



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 23, 2007

Mr. Daniel Bradford
Assistant County Attorney
Travis County
Post Office Box 1748
Austin, Texas 78767

OR2007-11022

Dear Mr. Bradford:

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 #287306.

The Travis County Medical Examiner's Office (the "medical examiner") received a request for various categories of information, including documents and tangible items, regarding a specified autopsy. You state that you are releasing most of the requested information to the requestor, but claim that the autopsy and x-ray photographs, as well as fingerprint information, are *excepted from disclosure under section 552.101 of the Government Code*. We have considered the exception you claim and reviewed the submitted information.

Initially, we address your argument that the request for physical evidence or tangible items, including tissue, blood, and organ samples, falls outside the scope of the Act. This office has ruled that tangible physical items are not the type of information contemplated under the Act. *See, e.g.*, Open Records Decision No.581 (1990). Thus, we agree that the tangible physical evidence collected by the medical examiner is not public information as that term is defined in section 552.002 of the Government Code. We, therefore, determine that the requested tangible physical evidence is not information made public by section 552.021 of the Government Code.

Next, we address your arguments regarding information that is subject to the Act. Section 552.101 encompasses section 11 of article 49.25 of the Code of Criminal Procedure, which provides as follows:

The medical examiner shall keep full and complete records properly indexed, giving the name if known of every person whose death is investigated, the

place where the body was found, the date, the cause and manner of death, and shall issue a death certificate . . . The records are subject to required public disclosure in accordance with Chapter 552, Government Code, except that a photograph or x-ray of a body taken during an autopsy is excepted from required public disclosure in accordance with Chapter 552, Government Code, but is subject to disclosure:

- (1) under a subpoena or authority of other law; or
- (2) if the photograph or x-ray is of the body of a person who died while in the custody of law enforcement.

Code Crim. Proc. art. 49.25, § 11. Under the above statute, autopsy and x-ray photographs of a person who died while in the custody of law enforcement are subject to public disclosure. Although you initially stated that no statutory exceptions apply to the submitted x-ray and autopsy photographs, we noted that the deceased individual was killed by police officers. Accordingly, our office requested clarification from the medical examiner in order to determine the circumstances in which the individual at issue was killed. *See Gov't Code § 552.303(c)* (providing that attorney general may give written notice to governmental body that additional information is necessary to render a decision). In your response dated August 16, 2007, you explained that the police officers “attempted to apprehend the decedent at which time an altercation pursued and a subsequent foot pursuit incurred . . . [after a foot pursuit.] . . . [o]ne of the officers then fired at the decedent several times and the decedent sustained two [gunshot wounds] to his middle back area.” We have reviewed your representations and the submitted photographs. *This office cannot resolve in the open records process the legal and factual question of whether the decedent in this case died while in the custody of law enforcement. Cf. Open Records Decision No. 554 (1990) (Office of the Attorney General cannot resolve questions of fact).* Accordingly, we find that if the decedent was not in the custody of law enforcement at the time of his death, the medical examiner must withhold the photographs of the body taken during the autopsy based on section 552.101 in conjunction with section 11 of article 49.25 of the Code of Criminal Procedure. If the decedent died while in the custody of law enforcement, we find that the medical examiner must release to the requestor the photographs of the body taken during the autopsy.

We should note, however, that the vast majority of the submitted photographs are not autopsy photographs but, rather, photographs taken of the crime scene. Crime scene and other photographs are not confidential under article 49.25 and may not be withheld from disclosure under section 552.101 of the Government Code on that basis. As you raise no further exceptions to disclosure for these photographs, they must be released to the requestor.

You argue that the submitted fingerprints are excepted from disclosure under section 552.101 in conjunction with chapter 560 of the Government Code. Chapter 560 provides that a

governmental body may not release fingerprint information except in certain limited circumstances. *See id.* §§ 560.001 (defining “biometric identifier” to include fingerprints), .002 (prescribing manner in which biometric identifiers must be maintained and circumstances in which they can be released), .003 (providing that biometric identifiers in possession of governmental body are exempt from disclosure under Act). However, the laws making such information confidential are intended to protect an individual’s privacy. *See Gov’t Code § 559.002(1)(A)* (individual whose biometric identifier is at issue may consent to its release). Because the right of privacy is purely personal and lapses at death, the fingerprints of the deceased individual may not be withheld on the basis of section 560.003. *See Moore v. Charles B. Pierce Film Enters. Inc.*, 589 S.W.2d 489 (Tex. Civ. App.-Texarkana 1979, writ *ref’d n.r.e.*); *see also* Attorney General Opinions JM-229 (1984); H-917 (1976). Therefore, the fingerprints must be released to the requestor.

In summary, if you find that the decedent was not in the custody of law enforcement at the time of his death, the medical examiner must withhold the submitted x-ray and autopsy photographs under section 552.101 of the Government Code in conjunction with section 49.25 of the Code of Criminal Procedure. Conversely, if you find that the decedent was in the custody of law enforcement at the time of his death, you must release the x-ray and autopsy photographs to the requestor. The fingerprints and remaining photographs must be released to the requestor.

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/eeg

Ref: ID# 287306

Enc. Submitted documents

c: Mr. Wayne Krause
Senior Staff Counsel
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(w/o enclosures)