



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 7, 2007

Ms. Beverly W. Stephens
Assistant City Attorney
City of San Antonio
P.O. Box 839966
San Antonio, Texas 78283-3966

OR2007-02598

Dear Ms. Stephens:

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# 273130.

The San Antonio Police Department (the "department") received a request for all investigative information related to the death of a named individual. You state that the department has released basic information. See Gov't Code § 552.108(c); *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177, 186-88 (Tex. Civ. App. – Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976); Open Records Decision No. 127 at 3-4 (1976). You claim that the remaining requested 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 address the department's obligations under section 552.301 of the Government Code in requesting this decision. Section 552.301 prescribes procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(b) requires a governmental body to ask for the attorney general's decision and state its exceptions to disclosure not later than the tenth business day after the date of its receipt of the written request for information. See Gov't Code § 552.301(b). Section 552.301(e) requires the governmental body to submit to the attorney general, not later than the fifteenth business day after the date of its receipt of the request, (1) written comments stating why the governmental body's claimed exceptions apply to the information that it seeks to withhold; (2) a copy of the written request for information; (3) a signed statement of the date on which the governmental body received the request, or evidence sufficient to establish that date; and (4) the specific information that the governmental body seeks to withhold or representative samples if the information is

voluminous. *See id.* § 552.301(e)(1)(A)-(D). If a governmental body fails to comply with section 552.301, the requested information is presumed to be subject to required public disclosure and must be released, unless there is a compelling reason to withhold any of the information. *See id.* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ).

You concede that the department did not comply with the deadlines prescribed by subsections 552.301(b) and 552.301(e) in requesting this decision. Therefore, the submitted information is presumed to be public under section 552.302. This statutory presumption can generally be overcome when the information is confidential by law or third-party interests are at stake. *See Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982)*. Section 552.108 of the Government Code is a discretionary exception to disclosure that a governmental body may waive. *See Gov't Code § 552.007; Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 177 at 3 (1977) (statutory predecessor to Gov't Code § 552.108 subject to waiver)*. However, the law enforcement interests under this exception of a governmental body other than the one that failed to comply with section 552.301 can provide a compelling reason for non-disclosure under section 552.302. *See Open Records Decision No. 586 at 2-3 (1991)*. Because you inform us that the Bexar County District Attorney's Office (the "district attorney") asserts a law enforcement interest in the information at issue, we will determine whether the department may withhold the submitted information on behalf of the district attorney under section 552.108. We also will consider your claims under section 552.101 of the Government Code, as the applicability of this exception can also provide a compelling reason for non-disclosure.

We next note that the submitted information contains documents that have been filed with a court. Information filed with a court is generally a matter of public record and may not be withheld from disclosure unless it is confidential under other law. *Gov't Code § 552.022(a)(17); Star-Telegram, Inc. v. Walker*, 834 S.W.2d 54 (Tex. 1992). Although you claim the submitted information is excepted under section 552.108 of the Government Code, that section is a discretionary exception under the Act and is, therefore, not "other law" that makes information confidential. *See Open Records Decision N. 177 (1977) (governmental body may waive statutory predecessor to section 552.108); see also Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally)*. Therefore, the department may not withhold the information that is subject to section 552.022, which we have marked, under section 552.108.

However, we note that the court-filed documents include information subject to section 552.130 of the Government Code.¹ Because section 552.130 constitutes other law for purposes of section 552.022, we will address the applicability of this exception to the

¹Unlike other exceptions to disclosure, this office will raise section 552.130 on behalf of a governmental body, as this exception is mandatory and may not be waived. *See Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions)*.

court-filed documents. Section 552.130 provides that information relating to a motor vehicle operator's license, driver's license, motor vehicle title, or registration issued by a Texas agency is excepted from public release. Gov't Code § 552.130(a)(1), (2). The department must withhold the Texas motor vehicle record information we have marked in the court-filed documents under section 552.130.

Some of the remaining information consists of medical records. Medical records are subject to the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. *See* Occ. Code § 151.001 *et seq.* 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.

Id. § 159.002(a)-(c). 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). 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). We note, however, that the MPA defines a "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 of treatment.

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. *See* Occ. Code §§ 159.004, .005. 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). We note that the requestor represents the deceased whose MPA records are at issue. Section 159.004(5) of the MPA allows disclosure of confidential information to "a person who has the written consent of the patient or other person authorized to act on the patient's behalf." Consent for the release of confidential

information must be in writing and signed by the patient or, if the patient is deceased, a personal representative of the patient. Occ. Code § 159.005(a)(1), (5). We have marked the medical records that you may release only in accordance with the MPA. The remaining information you have marked does not consist of medical records.

We note that the remaining information includes an accident report form that appears to have been completed pursuant to chapter 550 of the Transportation Code. *See* Transp. Code § 550.064 (officer's accident report). Section 550.065(b) of the Transportation Code states that except as provided by subsection (c), accident reports are privileged and confidential. Section 550.065(c)(4) provides for the release of accident reports to a person who provides two of the following three items of information: (1) date of the accident; (2) name of any person involved in the accident; and (3) specific location of the accident. *See* Transp. Code § 550.065(c)(4). Under this provision, the Texas Department of Public Safety or another governmental entity is required to release a copy of an accident report to a person who provides the agency with two or more of the items of information specified by the statute. *Id.* In this instance, the requestor has provided the department with two of the three specified items of information. Therefore, the accident report must be released to the requestor under section 550.065(c)(4) of the Transportation Code.

The remaining information includes emergency medical service ("EMS") records, access to which is governed by the Emergency Medical Services Act, sections 773.091 through 773.173 of the Health and Safety Code. *See* Open Records Decision No. 598 (1991). Section 773.091 of the Health and Safety Code 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). Information that is confidential under section 773.091 may be released to "any person who bears a written consent of the patient or other persons authorized to act on the patient's behalf." *Id.* § 773.092(e)(4). When a patient is deceased, his personal representative may consent to the release of his records. *Id.* § 773.093(a); *see also* Open Records Decision No. 632 (1995) (defining "personal representative" for purposes of Health & Safety Code § 773.093). The consent must be written and signed by the patient, authorized representative, or personal representative and

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. Health & Safety Code § 773.093(a). Upon review, we find that the documents that we have marked constitute EMS records that the department may only release upon receipt of proper consent under section 773.093(a) of the Health and Safety Code. *See id.* §§ 773.092, .093; ORD 632.

We next address your claim under section 552.108 of the Government Code, which excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]” Gov’t Code § 552.108(a)(1). A governmental body that claims an exception to disclosure under section 552.108 must reasonably explain how and why this exception is applicable to the information at issue. *See id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You inform us, and have submitted a letter from the district attorney stating, that the submitted information is related to a pending prosecution. Based on your representation and the district attorney’s letter, we conclude that section 552.108(a)(1) is applicable in this instance. *See Houston Chronicle*, 531 S.W.2d at 186-88 (court delineates law enforcement interests that are present in active cases). Therefore, the department may withhold the remaining information under section 552.108(a)(1) of the Government Code. As our ruling is dispositive, we need not address your remaining arguments.

In summary, other than the marked Texas motor vehicle record information, which must be withheld under section 552.130 of the Government Code, the court-filed documents must be released to the requestor pursuant to section 552.022(a)(17) of the Government Code. The submitted medical records, which we have marked, are governed by the MPA and may only be released in accordance therewith. The submitted accident report must be released pursuant to section 550.065(c)(4) of the Transportation Code. We have marked EMS records that must be withheld or released as prescribed by section 773.091 of the Health and Safety Code. The remaining information may be withheld under section 552.108(a)(1) of the Government Code.

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,



L. Joseph James
Assistant Attorney General
Open Records Division

LJJ/eb

Ref: ID# 273130

Enc. Submitted documents

c: Ms. Lynda Bartlett
Claim Representative
State Farm Claims
P.O. Box 799011
Dallas, Texas 75379-9011
(w/o enclosures)