



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 3, 2007

Ms. Patricia Fleming
Assistant General Counsel
Office of the General Counsel
Texas Department of Criminal Justice
P. O. Box 4004
Huntsville, Texas 77342-4004

OR2007-03691

Dear Ms. Fleming:

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# 275088.

The Texas Department of Criminal Justice (the "department") received a request for all medical records, including substance abuse counseling records, of a named deceased former inmate. You claim that the submitted information is excepted from disclosure under sections 552.101 and 552.134 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

Initially, we will address the department's claims under section 552.101 of the Government Code. 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. Section 552.101 of the Government Code encompasses section 290dd-2 of title 42 of the United States Code, which provides in relevant part:

(a) Requirement. Records of the identity, diagnosis, prognosis, or treatment of any patient which are maintained in connection with the performance of any program or activity relating to substance abuse education, prevention,

¹We note that in its brief dated February 12, 2007, the department withdrew its assertions of sections 552.107, 552.108, and 552.111 of the Government Code for the information it submitted.

training, treatment, rehabilitation, or research, which is conducted, regulated, or directly or indirectly assisted by any department or agency of the United States shall, except as provided in subsection (e) of this section, be confidential and be disclosed only for the purposes and under the circumstances expressly authorized under subsection (b) of this section.

42 U.S.C. § 290dd-2(a); *see also* 42 C.F.R. § 2.1 (records of identity, diagnosis, prognosis, or treatment of any patient which are maintained in connection with performance of drug abuse prevention function conducted, regulated, or directly or indirectly assisted by any department or agency of United States are generally confidential). We understand that the department operates a federally funded substance abuse treatment program. We note that federal law allows for the release of a patient's substance abuse records upon proper written consent. 42 C.F.R. §§ 2.15, .31, .33; *see* 42 U.S.C. § 290dd-2(b)(1). Accordingly, the substance abuse information, which you have marked, may be released only as provided under section 290dd-2 of title 42 of the United States Code and sections 2.15, 2.31, and 2.33 of title 42 of the Code of Federal Regulations.

We note that the submitted information contains a pre-sentence investigation report. Section 552.101 encompasses other statutes, including article 42.12 of the Code of Criminal Procedure. *See* Gov't Code § 552.101. Article 42.12 of the Code of Criminal Procedure is applicable to pre-sentence investigation reports and provides in part:

(j) The judge by order may direct that any information and records that are not privileged and that are relevant to a report required by Subsection (a) or Subsection (k) of this section be released to an officer conducting a presentence investigation under Subsection (i) of this section or a postsentence report under Subsection (k) of this section. The judge may also issue a subpoena to obtain that information. A report and all information obtained in connection with a presentence investigation or postsentence report are confidential and may be released only to those persons and under those circumstances authorized under Subsections (d), (e), (f), (h), (k), and (l) of this section and as directed by the judge for the effective supervision of the defendant. Medical and psychiatric records obtained by court order shall be kept separate from the defendant's community supervision file and may be released only by order of the judge.

Crim. Proc. Code art. 42.12 § 9(j). Accordingly, we have marked the pre-sentence investigation report that must be withheld pursuant to section 552.101 in conjunction with article 42.12 of the Code of Criminal Procedure.

The department claims that a portion of the submitted information consists of medical records, access to which is governed by the Medical Practices Act ("MPA"). Occ. Code

§§ 151.001-165.160. Section 552.101 of the Government Code also encompasses section 159.002 of the MPA, which 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). 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).

Section 159.002(c) 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). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). The MPA permits disclosure of MPA records to the patient, a person authorized to act on the patient's behalf, or a person who has the written consent of the patient. Occ. Code §§ 159.003, .004, .005. When a patient is deceased, medical records may be released only on the signed consent of the deceased's personal representative. *See id.* § 159.005(a)(5). The consent in that instance 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. *See id.* §§ 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 have marked the medical records that are subject to the MPA. Absent the applicability of an MPA access provision, the department must withhold these records pursuant to the MPA. *See* Open Records Decision No. 598 (1991). However, the department has failed to demonstrate how any of the remaining information constitutes medical records subject to the MPA, therefore none of the remaining information may be withheld on that basis.

You claim that the remaining information is excepted under section 552.134 of the Government Code. Section 552.134 relates to information about inmates and former inmates of the department and provides in relevant part:

(a) Except as provided by Subsection (b) or by Section 552.029, information obtained or maintained by the Texas Department of Criminal Justice is excepted from the requirements of Section 552.021 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). Upon review of your arguments and the information, we conclude that section 552.134 is applicable to some of the information at issue. We have marked the documents that must be withheld under section 552.134 of the Government Code. However, the remaining information is not "information about an inmate who is confined in a facility operated by or under contract with the department." Therefore, the remaining information may not be withheld pursuant to section 552.134 of the Government Code.

In summary, the department may release the substance abuse information only as provided under section 290dd-2 of title 42 of the United States Code and sections 2.15, 2.31, and 2.33 of title 42 of the Code of Federal Regulations. The department must withhold the presentence investigation report pursuant to 552.101 in conjunction with article 42.12 of the Code of Criminal Procedure. Absent the applicability of an MPA access provision, the department must withhold the information we have marked pursuant to section 552.101 in conjunction with the MPA. The department must withhold the information we have marked pursuant to section 552.134 of the Government Code. 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,



Jordan Johnson
Assistant Attorney General
Open Records Division

JJ/krl

Ref: ID# 275088

Enc. Submitted documents

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(w/o enclosures)