



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 19, 2004

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

OR2004-9885

Dear Mr. Hall:

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# 213653.

The Texas Department of Criminal Justice (the "department") received a request for a named individual's parole file. 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 have reviewed the information you submitted.

Initially, we address the department's obligations under section 552.301 of the Government Code. This section prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(b) requires the governmental body to ask for the attorney general's decision and state the exceptions to disclosure that it claims not later than the tenth business day after the date of its receipt of the written request for information. *See* Gov't Code § 552.301(b). Section 552.301(e) requires the governmental body to submit to the attorney general, not later than the fifteenth business day after the date of its receipt of the request, (1) written comments stating why the governmental body's claimed exceptions apply to the information that it seeks to withhold; (2) a copy of the written request for information; (3) a signed statement of the date on which the governmental body received the request, or evidence sufficient to establish that date; and (4) the specific information that the governmental body seeks to withhold or representative samples of the information if it is voluminous. *See id.* § 552.301(e)(1)(A)-(D). Section 552.302 provides that if a governmental body does not request an attorney general decision as prescribed by section

552.301, the information requested in writing is presumed to be subject to required public disclosure and must be released, unless there is a compelling reason to withhold the information. *See id.* § 552.302.

You inform us that the department received the present request for information on August 10, 2004. You requested this decision on September 16, 2004. Thus, you failed to request this decision within the ten-business-day period prescribed by section 552.301(b). Likewise, you did not timely comply with section 552.301(e). Therefore, the submitted information is presumed to be public and must be released, unless there is a compelling reason to withhold any of the information. *See id.*; *see also Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ). The presumption that information is public under section 552.302 can generally be overcome by a demonstration that the information is confidential by law or that third-party interests are at stake. *See Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982)*. In this instance, the department seeks to withhold the submitted information under section 552.101 of the Government Code. As a claim under this exception can provide a compelling reason for non-disclosure, we will address it.

Section 552.101 excepts from public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Govt. Code § 552.101. This exception encompasses information that is made confidential by statute. You raise section 552.101 in conjunction with section 508.313 of the Government Code. Chapter 508 of the Government Code is applicable to the department. Section 508.313 provides in part:

(a) All information obtained and maintained, including a victim protest letter or other correspondence, a victim impact statement, a list of inmates eligible for release on parole, and an arrest record of an inmate, is confidential and privileged if the information relates to:

(1) an inmate of the institutional division [of the department] subject to release on parole, release to mandatory supervision, or executive clemency;

(2) a releasee; or

(3) a person directly identified in any proposed plan of release for an inmate.

(b) Statistical and general information relating to the parole and mandatory supervision system, including the names of releasees and data recorded relating to parole and mandatory supervision services, is not confidential or privileged and must be made available for public inspection at any reasonable time.

(c) The department may provide information that is confidential and privileged under Subsection (a) to:

- (1) the governor;
- (2) a member of the [B]oard [of Pardons and Paroles];
- (3) the Criminal Justice Policy Council in performing duties of the council under Section 413.017 [of the Government Code]; or
- (4) an eligible entity requesting information for a law enforcement, prosecutorial, correctional, clemency, or treatment purpose.

Govt. Code § 508.313(a)-(c). You state that the submitted information relates to a releasee under section 508.313(a)(2). *See also id.* § 508.001(9) (“releasee” means person released on parole or to mandatory supervision). You also state that this information is held by the parole division of the department. Based on your representations, we conclude that the submitted information is generally confidential under section 552.101 in conjunction with section 508.313(a) of the Government Code.

We note, however, that some of the submitted information is subject to the Medical Practice Act (the “MPA”), subtitle B of title 3 of the Occupations Code.¹ *See Occ. Code* § 151.001 *et seq.* The MPA governs the disclosure of medical records. 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.

¹Under the rules of statutory construction, a statute enacted later in time prevails over an earlier-enacted statute. *See Gov’t Code* § 311.026, *Avery v. State*, 963 S.W.2d 550 (Tex.App.—Houston [1st Dist.] 1997, no pet.) (specific statute prevailed over general statute based on specific nature of statutory authority and fact that specific statute was originally enacted later in time than general statute). To the extent that the access provisions of the MPA conflict with the confidentiality provision in section 508.313 of the Government Code in this instance, the later-enacted provisions of the MPA prevail over section 508.313. *See Act of August 5, 1981, 67th Leg., 1st C.S., ch. 1, § 1, 1981 Tex. Gen. Laws 1, 31 (enacting MPA), Act of June 21, 1947, 50th Leg., R.S., ch. 452, § 29, 1947 Tex. Gen. Laws 1049, 1057 (enacting statutory predecessor to Gov’t Code § 508.313).*

Id. § 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). Medical records must be released upon the patient's 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. 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. As an attorney for the individual to whom this information pertains, the requestor may have a right of access to it. In any event, the department must not release the marked information unless it has authorization under the MPA to do so. *See* Open Records Decision No. 598 (1991).

The submitted documents also contain information that is governed by chapter 611 of the Health and Safety Code.² Chapter 611 is applicable to 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).³ 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 the submitted information that is confidential under section 611.002 of the Health and Safety Code. As an attorney for the individual to whom the information pertains, the requestor may have a right of access to it under sections 611.004 and 611.0045. Otherwise, the department must withhold the mental health information under section 552.101 of the Government Code.

²Chapter 611 is specifically applicable to mental health records and, like the MPA, was enacted subsequent to the enactment of section 508.313 of the Government Code. *See* Act of May 9, 1979, 66th Leg., R.S., ch. 239, 1979 Tex. Gen. Laws 512 (enacting statutory predecessor to Health & Safety Code ch. 611).

³A "professional" is (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. *See* Health & Safety Code § 611.001(2).

Section 552.101 also incorporates chapter 560 of the Government Code.⁴ Sections 560.001, 560.002, and 560.003 govern the public availability of fingerprint information and provide as follows:

Sec. 560.001. DEFINITIONS. In this chapter:

- (1) "Biometric identifier" means a retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry.
- (2) "Governmental body" has the meaning assigned by Section 552.003 [of the Government Code], except that the term includes each entity within or created by the judicial branch of state government.

Sec. 560.002. DISCLOSURE OF BIOMETRIC IDENTIFIER. A governmental body that possesses a biometric identifier of an individual:

- (1) may not sell, lease, or otherwise disclose the biometric identifier to another person unless:
 - (A) the individual consents to the disclosure;
 - (B) the disclosure is required or permitted by a federal statute or by a state statute other than Chapter 552 [of the Government Code]; or
 - (C) the disclosure is made by or to a law enforcement agency for a law enforcement purpose; and
- (2) shall store, transmit, and protect from disclosure the biometric identifier using reasonable care and in a manner that is the same as or more protective than the manner in which the governmental body stores, transmits, and protects its other confidential information.

Sec. 560.003. APPLICATION OF CHAPTER 552. A biometric identifier in the possession of a governmental body is exempt from disclosure under Chapter 552.

Govt. Code §§ 560.001, 560.002, 560.003. We have marked fingerprint information that is confidential under section 560.003. As an attorney for the individual to whom the information pertains, the requestor may have his consent to the release of the information.

⁴The statutory predecessor to chapter 560 of the Government Code was enacted in 2001. See Act of May 24, 2001, 77th Leg., R.S., ch. 634, § 2, 2001Tex. Gen. Laws 1195, 1196 (enacting Gov't Code ch. 559).

See id. § 560.002(1)(A). Otherwise, the department must withhold the fingerprint information under sections 552.101 and 560.003 of the Government Code.

In summary: (1) the department must not release the medical records that are confidential under the MPA unless it has authorization under the MPA to do so; (2) the mental health information is confidential under section 611.002 of the Health and Safety Code and must be withheld under section 552.101 of the Government 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; (3) the fingerprint information is confidential under section 560.003 of the Government Code and must be withheld under section 552.101, unless the requestor has consent for release of the information under section 560.002; and (4) the department must withhold the rest of the submitted information under section 552.101 in conjunction with section 508.313 of the Government Code.

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. Govt. 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).

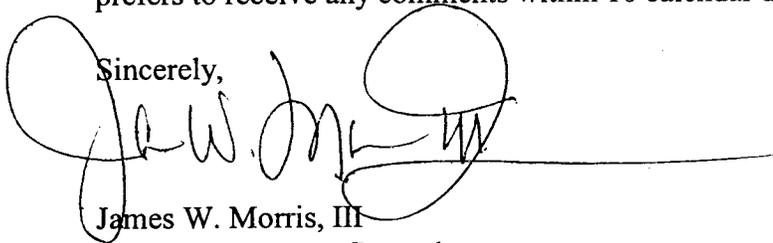
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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. Govt. 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 'J.W. Morris, III', with a long horizontal line extending to the right.

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

JWM/sdk

Ref: ID# 213653

Enc: Submitted documents

c: Mr. E. David Sawyer
Attorney at Law
P.O. Box 1021
Bedford, Texas 76095
(w/o enclosures)