ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 14, 2005

Mr. James M. Frazier III
Assistant General Counsel
Texas Department of Criminal Justice
P.O. Box 4004
Huntsville, TX 77342

OR2005-09338

Dear Mr. Frazier:

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# 234179.

The Texas Department of Criminal Justice (the "department") received a request for information related to a named inmate. You state that you have directed the requestor to the appropriate source for a portion of the requested information, but claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, and 552.134 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that a portion of the submitted information constitutes medical records pertaining to the requestor's client, access to which is governed by the Medical Practice Act ("MPA"), chapter 159 of the Occupations Code. Section 159.002 of the MPA provides:

> (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). We have further found that when a file is created as the result of a hospital stay, all the documents in the file relating to diagnosis and treatment constitute physician-patient communications or "[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician." Open Records Decision No. 546 (1990).

Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). The 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. Occ. Code §§ 159.004, .005. 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). We have marked the submitted information that constitutes medical records of the requestor's client.[1] These medical records are subject to the MPA. The department must release these medical records to the requestor upon receipt of the proper consent.

Next, we note that section 552.022 of the Government Code makes a portion of the remaining information expressly public. Section 552.022 provides in relevant part:

> (a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter 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). After reviewing the submitted documents, we find that a portion of the information you seek to withhold under sections 552.103 and 552.134 consists of completed reports made by department personnel. The department may withhold these completed reports only to the extent other law makes them confidential or the reports are protected by section 552.108 of the Government Code. Section 552.103 is a discretionary exception to public disclosure that protect a governmental body's interests and may be waived. *See* Gov't Code § 552.007; *Dallas Area Rapid Transit v. Dallas Morning News*, 4

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[1]We note that the submitted information includes clinic notes regarding evaluation and treatment of the inmate in question. To the extent such clinic notes were created by department personnel acting under the supervision of a physician, they constitute medical records within the scope of the MPA. However, if these notes were not created under the supervision of a physician, they are not subject to the MPA.

S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 665 at 2 n.5 (discretionary exceptions generally), 542 at 4 (1990) (statutory predecessor to section 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 department may not withhold the completed reports under that section. However, section 552.134 does constitute "other law" that makes information confidential; therefore, we will consider your arguments under this exception for the information subject to section 552.022 and the remaining submitted information.

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 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). We note that section 552.134 is explicitly made subject to section 552.029 of the Government Code. Section 552.029 provides:

> Notwithstanding Section 508.313 or 552.134, the following information about an inmate who is confined in a facility operated by or under a contract with the [department] 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.

Gov't Code § 552.029(8). Pursuant to section 552.029(8), basic information regarding the death of an inmate in custody, an alleged crime involving an inmate, and an incident involving the use of force is subject to required disclosure.

You state that the remaining information concerns an inmate confined in a facility operated by the department. Thus, we agree that section 552.134 is applicable to the remaining information. However, some of the completed reports subject to section 552.022 relate to crimes involving inmates. Thus, while the department must generally withhold the remaining information under section 552.134, the department must release basic information regarding crimes involving an inmate pursuant to section 552.029(8) unless this basic

information is otherwise excepted from disclosure under the Act.[2] As our ruling under section 552.134 is dispositive for the information not subject to section 552.022, we need not address your arguments under section 552.103 for this information.

Next, we address your claim that a portion of the section 552.029(8) basic information is excepted from disclosure under section 552.101 of the Government Code, which excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." We note that section 552.107(2) of the Government Code is the more appropriate exception in this instance. Section 552.107(2) excepts from required public disclosure information if "a court by order has prohibited disclosure of the information." You claim that the department is prohibited from releasing information that would identify the named inmate pursuant to a United States district court's order granting Plaintiff's Motion to Seal Plaintiff's Motion for Protective Order in Civil Action No. 7:02-CV-0087-M, *Roderick Keith Johnson v. Richard Wathen, et al.* However, upon review of this order, we find that it only seals certain court records; this court order does not prohibit the department from releasing information that would identify the named inmate in this instance. Accordingly, the department may not withhold any of the section 552.029(8) basic information under section 552.107(2) of the Government Code.

In summary, the submitted medical records may only be released in accordance with the MPA. With the exception of the basic information subject to section 552.029(8) of the Government Code, the department must withhold the remaining information under section 552.134 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. 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).

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[2]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.

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); *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 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. 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,

James A. Person III
Assistant Attorney General
Open Records Division

JAP/jpa

Ref: ID# 234179

Enc. Submitted documents

c: Mr. Jeffrey Monks
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