



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

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Mr. John C. West
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OR2006-14874

Dear Ms. Fleming and Mr. West:

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# 267089.

The Texas Department of Criminal Justice (the "department") received a request for all records regarding a named inmate who died during his incarceration. The Office of the General Counsel (the "OGC") and the Office of the Inspector General (the "OIG") have submitted separate briefs, as well as separate documents that each seeks to withhold from disclosure. The OGC states that it will release basic information regarding the death in custody. The OGC claims that the information it has submitted is excepted from disclosure under sections 552.101 and 552.134 of the Government Code. The OIG states that it will release basic information regarding the death in custody investigation and the custodial death report, with redactions pursuant to the previous determination issued by this office in Open

Records Letter No. 2005-01067 (2005).¹ See Gov't Code § 552.301(a); Open Records Decision No. 673 at 7-8 (2001) (delineating elements of second type of previous determination under Gov't Code § 552.301(a)). The OIG also states that it is withholding social security numbers under section 552.147 of the Government Code.² The OIG claims that the information it has submitted is excepted from disclosure under sections 552.101, 552.108, and 552.134 of the Government Code. We have considered the claimed exceptions and reviewed the submitted information.

Initially, the OIG states that some of the requested information was the subject of a prior ruling of this office, issued as Open Records Letter No. 2006-09726 (2006). In Open Records Letter No. 2006-09726, we concluded that the OIG may only disclose the portion of the submitted information consisting of medical records in accordance with the access provisions of the Medical Practices Act. We also determined that, with the exception of information that must be released under section 552.029(8), the OIG must withhold the information it submitted pursuant to section 552.134. The OIG indicates that, other than the addition of the Final Autopsy Report, the pertinent facts and circumstances have not changed since the issuance of Open Records Letter No. 2006-09726. Thus, the OIG must continue to rely on Open Records Letter No. 2006-09726 for the information that was at issue in that prior ruling. See Open Records Decision No. 673 (2001) (governmental body may rely on prior ruling as previous determination when 1) the records or information at issue are precisely the same records or information that were previously submitted to this office pursuant to section 552.301(e)(1)(D); 2) the governmental body which received the request for the records or information is the same governmental body that previously requested and received a ruling from the attorney general; 3) the prior ruling concluded that the precise records or information are or are not excepted from disclosure under the Act; and 4) the law, facts, and circumstances on which the prior ruling was based have not changed since the issuance of the ruling). To the extent the requested information was not addressed in Open Records Letter No. 2006-09726, we will address your claims for exception from disclosure.

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. A portion of the information submitted by the OIG constitutes medical records, access to which

¹Open Records Letter No. 2005-01067 serves as a previous determination for the department that the present and former home addresses and telephone numbers, social security numbers, and family member information of current or former employees of the department, regardless of whether the current or former employee complies with section 552.1175 of the Government Code, are excepted from disclosure under section 552.117(a)(3) of the Government Code.

²We 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. Gov't Code § 552.147(b).

is governed by the Medical Practices Act ("MPA"). Occ. Code §§ 151.001-165.160. Section 159.002 of the MPA provides in part:

(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.

Id. § 159.002(a)-(c). 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). Furthermore, we have concluded that when a file is created as the result of a hospital stay, all of the documents in the file that relate to diagnosis and treatment constitute either physician-patient communications or records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician. *See* Open Records Decision No. 546 (1990). This office has determined that in governing access to a specific subset of information, the MPA prevails over the more general provisions of chapter 552 of the Government Code. *See* Open Records Decision No. 598 (1991). When a patient is deceased, as is the case here, medical records pertaining to the deceased patient may only be released upon the signed consent of the deceased's personal representative. *See* Occ. Code §§ 159.005(a)(5). Medical records must be released upon 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. *See* Occ. Code §§ 159.004, 159.005. 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 medical records that are confidential under the MPA. As an attorney representing the family of the deceased inmate, the requestor may have a right of access to that information under the MPA. In any event, the medical record may only be released in accordance with the MPA. *See* Open Records Decision No. 598 (1991).

Section 552.101 also encompasses criminal history record information ("CHRI"). CHRI generated by the National Crime Information Center ("NCIC") or by the Texas Crime

Information Center ("TCIC") is confidential. 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, but 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.* §§ 411.090-411.127. Thus, any CHRI generated by the federal government or another state may not be made available to the requestor except in accordance with federal regulations. *See* Open Records Decision No. 565 (1990). We note that, because the laws governing the dissemination of information obtained from the NCIC or TCIC are based on both law enforcement and privacy interests, the CHRI of a deceased individual that is obtained from the DPS or another criminal justice agency may be disseminated only as permitted by subchapter F of chapter 411 of the Government Code. *See* Open Records Decision No. 565 at 10-12 (1990). Therefore, the CHRI obtained from the NCIC or TCIC networks that the OGC has marked in the information it has submitted is confidential under federal law and subchapter F of chapter 411 of the Government Code, and the OGC must withhold it under section 552.101 of the Government Code.

We turn now to the OCG's and OIG's claims regarding section 552.134 of the Government Code for the remaining submitted information. 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 552.134 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). Upon review, we agree that the remaining submitted information constitutes information about an inmate for purposes of section 552.134. However, as you acknowledge, some of these records concern the death of an inmate in custody. Thus, the OGC and the OIG must release basic information concerning this death. *Id.* The OGC and the OIG must withhold the remaining submitted information pursuant to section 552.134.³

In summary, OIG must continue to rely on Open Records Letter No. 2006-09726 for the information that was at issue in that prior ruling. The OIG may only release the medical documents in accordance with the MPA. The OGC must withhold the marked CHRI under section 552.101 in conjunction with chapter 411 of the Government Code. With the exception of the basic information, which both the OGC and the OIG state has been released, the OGC and OIG must withhold the remaining information they have submitted 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).

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

³As our ruling is dispositive, we do not address the remaining arguments against disclosure.

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,



Gilbert N. Saenz
Assistant Attorney General
Open Records Division

GNS/sdk

Ref: ID# 267089

Enc. Submitted documents

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(w/o enclosures)