



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 1, 2004

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

OR2004-9282

Dear Mr. Frazier:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 212176.

The Texas Department of Criminal Justice (the "department") received a request for information relating to the investigation of the death of a named inmate. You claim that most of the 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 have reviewed the information you submitted.

Section 552.101 excepts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information that is made confidential by statute. The disclosure of medical records is governed by the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. Section 159.002 of the MPA provides in 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(a)-(c). This office has determined that in governing access to a specific subset of information, the MPA prevails over the more general provisions of the Act. *See* Open Records Decision No. 598 (1991). We also have determined that the MPA ordinarily encompasses only records created either by a physician or by someone acting under the supervision of a physician. *See id.* However, when a file is created as the result of a hospital stay, we have concluded 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). When a patient is deceased, as is the case here, medical records pertaining to the deceased patient may only be released upon the signed consent of the deceased's personal representative. *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 id.* §§ 159.004, .005. Any subsequent release of medical records must be consistent with the purposes for which the governmental body obtained the records. *See id.* § 159.002(c); Open Records Decision No. 565 at 7 (1990). We have marked the submitted information that is confidential under the MPA. That information may be released only if the department has authority under the MPA to do so. *See* Open Records Decision No. 598 (1991).

The submitted information also includes dental records that are subject to chapter 258 of the Occupations Code. Section 258.102 of the Occupations Code provides as follows:

(a) The following information is privileged and may not be disclosed except as provided by this article:

- (1) a communication between a dentist and a patient that relates to a professional service provided by the dentist; and
- (2) a dental record.

(b) The privilege described by this section applies regardless of when the patient received the professional service from the dentist.

Occ. Code § 258.102. A "dental record" means dental information about a patient that is created or maintained by a dentist and relates to the history or treatment of the patient. *See id.* §258.101(1). Information that is privileged under chapter 258 of the Occupations Code may be disclosed only under certain specified circumstances. *See id.* § 258.104 (consent to disclosure); *see also id.* §§ 258.105, .106, .107 (exceptions to privilege). When the patient is deceased, as is the case here, consent for the release of privileged information must be signed by a personal representative of the patient. *See id.* § 258.104(b)(5). The written consent for the release of privileged information required under section 258.104 must specify (1) the information covered by the release, (2) the person to whom the information is to be released, and (3) the purpose for the release. *Id.* § 258.104(c). A person who receives information that is privileged under section 258.102 of the Occupations Code may disclose that information to another person only to the extent that disclosure is consistent with the purpose for which the information was obtained. *See id.* § 258.108. We have marked the submitted dental records that are privileged under section 258.102 of the Occupations Code. The dental records may only be released in accordance with chapter 258 of the Occupations Code.

Section 611.002 of the Health and Safety Code provides for the confidentiality of certain mental health records. Section 611.002 provides in part:

(a) Communications 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, are confidential.

(b) Confidential communications or records may not be disclosed except as provided by Section 611.004 or 611.0045.

Health & Safety Code § 611.002(a)-(b). Section 611.001 defines a "professional" as (1) a person authorized to practice medicine, (2) a person licensed or certified by the state to diagnose, evaluate or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals. *See Open Records Decision No. 565 (1990)*. We have marked information that is confidential under section 611.002. Unless the requestor has a statutory right of access to the marked information under sections 611.004 and 611.0045, it must be withheld under section 552.101 of the Government Code.

The submitted information also includes Sections II through V of a custodial death report. Article 49.18(b) of the Code of Criminal Procedure requires law enforcement agencies to complete custodial death reports and file them with the attorney general, who is required to

make the report available to any interested party, except for any portion that the attorney general determines is privileged. This office has held that under article 49.18(b) in conjunction with a directive issued by the office of the attorney general, section one of a custodial death report filed with this office is public information. All remaining portions of the report, including all attachments, are deemed privileged and must be withheld from the public. *See* Open Records Decision No. 521 (1989). You state that the requestor has been or will be provided with the public portion of the custodial death report. The department must withhold the remaining contents of the report under section 552.101 of the Government Code.

Next, we address your claim under section 552.134. This exception relates to inmates of the department. Section 552.134 states that “[e]xcept as provided by Subsection (b) or by Section 552.029 [of the Government Code], information obtained or maintained by the [department] 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 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.” *Id.* § 552.029(8). Thus, the legislature explicitly made section 552.134 subject to section 552.029.

Although the individual to whom the submitted information pertains is deceased, we agree that section 552.134 is applicable to information that relates to the deceased individual as an inmate of the department. We also note that the submitted information relates to the death of the inmate in custody and to an alleged crime involving the inmate. Therefore, basic information about the inmate’s death and about the alleged crime involving the inmate is subject to disclosure under section 552.029(8). The basic information that must be released under section 552.029(8) includes the time and place of the incident, the names of inmates and of department employees who were involved, a brief narrative of the incident, a brief description of any injuries sustained by anyone involved, and information regarding any criminal charges or disciplinary actions that were filed as a result of the incident. The department must withhold the rest of the submitted information under section 552.134.

In summary: (1) the information that is confidential under the MPA may be released only if the department has authority under the MPA to do so; (2) the dental records that are privileged under section 258.102 of the Occupations Code may only be released in accordance with chapter 258 of the Occupations Code; (3) the mental health records must be withheld under section 552.101 of the Government Code in conjunction with section 611.002 of the Health and Safety Code unless the requestor has a right of access to the information under sections 611.004 and 611.0045 of the Health and Safety Code; (4) the department must withhold the non-public portions of the custodial death report under

section 552.101 in conjunction with article 49.18(b) of the Code of Criminal Procedure; and (5) except for the basic information that is subject to section 552.029(8), the rest of the submitted information must be withheld under section 552.134.¹ As we are able to make these determinations, we need not address your other claims under sections 552.101, 552.108 and 552.117.

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).

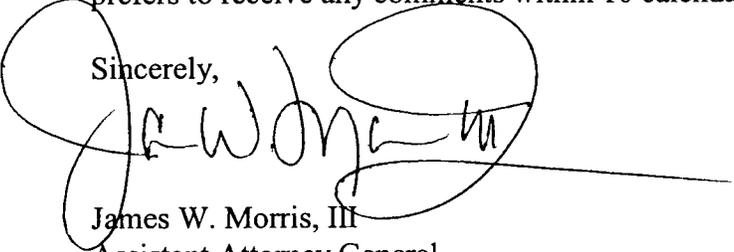
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

¹We note that the information that is subject to section 552.029(8) corresponds to the basic front-page information that is made public under section 552.108(c). See Gov't Code § 552.108(c); *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177, 186-188 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976); Open Records Decision No. 127 at 3-4 (1976) (summarizing types of information deemed public in *Houston Chronicle*).

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,



James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 212176

Enc: Submitted documents

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(w/o enclosures)