



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 6, 2005

Mr. Michael P. Mondville
Assistant General Counsel
Office of the General Counsel
Texas Department of Criminal Justice
P.O. Box 13084 Capitol Station
Austin, Texas 78711

OR2005-08097

Dear Mr. Mondville:

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# 231556.

The Texas Department of Criminal Justice (the "department") received a request for the department's "database which tracks inmate deaths." You state that some responsive information has been released to the requestor. You claim that portions of the submitted information are excepted from disclosure under sections 552.101 and 552.134 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Section 552.134 of the Government Code 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

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

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.

(b) Subsection (a) does not apply to:

...

(2) information about an inmate sentenced to death.

Gov't Code § 552.134(a), (b)(2). Section 552.134 is explicitly made subject to section 552.029, which provides in relevant part the following:

Notwithstanding . . . Section 552.134, the following information about an inmate who is confined in a facility operated by or under a contract with the Texas Department of Criminal Justice is subject to required disclosure under Section 552.021:

...

(8) 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). The information submitted by the department concerns inmates confined in a facility operated by or under contract with the department. Thus, section 552.134 is applicable to most of the submitted information, and it must generally be withheld on that basis. We note, however, that some of the information at issue pertains to inmates who were on death row and thus is “information about an inmate sentenced to death.” *Id.* § 552.134(b)(2). Section 552.134(a) is not applicable to such information. *Id.* Thus, the department may not withhold any of the submitted information that pertains to a death row inmate under section 552.134.

Further, the submitted documents subject to section 552.134 contain information regarding the deaths of inmates while in custody. Under section 552.029(8), basic information regarding these incidents is subject to required disclosure. 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.

Although not excepted from disclosure under section 552.134, you assert that some of the information at issue is excepted from disclosure under section 552.101 of the Government

Code in conjunction with common law privacy.² The doctrine of 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). We note, however, that because the common law right to privacy is a personal right that lapses at death, common law privacy does not protect information that relates only 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). In this instance, all of the information at issue relates to deceased inmates. Therefore, none of the information is private, and the department may not withhold any portion of it under section 552.101 on that basis.

You also assert that portions of the information not otherwise excepted under section 552.134 are medical records, access to which is governed by the Medical Practice Act (“MPA”), chapter 159 of the Occupations Code.³ *See* 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). 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). Further, 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. *See also* Open Records Decision No. 272 (1981) (right of privacy lapses at death). Based on our review of the submitted information, we find that the records

²Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision” and encompasses the common law right of privacy. Gov’t Code § 552.101.

³Section 552.101 also encompasses information protected by other statutes.

at issue do not constitute or reflect a “record of the identity, diagnosis, evaluation, or treatment of a patient by a physician” and thus are not medical records subject to the MPA.

In summary, other than basic information, the department must withhold the information pertaining to non-death row inmates under section 552.134. The remaining submitted information must be released to the requestor.

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).

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 Office of the Attorney General 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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/jpa

Ref: ID# 231556

Enc. Submitted documents

c: Mr. Bill Medaille
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(w/o enclosures)