



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

February 15, 2005

Mr. James M. Frazier, III  
Assistant General Counsel  
Texas Department of Criminal Justice  
Office of the General Counsel  
P.O. Box 4004  
Huntsville, Texas 7734

OR2005-01392

Dear Mr. Frazier:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 218739.

The Texas Department of Criminal Justice (the "department") received a request for information pertaining to an inmate who died in custody, including the inmate's complete Texas Department of Corrections file, and any incident reports or investigations relating to his death.<sup>1</sup> You claim that the requested information is excepted from disclosure under sections 552.101, 552.108, 552.117, 552.134, and 552.1325 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also reviewed comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Initially, we note that a document we have marked was created after the request for information was made. The Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Econ. Opportunities Dev.*

---

<sup>1</sup>With regard to the eight questions raised by the requestor, we note that the Public Information Act ("Act") does not require a governmental body to answer questions. *See* Open Records Decision No. 555 at 1-2 (1990). However, a governmental body must make a good faith effort to relate a request to information it holds. *See* Open Records Decision No. 561 at 8 (1990).

*Corp. v. Bustamante*, 562 S.W.2d 266 (Tex.Civ.App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986). Therefore, the Act does not require the department to release this information.

Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This section encompasses information protected by other statutes. You claim that some of the submitted information consists of medical records, access to which is governed by the Medical Practice Act (“MPA”). Occ. Code §§ 151.001-165.160. Section 159.002 of the MPA provides in part as follows:

(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.

*Id.* § 159.002(b), (c). Some of the submitted medical records are subject to the MPA. These 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. *Id.* §§ 159.004, 159.005. Medical records pertaining to a deceased patient may only be released upon the signed consent of the deceased’s personal representative. *See id.* § 159.005(a)(5). 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 portion of the submitted information that constitutes medical records and that may only be released in accordance with the MPA. Open Records Decision No. 598 (1991).

However, some of the submitted medical records are not subject to the MPA. 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, some of the submitted medical 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 at death).

You also claim that a portion of the submitted information is subject to Chapter 611 of the Health and Safety Code, which provides for the confidentiality of records created or maintained by a mental health professional. Section 611.002(a) reads as follows:

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.

Health & Safety Code § 611.002. 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. *Id.* § 611.001(b). 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 information that constitutes mental health records, and that may only be released in accordance with sections 611.004 and 611.0045 of the Health and Safety Code. *See* Health & Safety Code § 611.004(a)(5) (professional may disclose confidential information to patient’s personal representative if patient is deceased).

You also argue that the submitted fingerprints are excepted from disclosure under section 552.101 in conjunction with chapter 560 of the Government Code. Sections 560.001, 560.002, and 560.003 of the Government Code 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.

Gov't Code § 560.001-.003. The submitted fingerprint information is confidential under section 560.003. However, the requestor is an attorney representing the family of the deceased individual. Therefore, the requestor has a special right of access to the fingerprints. *See id.* § 560.002(1).

We turn now to your claim regarding section 552.134 of the Government Code. Section 552.134(a) relates to inmates of the department and provides in relevant part the following:

(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 and an alleged crime involving inmates. *Id.* § 552.029.

The legislature explicitly made section 552.134 subject to section 552.029. On review, we find that the remaining information constitutes information about an inmate for purposes of section 552.134. However, these records contain information about the death of the inmate in custody and an alleged crime involving an inmate. Thus, basic information concerning the death and the crime must be released. Basic information includes the time and place of the incident, names of inmates and department officials directly involved, a brief narrative

of the incident, a brief description of any injuries sustained, and information regarding criminal charges or disciplinary actions filed as a result of the incident. The information that we have marked must be withheld pursuant to section 552.134.<sup>2</sup>

In summary, the department (1) may only release the marked medical records in accordance with the MPA, (2) may only release the marked mental health records in accordance with sections 611.004 and 611.0045 of the Health and Safety Code; (3) must release the submitted fingerprint information under section 560.002 of the Government Code; and (4) with the exception of basic information about the death of an inmate and an alleged crime involving an inmate, must withhold the remaining information under section 552.134.

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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).

---

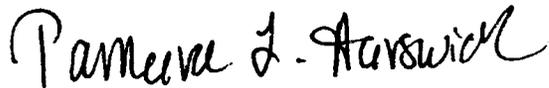
<sup>2</sup>As our ruling on this information is dispositive, we need not address your other claimed exceptions to disclosure, except to note that basic information about an alleged crime is also not excepted from disclosure under section 552.108 of the Government Code. See Gov't Code § 552.108(c); see also *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976).

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); *Tex. 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,



Tamara L. Harswick  
Assistant Attorney General  
Open Records Division

TLH/sdk

Ref: ID# 218739

Enc. Submitted documents

c: Mr. Mark Ticer  
Attorney at Law  
3300 Oak Lawn Avenue, Suite 700  
Dallas, Texas 75219  
(w/o enclosures)