



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

September 30, 2008

Mr. John C. West  
General Counsel  
Office of the Inspector General  
Texas Department of Criminal Justice  
P.O. Box 13084  
Austin, Texas 78711

OR2008-13395

Dear 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# 323137.

The Texas Department of Criminal Justice's Office of the Inspector General (the "OIG") received a request for information pertaining to a named inmate who died during his incarceration. You state that the OIG will release some information to the requestor with redactions pursuant to section 552.147 and the previous determination issued by this office in Open Records Letter No. 2005-01067 (2005).<sup>1</sup> You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.108, and 552.134 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

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<sup>1</sup>Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act. Open Records Letter No. 2005-01067 authorizes the OIG to withhold the present and former home addresses and telephone numbers, social security numbers, and family member information of current or former employees of the Texas Department of Criminal Justice (the "department") under section 552.117(a)(3) of the Government Code without the necessity of requesting an attorney general decision with regard to the applicability of that exception. *See* Gov't Code § 552.301(a); Open Records Decision No. 673 at 7-8 (2001).

Initially, you state that a portion of the submitted information is subject to Open Records Letter No. 2004-6370 (2004), which serves as a previous determination under section 552.301(a) of the Government Code for the department with respect to shift rosters. Therefore, pursuant to that previous determination, the OIG may withhold the submitted shift rosters under section 552.108(b)(1) of the Government Code. *See* Open Records Decision No. 673 at 7-8 (2001) (establishing criteria for previous determinations).

Next, we note that the remaining submitted information is subject to section 552.022(a)(1) of the Government Code, which provides that:

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). The submitted information consists of four completed investigations made by the OIG or the Texas Department of Criminal Justice (the "department"). A completed investigation must be released under section 552.022(a)(1) unless the information is excepted from disclosure under section 552.108 or expressly confidential under other law. Although you seek to withhold the submitted information under section 552.103 of the Government Code, this section is a discretionary exception to disclosure that a governmental body may waive. *See id.* § 552.007; *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); 665 at 2 n.5 (discretionary exceptions generally). Accordingly, section 552.103 is not other law that makes information confidential for purposes of section 552.022. Therefore, the OIG may not withhold any of the submitted information under section 552.103. However, because information subject to section 552.022(a)(1) may be withheld under sections 552.101, 552.108, and 552.134 we will address the OIG's arguments under these exceptions.

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 encompasses the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. *See* Occ. Code § 151.001. 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). Information subject to the MPA includes both medical records and information obtained from those medical records. *See* 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). We note that 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* Occ. Code § 159.001(3). Under this definition, a deceased person cannot be a "patient" under section 159.002 of the MPA. Thus, section 159.002 is applicable only to the medical records of a person who was alive at the time of the diagnosis, evaluation, or treatment.

Medical records must be released on 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 id.* §§ 159.004. When a patient is deceased, as is the case here, medical records pertaining to the deceased patient may only be released upon the signed consent of the deceased's personal representative. *See id.* § 159.005(a)(5). Section 159.002(c) also 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). This office has determined that in governing access to a specific subset of information, the MPA prevails over the more general provisions of the Act. *See* Open Records Decision No. 598 (1991). We have marked the medical records in the documents submitted by the OIG that are confidential under the MPA. We note that as the attorney for the father of the deceased inmate whose medical records are at issue, the requestor may have a right of access to that inmate's marked medical records under the MPA. *See id.* § 159.005(a)(2). The marked medical records may only be released in accordance with the MPA. *See* ORD 598.

Section 552.101 also encompasses mental health records that are confidential under section 611.002 of the Health and Safety Code. That section 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 is made confidential by section 611.002 only by certain individuals. *See id.* §§ 611.004, .0045; ORD 565 (1990). We have marked mental health records that the OIG must withhold under section 611.002, unless the requestor is authorized to obtain that information under sections 611.004 and 611.0045. *See* Health & Safety Code § 611.004(a)(5) (professional may disclose confidential information to patient’s personal representative if patient is deceased).

The submitted information also includes emergency medical service (“EMS”) records that are subject to chapter 773 of the Health and Safety Code, which is also encompassed by section 552.101. Access to EMS records is governed by the provisions of section 773.091 of the Health and Safety Code. *See* Open Records Decision No. 598 (1991). Section 773.091 provides in part the following:

(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). We have marked the information that constitutes EMS records pursuant to section 773.091. We note, however, that records that are confidential under section 773.091 may be disclosed to “any person who bears a written consent of the patient or other persons authorized to act on the patient’s behalf for the release of confidential information.” *Id.* § 773.092(e)(4), .093. Among the individuals authorized to act on the patient’s behalf in providing written consent is a “personal representative” if the patient is deceased. *Id.* Section 773.093 provides that a consent for release of EMS records must specify: (1) the information or records to be covered by the release; (2) the reasons or purpose for the release; and (3) the person to whom the information is to be released. Thus, the OIG must withhold the marked EMS records under section 552.101 of the Government Code in conjunction with section 773.091 of the Health and Safety Code, except as specified by section 773.091(g). However, the OIG must release the EMS records on receipt of proper consent under section 773.093(a). *See id.* §§ 773.092, .093.

Next, we address section 552.134 of the Government Code for the remaining information. Section 552.134 is applicable to 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 in part 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.

We conclude that section 552.134(a) is generally applicable to remaining submitted information. However, the remaining documents contain information regarding incidents involving the death of an inmate, use of force, and alleged criminal conduct involving inmates. Under section 552.029(8), basic information regarding these incidents is subject to required disclosure. *Id.* In addition, we find that the OIG has failed to demonstrate how the submitted Security Memorandum and Healthcare Policy, which we have marked, relates to inmates; therefore, this information may not be withheld under section 552.134.

Although not excepted from disclosure under section 552.134, some of the basic information at issue is excepted from disclosure under section 552.101 of the Government Code in conjunction with common law privacy.<sup>2</sup> Common-law privacy protects information that (1) contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Information that tends to identify a victim of sexual assault is protected under common law privacy. See Open Records Decision No. 339 (1982); *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied) (identity of witnesses to and victims of sexual harassment was

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<sup>2</sup>Section 552.101 also encompasses the common law right of privacy. Gov't Code § 552.101.

highly intimate or embarrassing information and public did not have a legitimate interest in such information). Thus, the OIG must withhold the identifying information of an inmate who is an alleged victim of sexual assault pursuant to section 552.101 of the Government Code in conjunction with common law privacy. The remaining basic information must be released. Basic information includes the time and place of the incident, names of inmates and department officials directly involved, a brief narrative of the incident, a brief description of any injuries sustained, and information regarding criminal charges or disciplinary actions filed as a result of the incident.

We will now address your argument under section 552.108(b)(1) for the submitted Security Memorandum and Healthcare Policy. Section 552.108(b)(1) excepts from disclosure “[a]n internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution . . . if . . . release of the internal record or notation would interfere with law enforcement or prosecution[.]” Gov’t Code § 552.108(b)(1); *see also City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet.) (section 552.108(b)(1) protects information that, if released, would permit private citizens to anticipate weaknesses in police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate state laws). The statutory predecessor to section 552.108(b)(1) protected information that would reveal law enforcement techniques. *See, e.g.*, Open Records Decision Nos. 531 (1989) (release of detailed use of force guidelines would interfere with law enforcement), 456 (1987) (release in advance of information regarding location of off-duty police officers would interfere with law enforcement), 413 (1984) (release of sketch showing security measures to be used at next execution would interfere with law enforcement), 409 (1984) (information regarding certain burglaries protected if it exhibits pattern that reveals investigative techniques), 341 (1982) (release of certain information from Department of Public Safety would hamper departmental efforts to detect forgeries of drivers’ licenses), 252 (1980) (statutory predecessor was designed to protect investigative techniques and procedures used in law enforcement), 143 (1976) (disclosure of specific operations or specialized equipment directly related to investigation or detection of crime may be excepted). The statutory predecessor to section 552.108(b)(1) was not applicable, however, to generally known policies and procedures. *See, e.g.*, Open Records Decision Nos. 531 at 2-3 (1989) (Penal Code provisions, common law rules, and constitutional limitations on use of force not protected), 252 at 3 (1980) (governmental body failed to indicate why investigative procedures and techniques requested were any different from those commonly known).

You state that release of the submitted Security Memorandum and Healthcare Policy would interfere with ongoing law enforcement activities. You state that this information “was gathered and/or constructed by OIG to further the detection and investigation of a crime and could be used by others in the planning and execution of a crime” and that knowledge of this information could compromise prison security by being “used to facilitate an escape plan.” Based on your representations and our review, we find that the release of a portion of the

information at issue, which we have marked, would interfere with law enforcement. The OIG may withhold the information we have marked in the submitted Security Memorandum and Healthcare Policy under section 552.108(b)(1) of the Government Code. However, we find you have not demonstrated how release of the remaining information in the submitted Security Memorandum and Healthcare Policy would interfere with law enforcement. Accordingly, none of this information, which we have marked for release, may be withheld under section 552.108(b)(1).

In summary, pursuant to Open Records Letter No. 2004-6370 (2004), the OIG may withhold the submitted shift rosters under section 552.108(b)(1) of the Government Code. The OIG may only release the (1) marked medical records in accordance with the MPA; (2) marked mental health records in accordance with chapter 611 of the Health and Safety Code; and (3) marked EMS records in accordance with chapter 773 of the Health and Safety Code. With the exception of basic information and the submitted Security Memorandum and Healthcare Policy, the OIG may withhold the remaining information under section 552.134 of the Government Code. The identifying information of the inmates who are the alleged victims of sexual assault must be withheld under section 552.101 in conjunction with common-law privacy, but all other basic information regarding the death of an inmate, use of force, or alleged crimes involving inmates must be released pursuant to section 552.029(8) of the Government Code. The OIG may withhold the information we have marked in the submitted Security Memorandum and Healthcare Policy under section 552.108(b)(1). The remaining information in the submitted Security Memorandum and Healthcare Policy 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 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).

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

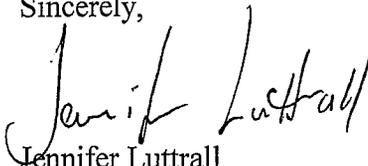
Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

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,



Jennifer Luttrall  
Assistant Attorney General  
Open Records Division

JL/eeg

Ref: ID# 323137

Enc. Submitted documents

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