



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 30, 2005

Sheriff Larry Lynch
McLennan County Sheriff's Department
219 North 6th Street
Waco, Texas 76701

OR2005-07911A

Dear Sheriff Lynch:

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# 231125.

The McLennan County Sheriff's Department (the "sheriff") received two requests from two different representatives of the local NBC news affiliate for all information related to a specified murder investigation and sought a ruling from this office as to whether some of the requested information was excepted from disclosure under the Act. In response, this office issued Open Records Letter No. 2005-07911 (2005) to the sheriff on August 30, 2005. We have re-examined our ruling in that decision and have determined that an error was made in its issuance. Where this office determines that an error was made in the decision process under sections 552.301 and 552.306 of the Government Code and that error resulted in an incorrect decision, we will correct the previously issued ruling. *See generally* Gov't Code § 552.011 (providing that the Office of Attorney General may issue a decision to maintain uniformity in application, operation, and interpretation of this chapter). Consequently, this decision serves as the correct ruling and is a substitute for the decision issued on August 30, 2005. You claim that the submitted information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note the submitted information includes documents that are not subject to the Act, as well as documents that may not be subject to the Act. This office has concluded that grand juries are not governmental bodies subject to the Act, so records within the actual or constructive possession of a grand jury are not subject to disclosure under the Act. *See* Open

Records Decision No. 513 (1988). When an individual or 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. *Id.* at 3. Information that is not so held or maintained is subject to the Act and may be withheld only if a specific exception to disclosure is applicable. *Id.* A portion of the submitted information relates to grand jury records. Thus, to the extent this information is maintained by the sheriff for or on behalf of the grand jury, it is in the custody of the sheriff as an agent of the grand jury and is not subject to disclosure under the Act. *Id.* at 4. To the extent it is not so maintained, it is subject to the Act and may be withheld only if an exception under the Act is shown to apply. As we are unable to determine the extent to which a portion of these documents are maintained for or on behalf of the grand jury, we will also address the exceptions that you claim under the Act for these documents.

Because the applicability of section 552.108 is potentially broadest, we consider your arguments under this exception first. This section provides in relevant part as follows:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:

(1) release of the information would interfere with the detection, investigation, or prosecution of crime;

...

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from [required public disclosure] if:

(1) release of the internal record or notation would interfere with law enforcement or prosecution;

Gov't Code § 552.108(a)(1), (b)(1). Generally, a governmental body claiming subsection 552.108(a)(1) or 552.108(b)(1) must reasonably explain, if the information does not supply the explanation on its face, how and why the release of the requested information would interfere with law enforcement. *See* Gov't Code §§ 552.108(a)(1), (b)(1), .301(e)(1)(a); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state, and the submitted information reflects, that the defendant pleaded guilty to murder. You also state that the defendant was subsequently sentenced, and the submitted information reflects that the sentencing occurred on the same date the sheriff received the first request for information. Thus, it follows that the defendant had pleaded guilty and been sentenced prior to the date on which the sheriff received the second request. You argue that the prosecution was still pending on the date the sheriff received the requests for information because the defendant had a right to request a new trial within 30 days of his sentencing. Upon review, however, we find that a mere

chance that the defendant may request a new trial is not sufficient to demonstrate that the release of the submitted information will interfere with your prosecution or law enforcement efforts. Thus, the sheriff may not withhold the submitted information under section 552.108(a)(1) or section 552.108(b)(1).

You also claim that portions of the submitted information are excepted from disclosure under section 552.101 of the Government Code. Access to medical records is governed by the Medical Practice Act ("MPA"), chapter 159 of the Occupations Code. Section 159.002 of the MPA provides:

- (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. Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See* Occ. Code §§ 159.002, .004; Open Records Decision No. 598 (1991). This office has concluded that the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982).

Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). The MPA permits disclosure of MPA records to the patient, a person authorized to act on the patient's behalf, or a person who has the written consent of the patient. Occ. Code §§ 159.003, .004, .005. Thus, the sheriff must release the submitted medical records, which we have marked, only in accordance with the MPA. Open Records Decision No. 598 (1991).

The submitted information also includes documents that are 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 provides in part the following:

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(a). 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 the information that constitutes mental health records, which may only be released in accordance with the access provisions of sections 611.004 and 611.0045 of the Health and Safety Code.

Section 552.101 also encompasses section 1703.306 of the Occupations Code, which provides as follows:

(a) A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person other than:

- (1) the examinee or any other person specifically designated in writing by the examinee;
- (2) the person that requested the examination;
- (3) a member, or the member’s agent, of a governmental agency that licenses a polygraph examiner or supervises or controls a polygraph examiner’s activities;
- (4) another polygraph examiner in private consultation; or
- (5) any other person required by due process of law.

(b) The [Polygraph Examiners B]oard or any other governmental agency that acquires information from a polygraph examination under this section shall maintain the confidentiality of the information.

(c) A polygraph examiner to whom information acquired from a polygraph examination is disclosed under Subsection (a)(4) may not disclose the information except as provided by this section.

Occ. Code § 1703.306. The requestors are not persons to whom polygraph information may be disclosed under this provision; therefore, the sheriff must withhold the polygraph

information we have marked in the submitted information under section 552.101 in conjunction with section 1703.306.

Section 552.101 encompasses criminal history record information (“CHRI”) generated by the National Crime Information Center or by the Texas Crime Information Center. Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety (“DPS”) maintains, except that the DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See Gov’t Code* § 411.083. Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090 - .127. Furthermore, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F. *See Gov’t Code* § 411.082(2)(B) (term CHRI does not include driving record information). Thus, to the extent that the information at issue is CHRI, generated by TCIC and NCIC, it is excepted from required public disclosure by section 552.101 of the Government Code.

Section 552.101 also encompasses the doctrines of common law and constitutional privacy. Common law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683.

Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual’s interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual’s autonomy within “zones of privacy” which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual’s privacy interests and the public’s need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common law doctrine of privacy; the information must concern the “most intimate aspects of human affairs.” *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)).

This office has found that the following types of information are excepted from required public disclosure under constitutional or common law privacy: an individual's criminal history when compiled by a governmental body, *see* Open Records Decision No. 565 (1990) (*citing U. S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989)), some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps), personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990), information concerning the intimate relations between individuals and their family members, *see* Open Records Decision No. 470 (1987), and lists of inmate visitors and correspondents, *see* Open Records Decision Nos. 430 (1985), 428 (1985), 185 (1978).

We note that the right to privacy is a personal right that lapses at death, and therefore it does not encompass information that relates to a deceased individual. *See Moore v. Charles B. Pierce Film Enters., Inc.*, 589 S.W.2d 489, 491 (Tex. App.—Texarkana 1979, writ ref'd n.r.e.); Open Records Decision No. 272 at 1 (1981). However, the United States Supreme Court has determined that surviving family members can have a privacy interest in information relating to their deceased relatives. *See Nat'l Archives & Records Admin. v. Favish*, 124 S. Ct. 1570 (2004). In this instance, we have been provided correspondence from Patrick Dennehy's family in which the family asserts a privacy interest in the release of the death-scene images of their son, Mr. Dennehy. After reviewing your comments and the family's correspondence, we find, in this instance, that the family's privacy interest in the photographs that depict the body of the deceased outweighs the public's interest in the disclosure of this information. Thus, the sheriff must withhold the photographs that depict the body of the deceased under section 552.101 of the Government Code in conjunction with the constitutional right to privacy. Further, based on your arguments and our review of the remaining submitted information, we find that portions of the remaining submitted information are protected by common law and constitutional privacy. Accordingly, we conclude that the sheriff must withhold the information that we have marked pursuant to section 552.101 of the Government Code in conjunction with common law and constitutional privacy.

We note that the submitted information contains Texas motor vehicle record information that is subject to section 552.130 of the Government Code.¹ Section 552.130 provides in relevant part the following:

- (a) Information is excepted from the requirements of Section 552.021 if the information relates to:

¹The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

- (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]
- (2) a motor vehicle title or registration issued by an agency of this state[.]

Gov't Code § 552.130(a). The sheriff must withhold the Texas motor vehicle record information in the remaining documents that we have marked under section 552.130. We note, however, that the purpose of section 552.130 is to protect the privacy interests of individuals. Some of the submitted motor vehicle information pertains to an individual who is deceased. Since the right of privacy lapses at death, the sheriff may not withhold the Texas motor vehicle information contained in the submitted documents that pertains to a deceased individual. *See generally Moore v. Charles E. Pierce Film Enters. Inc.*, 589 S. W. 2nd 489 (Tex. Civ. App.—Texarkana 1979, writ ref'd n.r.e.); *Justice v. Belo Broadcasting Corp.*, 472 F. Supp. 145, 146-147 (N.D. Tex. 1979); Attorney General Opinions JM-229 (1984); H-917 (1976); Open Records Decision No. 272 at 1 (1981) (privacy rights lapse upon death).

We also note that the submitted information contains account numbers to which section 552.136 of the Government Code is applicable. This section provides as follows:

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

- (1) obtain money, goods, services, or another thing of value; or
- (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Gov't Code § 552.136. We have marked the information that the sheriff must withhold under section 552.136.

Further, the submitted information contains an e-mail address to which section 552.137 of the Government Code is applicable. Section 552.137 excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See Gov't Code § 552.137(a)-(c)*. Section 552.137 does not apply to a government employee's work

e-mail address because such an address is not that of the employee as a “member of the public” but is instead the address of the individual as a government employee. The e-mail address at issue does not appear to be of a type specifically excluded by section 552.137(c). You do not inform us that the member of the public to whom the e-mail address at issue pertains has affirmatively consented to the release of his or her e-mail address. The sheriff must, therefore, withhold the e-mail address we have marked under section 552.137 of the Government Code.

Finally, we note that the submitted information contains social security numbers. Section 552.147 of the Government Code² provides that “[t]he social security number of a living person is excepted from” required public disclosure under the Act. Therefore, the sheriff must withhold the social security numbers belonging to living persons, which we have marked, under section 552.147.³

In summary, information that is in the possession of the sheriff as agent of the grand jury is not subject to release under the Act. The submitted medical records may only be released in accordance with the MPA, and the submitted mental health records may only be released in accordance with the access provisions of sections 611.004 and 611.0045 of the Health and Safety Code. The marked polygraph information must be withheld under section 552.101 in conjunction with section 1703.306 of the Occupations Code. To the extent that any of the information at issue is CHRI, generated by TCIC and NCIC, it is excepted from required public disclosure by section 552.101 in conjunction with chapter 411 of the Government Code. The sheriff must withhold the photographs that depict the body of the deceased and the information that we have marked pursuant to section 552.101 of the Government Code in conjunction with common law and constitutional privacy. The sheriff must withhold the Texas motor vehicle record information that we have marked under section 552.130. The marked account numbers must be withheld under section 552.136 of the Government Code and the marked e-mail address must be withheld under section 552.137 of the Government Code. The marked social security numbers must be withheld under section 552.147 of the Government Code. The remaining information must be released to the requestors.

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

²Added by Act of May 23, 2005, 79th Leg., R.S., S.B. 1485, § 1, sec. 552.147(a) (to be codified at Tex. Gov’t Code § 552.147).

³We note that section 552.147(b) of the Government Code authorizes a governmental body to redact a living person’s social security number from public release without the necessity of requesting a decision from this office under the Act.

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).

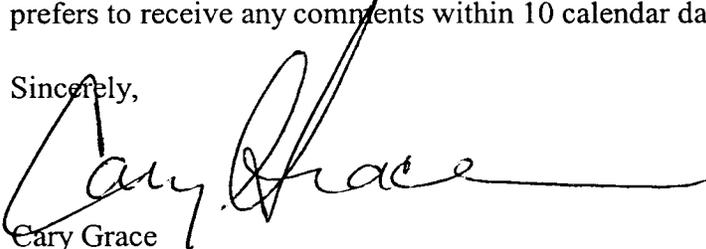
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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).

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,



Cary Grace
Assistant Attorney General
Open Records Division

ECG/sdk

Ref: ID# 231125

Enc. Submitted documents

c: Mr. Chris Severy and Mr. Stephen Iandoli
KCEN-TV
100 North 6th Street, Suite 100
Waco, Texas 76701
(w/o enclosures)