



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 25, 2008

Mr. O.C. Robbins
Executive Director
Texas Funeral Service Commission
P.O. Box 12217
Austin, Texas 78711

OR2008-16244

Dear Mr. Robbins:

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# 328666.

The Texas Funeral Service Commission (the "commission") received two requests from the same requestor for the following: 1) information regarding a specified closed investigation of White Funeral Home; 2) information regarding a former commission employee; 3) the number of complaints filed against White Funeral Home since 2003; and 4) any and all complaints filed against White Funeral Home in the past sixty days. You state you will release some information to the requestor, but claim some of the submitted information is excepted from disclosure under sections 552.101, 552.115, 552.117, and 552.136 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

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. Section 651.203 of the Occupations Code provides that "[i]nformation in a [complaint file maintained by the commission], other than information relating to a complaint that has not reached a final disposition, is public information." Occ. Code § 651.203(b). We conclude this language makes confidential information relating to a complaint that has not reached a final disposition. You state that some of the requested information relates to two complaints

that are currently under investigation. Based on your argument and our review, we agree the information at issue is confidential under section 651.203(b) of the Occupations Code. Therefore, the information we have marked must be withheld under section 552.101 of the Government Code in conjunction with section 651.203(b) of the Occupations Code.

Section 552.101 of the Government Code also encompasses the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. *See id.* § 151.001. Section 159.002 of the MPA 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). This office has concluded that when a file is created as the result of a hospital stay, all of the documents in the file that relate to diagnosis and treatment constitute either physician-patient communications or records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician. *See* Open Records Decision No. 546 (1990). 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 creation of the records. We have marked the medical records in the remaining information that are subject to the MPA. This information may only be released in accordance with the MPA. *See* Open Records Decision No. 598 (1991). You have failed to demonstrate how the remaining records at issue were either created by or under the supervision of a physician or contain the identity, diagnosis, evaluation, or treatment of a patient by a physician. Thus, the remaining records do not constitute medical records for purposes of the MPA, and they may not be withheld on this basis.

Next, you assert some of the remaining information is excepted from disclosure under section 552.101 of the Government Code in conjunction with common-law privacy. The

doctrine of common-law privacy protects information that is highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and of no legitimate public interest. See *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. The common-law right to privacy is a personal right that lapses at death, and therefore it does not encompass information that relates to a deceased individual. See *Moore v. Charles B. Pierce Film Enterprises 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). In this instance, most of the information you seek to withhold under common-law privacy pertains to a deceased individual. Additionally, you have failed to demonstrate that any of the information at issue is intimate and embarrassing information pertaining to a living individual that is of no legitimate public interest. Therefore, none of the remaining information is protected by common-law privacy, and the commission may not withhold it under section 552.101 of the Government Code on that basis.

Next, you assert the submitted death certificate is confidential under section 552.115 of the Government Code. Section 552.115 provides that a death record maintained by the bureau of vital statistics of the Texas Department of Health or a local registration official is excepted from required public disclosure except that “a death record is public information and available to the public on and after the 25th anniversary of the date of death as shown on the record filed with the bureau of vital statistics or local registration official.” Gov’t Code § 552.115(a)(2). We note that section 552.115 is applicable only to information maintained by the bureau of vital statistics or a local registration official. See Open Records Decision No. 338 (1982). Because section 552.115 does not apply to information held by the commission, we conclude that the commission may not withhold the submitted death certificate on this basis.

You raise section 552.117 of the Government Code for portions of the remaining information. Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Gov’t Code § 552.117(a)(1). Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. See Open Records Decision No. 530 at 5 (1989). The commission may only withhold information under section 552.117(a)(1) if the former employee elected confidentiality under section 552.024 prior to the date on which the request for this information was made. If the former employee timely elected, the commission must withhold the personal information we have marked under section 552.117(a)(1). The commission may not withhold this information under

section 552.117(a)(1), however, if the former employee did not make a timely election to keep this information confidential.

Next, you claim some of the remaining information is excepted from disclosure under section 552.136 of the Government Code. Section 552.136 states that “[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136(b). Upon review, we agree the commission must withhold the credit card numbers we have marked under section 552.136 of the Government Code.

In summary, the commission must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 651.203(b) of the Occupations Code. The medical records we have marked may only be released in accordance with the MPA. If the former employee timely elected confidentiality, then the commission must withhold the personal information we have marked under section 552.117(a)(1) of the Government Code. The commission must withhold the credit card numbers we have marked pursuant to section 552.136 of the Government Code. The remaining information must be released to the requestor.¹

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

¹We note that the submitted information contains social security numbers. 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.

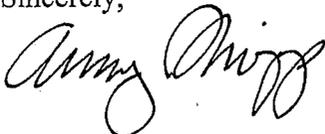
Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor 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,



Amy L.S. Shipp
Assistant Attorney General
Open Records Division

ALS/jb

Ref: ID# 328666

Enc. Submitted documents

c: Requestor
(w/o enclosures)