



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 3, 2007

Mr. Jason L. Mathis
Cowles & Thompson
City of Addison
901 Main Street, Suite 4000
Dallas, Texas 75202-3793

OR2007-03701

Dear Mr. Mathis:

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 #275129.

The Addison Police Department (the "department"), which you represent, received a request for a specified investigation report. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We must first address the procedural requirements of section 552.301 of the Government Code. Pursuant to section 552.301(b), a governmental body must ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the tenth business day after the date of receiving the written request. Gov't Code § 552.301(b).

You state that the department received this request for information on January 17, 2007. However, the department did not assert section 552.111 of the Government Code until February 7, 2007. We therefore find that the department failed to raise this exception within the ten business day period mandated by section 552.301(b).

Because the department failed to comply with the procedural requirements of section 552.301 in requesting this decision, the requested information is now presumed public and must be released unless a compelling reason exists to withhold the information. *See* Gov't Code § 552.302; *see also Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex.

App.-- Austin 1990, no writ); *City of Houston v. Houston Chronicle Publ'g Co.*, 673 S.W.2d 316, 323 (Tex. App.--Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). Generally, a governmental body may demonstrate a compelling reason to withhold information by a showing that the information is made confidential by another source of law or affects third party interests. See Open Records Decision Nos. 630 (1994), 150 at 2 (1977). Section 552.111 of the Government Code is a discretionary exception to disclosure that protects the governmental body's interests and may be waived by the governmental body. See Open Records Decision No. 663 (1999) (governmental body may waive section 552.111); see also Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). In failing to comply with section 552.301, the department has waived its claim under section 552.111. Therefore, the department may not withhold any of the submitted information pursuant to section 552.111. However, because the department timely raises sections 552.101 and 552.103 of the Government Code, we will consider your arguments under these exceptions.

Next, we note that a portion of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides that:

(a) . . . 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). In this instance, the submitted information includes a completed report made for the department. The department must release the completed report under section 552.022(a)(1) unless it is excepted from disclosure under section 552.108 or expressly confidential under other law. You assert that the report at issue is excepted from disclosure under section 552.103 of the Government Code. However, section 552.103 is a discretionary exception under the Act, and does not constitute law that makes information confidential for purposes of section 552.022. See *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.--Dallas 1999, no pet.) (governmental body may waive section 552.103). Accordingly, the department may not withhold this information under section 552.103 of the Government Code. As you make no further arguments against the disclosure of this information, it must be released.

The department claims that the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 42 U.S.C. §§ 1320d-1320d-8, governs the remaining information. At the direction of Congress, the Secretary of Health and Human Services ("HHS") promulgated regulations setting privacy standards for medical records, which HHS issued as the Federal Standards for Privacy of Individually Identifiable Health Information. See Health Insurance

Portability and Accountability Act of 1996, 42 U.S.C. § 1320d-2 (Supp. IV 1998) (historical & statutory note); Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. Pts. 160, 164 (“Privacy Rule”); *see also* Attorney General Opinion JC-0508 at 2 (2002). These standards govern the releasability of protected health information by a covered entity. *See* 45 C.F.R. pts. 160, 164. Under these standards, a covered entity may not use or disclose protected health information, excepted as provided by parts 160 and 164 of the Code of Federal Regulations. 45 C.F.R. § 164.502(a).

This office has previously addressed the interplay of the Privacy Rule and the Act. Open Records Decision No. 681 (2004). In that decision, we noted that section 164.512 of title 45 of the Code of Federal Regulations provides that a covered entity may use or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law. *See* 45 C.F.R. § 164.512(a)(1). We further noted that the Act “is a mandate in Texas law that compels Texas governmental bodies to disclose information to the public.” *See* Open Records Decision No. 681 at 8 (2004); *see also* Gov’t Code §§ 552.002, .003, .021. We therefore held that the disclosures under the Act come within section 164.512(a). Consequently, the Privacy Rule does not make information confidential for the purpose of section 552.101 of the Government Code. Open Records Decision No. 681 at 9 (2004); *see also* Open Records Decision No. 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). Because the Privacy Rule does not make confidential information that is subject to disclosure under the Act, the department may withhold requested protected health information from the public only if an exception in subchapter C of the Act applies.

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 emergency medical service (“EMS”) records is governed by the provisions of the Emergency Medical Services Act, Health and Safety Code sections 773.091-.173. *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). The remaining information consists of EMS records. Confidential EMS records 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.” Health & Safety Code § 773.092(e)(4). When a patient is deceased, his personal representative may consent to the release of his records. Health & Safety Code § 773.093(a); *see also* Open Records Decision No. 632 (1995) (defining “personal representative” for purposes of EMS Act). This 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). In this instance, the requestor has not provided proper written consent necessary for the release of the emergency records. Accordingly, except for information enumerated in section 773.091(g), the submitted EMS records are confidential under section 773.091(b) of the Health and Safety Code and must be withheld under section 552.101 of the Government Code. However, the department must release them upon receipt of proper consent pursuant to section 773.093(a). *See* Health & Safety Code §§ 773.092,.093; ORD 632.

In summary, except for the information enumerated in section 773.091(g), the department must withhold the EMS records under section 552.101 of the Government Code in conjunction with section 773.091(b) of the Health and Safety 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,



Reg Hargrove
Assistant Attorney General
Open Records Division

RJH/eb

Ref: ID# 275129

Enc. Submitted documents

c: Ms. Rita Brown
330 East Las Colinas Boulevard, #236
Irving, Texas 75039
(w/o enclosures)