to Public Information Act (the "Act") do not apply to information that is made public by other statutes). Parts II through V of the report, including any attachments, are confidential and must be withheld under section 552.101.

Next, you assert that the submitted information contains medical records, access to which is governed by the Medical Practice Act, (the "MPA"), subtitle B of title 3 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.

Occ. Code § 159.002(b), (c). The MPA defines "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. Thus, section 159.002 protects only the medical records of people who were alive at the time the records were created. Therefore, the submitted records are not subject to the MPA and may not be withheld on that basis. *See also* Open Records Decision No. 272 (1981) (right of privacy lapses upon death).

We turn now to your arguments regarding the remaining submitted information. Section 552.134(a) of the Government Code relates to inmates of the department and provides in relevant part:

(a) Except as provided by Subsection (b) or by Section 552.029 [of the Government Code], information obtained or maintained by the Texas Department of Criminal Justice is excepted from [required public disclosure] if it is information about an inmate who is confined in a facility operated by or under a contract with the department.

Gov't Code § 552.134(a). Section 552.029 of the Government Code provides that, notwithstanding section 552.134, eight specified categories of "information about an inmate who is confined in a facility operated by or under a contract with [the department are] subject to required disclosure[.]" These eight categories of information include "basic information regarding the death of an inmate in custody, an incident involving the use of force, or an alleged crime involving the inmate." Gov't Code § 552.029.

The legislature explicitly made section 552.134 subject to section 552.029. On review, we find that the remaining submitted records constitute information about an inmate for the purposes of section 552.134. However, the records concern the death of an inmate in custody. Thus, basic information concerning the death must be released. The remaining submitted information must be withheld pursuant to section 552.134 of the Government Code.¹

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).

¹Because our ruling is dispositive, we need not address your remaining arguments against disclosure, except to note that information that is subject to release under section 552.029 is not excepted by section 552.108 of the Government Code. See Gov't Code § 552.108(c) (basic information must be released).

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,

A handwritten signature in black ink, appearing to read "Sarah Swanson", with a long horizontal flourish extending to the right.

Sarah I. Swanson
Assistant Attorney General
Open Records Division

SIS/krl

Ref: ID# 209644

Enc. Submitted documents

c: Mr. Mark D. Haas
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(w/o enclosures)