



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 19, 2008

Mr. James Mu
Assistant General Counsel
Office of the General Counsel
Texas Department of Criminal Justice
P.O. Box 4004
Huntsville, Texas 77342-4004

Mr. John C. West
General Counsel
Office of the Inspector General
Texas Department of Criminal Justice
4616 Howard Lane Suite 250
Austin, Texas 78728

OR2008-12934

Dear Mr. Mu 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# 322225.

The Texas Department of Criminal Justice (the "department") received a request for information relating to a deceased inmate of the department. Both the Office of the General Counsel (the "OGC") and the Office of the Inspector General (the "OIG") state that some of the requested information either has been or will be released. The OIG states that social security numbers and certain other information will be withheld under sections 552.117 and 552.147 of the Government Code.¹ Both the OGC and the OIG have submitted

¹See Gov't Code § 552.147(b) (authorizing governmental body to redact living person's social security number from public release under Gov't Code § 552.147 without necessity of requesting attorney general decision under Act); Open Records Letter No. 2005-01067 (2005) (authorizing department to withhold information relating to its current or former employees under Gov't Code § 552.117(a)(3) without necessity of requesting attorney general decision).

information that the department seeks to withhold under sections 552.101, 552.108, and 552.134 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We also have considered the comments that we received from the requestor.²

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 exception encompasses information that other statutes make confidential. Article 49.18(b) of the Code of Criminal Procedure provides that a custodial death report shall be made public, with the exception of any portion of the report that the Office of the Attorney General (the "OAG") determines is privileged. *See* Crim. Proc. Code art. 49.18(b). The format of a custodial death report was revised in May of 2006 and now consists of four pages and an attached summary of how the death occurred. The OAG has determined that both the four-page report and the summary must be released to the public, but any other documents submitted with the revised report are confidential under article 49.18(b). The OIG states, and has submitted documentation reflecting, that the four-page portion of a responsive custodial death report has been released to the requestor. Pursuant to article 49.18(b), the department also must release the summary of how the inmate's death occurred.

Section 552.101 also encompasses the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. Section 159.002 of the MPA provides in part:

(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(b)-(c). Section 159.001 of the MPA defines "patient" as a person who consults with or is seen by a physician to receive medical care. *See id.* § 159.001(3). Under this definition, a deceased person cannot be a "patient" under section 159.002 of the MPA. Thus, section 159.002 of the MPA is applicable only to the medical records of a person who was alive at the time of the diagnosis, evaluation, or treatment. The OIG contends that some of the submitted information consists of the deceased inmate's medical records. We find, however, that the records in question are not related to the diagnosis, evaluation, or treatment of a patient, as defined by section 159.001 of the MPA. We therefore conclude that the information in question is not confidential under the MPA.

²*See* Gov't Code § 552.304 (any person may submit written comments stating why information at issue in request for attorney general decision should or should not be released).

The OIG also raises section 552.101 in conjunction with section 611.002 of the Health and Safety Code, which provides in part:

(a) Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.

(b) Confidential communications or records may not be disclosed except as provided by Section 611.004 or 611.0045.

Health & Safety Code § 611.002(a)-(b); *see also id.* § 611.001 (defining “patient” and “professional”). Sections 611.004 and 611.0045 of the Health and Safety Code provide for access to information that section 611.002 makes confidential only by certain individuals. *See id.* §§ 611.004, 611.0045; Open Records Decision No. 565 (1990). We have marked mental health records that the department must withhold under section 611.002 of the Health and Safety Code, unless the requestor is authorized to obtain that information under sections 611.004 and 611.0045. *See id.* § 611.004(a)(5) (professional may disclose confidential information to patient’s personal representative if patient is deceased).

Next, we address section 552.134 of the Government Code. That exception encompasses information relating to inmates of the department and states that

[e]xcept as provided by Subsection (b) or by Section 552.029 [of the Government Code], information obtained or maintained by the [department] 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 552.029 of the Government Code provides, however, that

[n]otwithstanding . . . Section 552.134, the following information about an inmate who is confined in a facility operated by or under a contract with the [department] 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). Thus, the legislature explicitly made section 552.134 subject to section 552.029.

Both the OGC and the OIG claim section 552.134. We note that although the inmate to whom the submitted information pertains is deceased, section 552.134 is applicable to

information that relates to the decedent as an inmate. We find that section 552.134 is generally applicable to the remaining information. We note, however, that the information in question is related to the death of an inmate in custody and uses of force. Basic information about each of those incidents is subject to disclosure under section 552.029(8). Basic information under section 552.029(8) includes the time and place of the incident, the names of inmates and of department employees who were involved, a brief narrative of the incident, a brief description of any injuries sustained by anyone involved, and information regarding any criminal charges or disciplinary actions that were filed as a result of the incident. With the exception of the basic information that must be released under section 552.029(8), the department must withhold the remaining information under section 552.134.

In summary: (1) the department must release the summary of how the inmate's death occurred pursuant to article 49.18(b) of the Code of Criminal Procedure; (2) the department must withhold the marked mental health records under section 552.101 of the Government Code in conjunction with section 611.002 of the Health and Safety Code, unless the requestor is authorized to obtain that information under sections 611.004 and 611.0045 of the Health and Safety Code; and (3) the department must withhold the rest of the submitted information under section 552.134 of the Government Code, except for the basic information that must be released under section 552.029(8) of the Government Code. As we are able to make these determinations, we need not address the department's other arguments against disclosure.³

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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3). If the governmental body does not file suit over 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).

³With regard to the OIG's claim under section 552.108(a)(1) of the Government Code, we note that basic information under section 552.029(8) corresponds to basic front-page information under section 552.108(c). See Gov't Code § 552.108(c); *Houston Chronicle Publishing 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).

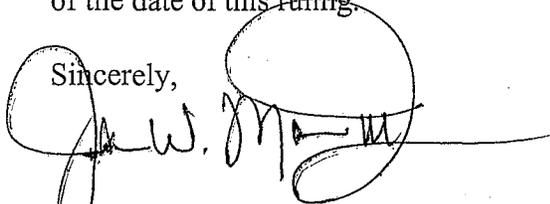
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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 challenge 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,

A handwritten signature in black ink, appearing to read "J.W. Morris, III", with a large circular flourish above the name.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/jh

Ref: ID# 322225

Enc: Submitted information

c: Ms. Deborah Stevenson
12858 Noel Road #1103
Dallas, Texas 75230
(w/o enclosures)