



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 7, 2006

Ms. Pamela Smith
Assistant General Counsel
Texas Department of Public Safety
5805 N. Lamar Blvd. Box 4087
Austin, Texas 78773-000

OR2006-10415

Dear Ms. Smith:

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# 258614.

The Texas Department of Public Safety (the "department") received a request for all documents related to the arrest and death of a named person. You claim that the submitted information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information protected by other statutes. Access to medical records is governed by the Medical Practice Act (the "MPA"). Occ. Code §§ 151.001-165.160. 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. The MPA defines a "patient" as "a person who, to receive medical care, consults with or is seen by a physician." *Id.* § 159.001. In this instance, the named person who is now deceased received medical care prior to his death. Accordingly, this individual was a "patient" pursuant to section 159.001 of the Occupations Code. We note that medical records pertaining to a deceased individual may be released only on the signed consent of the personal representative of the deceased. Occ. Code § 159.005(a)(5). The consent must specify (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). Upon review, we have marked the documents that are medical records for the purposes of the MPA. In this instance, you do not state if the requestor has provided sufficient evidence that she is the authorized personal representative of the deceased. Accordingly, if the requestor provides sufficient evidence that she is the deceased's authorized representative, the department must release the medical records we have marked to the requestor. *See* Occ. Code §§ 159.004, .005. If the requestor does not provide the proper authorization, then the department must withhold the records at issue under section 552.101 of the Government Code in conjunction with the MPA.

We note that one of the remaining documents is confidential under section 552.101 in conjunction with the Emergency Medical Services Act, sections 773.091 through 773.173 of the Health and Safety Code, which governs access to emergency medical service ("EMS") records. *See* Open Records Decision No. 598 (1991). Section 773.091 of the Emergency Medical Services Act provides in part:

(b) Records of the identity, evaluation, or treatment of a patient by emergency medical services personnel or by a physician providing medical supervision that are created by the emergency medical services personnel or physician or maintained by an emergency medical services provider are confidential and privileged and may not be disclosed except as provided by this chapter.

(g) The privilege of confidentiality under this section does not extend to information regarding the presence, nature of injury or illness, age, sex, occupation, and city of residence of a patient who is receiving emergency medical services.

Health & Safety Code § 773.091(b), (g). We have marked the document that constitutes an EMS record pursuant to section 773.091. We note, however, that records that are

confidential under section 773.091 may be disclosed to "any person who bears a written consent of the patient or other persons authorized to act on the patient's behalf for the release of confidential information." Health & Safety Code §§ 773.092(e)(4), .093. Among the individuals authorized to act on the patient's behalf in providing written consent is a "personal representative" if the patient is deceased. *Id.* Section 773.093 provides that a consent for release of EMS records must specify: (1) the information or records to be covered by the release; (2) the reasons or purpose for the release; and (3) the person to whom the information is to be released. Accordingly, if the requestor provides sufficient evidence that she is the deceased's authorized representative, the department must release the EMS document, which we have marked, to the requestor in its entirety. *See* Health & Safety Code §§ 773.092, .093; *see also* Open Records Decision No. 632 (1995). If the requestor does not provide the proper authorization, then, with the exception of the information subject to section 773.091(g), the department must withhold the marked EMS document under section 552.101 of the Government Code in conjunction with section 773.091 of the Health and Safety Code.

Finally, we note that the remaining documents are excepted from public disclosure under section 552.101 in conjunction with 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). Accordingly, we have marked the information that is subject to chapter 611 of the Health and Safety Code and 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).

In summary, if the requestor provides sufficient evidence that she is the deceased's authorized representative, the department must release the medical records we have marked to the requestor. If the requestor does not provide the proper authorization, then the department must withhold the records at issue under section 552.101 of the Government Code in conjunction with the MPA. If the requestor provides sufficient evidence that she is the deceased's authorized representative, the department must release the marked EMS document to the requestor in its entirety. If the requestor does not provide the proper authorization, then, with the exception of the information subject to 773.091(g), the

department must withhold the marked EMS document under section 552.101 of the Government Code in conjunction with section 773.091 of the Health and Safety Code. We have marked the mental health records that may only be released in accordance with sections 611.004 and 611.0045 of the Health and Safety Code. As the department does not raise any other exceptions against disclosure, the remaining information must be released.

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); *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,

A handwritten signature in black ink, appearing to read 'J. Thompson', with a long horizontal flourish extending to the right.

Jaclyn N. Thompson
Assistant Attorney General
Open Records Division

JNT/ir

Ref: ID# 258614

Enc. Submitted documents

c: Ms. Elizabeth Franke
Texas Civil Rights Project
1405 Montopolis Drive
Austin, TX 78741-3438
(w/o enclosures)