



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 22, 2004

Ms. Mary E. Reveles
Assistant County Attorney
Fort Bend County Attorney's Office
301 Jackson Street, Suite 728
Richmond, Texas 77469-3108

OR2004-10802

Dear Ms. Reveles:

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# 215597.

The Fort Bend County Sheriff's Office (the "sheriff") received a request for a custodial death report and medical records relating to a named individual. You claim that the requested information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and have reviewed the information you submitted.¹

We first note that the submitted medical records appear to have been obtained pursuant to a grand jury subpoena. This office has concluded that a grand jury is not a governmental body that is subject to the Act, so that records that are within the actual or constructive possession of a grand jury are not subject to disclosure under the Act. *See Gov't Code* §§ 552.003(1)(B) (Act's definition of governmental body does not include judiciary), .0035 (access to information collected, assembled, or maintained by or for judiciary is governed by rules adopted by Supreme Court of Texas or other applicable laws and rules); *Open Records Decision No. 513 at 3 (1988)* (information held by grand jury, which is extension of judiciary for purposes of Act, is not itself subject to Act). When an individual or an entity acts at the direction of the grand jury as its agent, information prepared or collected by the agent is within the grand jury's constructive possession and is not subject to the Act. *See Open*

¹This letter ruling assumes that the submitted representative sample of information is truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the sheriff to withhold any information that is substantially different from the submitted information. *See Gov't Code* §§ 552.301(e)(1)(D), .302; *Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988)*.

Records Decision No. 513 at 3. Information that is not so held or maintained is subject to the Act and may be withheld from the public only if a specific exception to disclosure is shown to be applicable. *Id.* Thus, to the extent that the sheriff has custody of the submitted medical records as an agent of the grand jury, any such information is in the grand jury's constructive possession and is not subject to disclosure under the Act. *Id.* at 4. The rest of this decision is not applicable to such information. To the extent that the submitted medical records are not held by the sheriff as an agent of the grand jury, we address their public availability under the Act.

Next, we note that section 552.022 of the Government Code is applicable in this instance. Section 552.022(a) provides in part that

the following categories of information are public information and not excepted from required disclosure under [the Act] unless they are expressly confidential under other law:

- (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). In this instance, the submitted information includes a custodial death report made by the sheriff's office. The rest of the submitted information appears to consist of the attachments to the custodial death report. The custodial death report and its attachments are subject to disclosure under section 552.022(a)(1), unless the information is excepted from disclosure under section 552.108 or expressly confidential under other law. You do not claim an exception to disclosure under section 552.108. Section 552.103, which you do claim, is a discretionary exception that protects a governmental body's interests and may be waived. *See* Gov't Code § 552.007; *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App. — Dallas 1999, no pet.) (Gov't Code § 552.103 may be waived); Open Records Decision Nos. 665 at 2 n.5) (discretionary exceptions generally), 542 at 4 (1990) (statutory predecessor to Gov't Code § 552.103 subject to waiver). As such, section 552.103 is not other law that makes information confidential for the purposes of section 552.022. Therefore, the sheriff may not withhold information contained in the custodial death report or the attachments to the report under section 552.103.

We note, however, that article 49.18(b) of the Code of Criminal Procedure is applicable to the information that is subject to section 552.022. In Open Records Decision No. 521 (1989), this office addressed the confidentiality of custodial death reports and their attachments under article 49.18(b).² We concluded that under article 49.18(b) in conjunction

²Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception incorporates statutory confidentiality provisions such as article 49.18(b) of the Code of Criminal Procedure. Unlike other exceptions to disclosure, this office will raise section 552.101 on behalf of a governmental body, because the Act prescribes criminal penalties for the release of confidential information. *See* Gov't Code §§ 552.007, .352; Open Records Decision No. 325 at 2 (1982).

with a directive issued by the Office of the Attorney General, Section I of a custodial death report filed with this office is public information, but Sections II through V of the report, including any attachments, are confidential. *See* Open Records Decision No. 521 at 4-5; *see also* Crim. Proc. Code 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). Therefore, Section I of the submitted custodial death report must be released to the requestor under article 49.18(b) of the Code of Criminal Procedure. The rest of the submitted information that is subject to the Act must be withheld from disclosure under section 552.101 of the Government Code in conjunction with article 49.18(b) as information made confidential by law.

In summary: (1) to the extent that the sheriff has custody of the submitted medical records as an agent of the grand jury, any such information is in the grand jury's constructive possession and is not subject to disclosure under the Act; and (2) the sheriff must release Section I of the custodial death report under article 49.18(b) of the Code of Criminal Procedure and withhold the rest of the submitted information that is subject to the Act under section 552.101 of the Government Code in conjunction with article 49.18(b).

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,

A handwritten signature in black ink, appearing to read 'James W. Morris, III', with a long horizontal flourish extending to the right.

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

JWM/krl

Ref: ID# 215597

Enc: Submitted documents

c: Ms. Bernadette M. Johnlewis
Attorney at Law
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Houston, Texas 77004
(w/o enclosures)