



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

April 17, 2009

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

OR2009-05108

Dear Mr. Mu:

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# 340238.

The Texas Department of Criminal Justice (the "department") received a request for all documents relating to a specified incident involving an inmate. You state you have released or will release some of the responsive information to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.107, and 552.134 of the Government Code and privileged under Texas Rule of Evidence 503. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note the submitted information contains a Use of Force report that is subject to section 552.022(a)(1) of the Government Code. Section 552.022(a)(1) provides for required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body[,]" unless the information is expressly confidential under other law or excepted from disclosure under section 552.108 of the Government Code. Gov't Code §. 552.022(a)(1). Although you seek to withhold a portion of the report under section 552.107 of the Government Code, this section is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See* Open Records Decision No. 676 at 6 (2002) (stating that where section 552.022 is applicable to the information at issue the governmental body should raise Texas Rule of Evidence 503 not section 552.107 of the Government Code); Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.107 is not other law that makes

information confidential for the purposes of section 552.022. Accordingly, the department may not withhold any of the information that is subject to section 552.022 under section 552.107. However, the attorney-client privilege found in Texas Rule of Evidence 503 can serve as other law for the purposes of section 552.022 of the Government Code. *See In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001) (addressing applicability of Texas Rule of Evidence 503 to information encompassed by section 552.022 of the Government Code). Therefore, we will consider your argument against disclosure under Texas Rule of Evidence 503 for the information that is subject to section 552.022. Because sections 552.101 and 552.134 of the Government Code can provide a compelling reason to withhold information, we will also consider your arguments under sections 552.101 and 552.134.

Section 552.134(a) relates to inmates of the department and provides the following:

Except as provided by Subsection (b) or by Section 552.029 [of the Government Code], information obtained or maintained by the Texas Department of Criminal Justice 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.

Section 552.134 is explicitly made subject to section 552.029, which provides in relevant part the following:

Notwithstanding . . . Section 552.134, the following information about an inmate who is confined in a facility operated by or under a contract with the Texas Department of Criminal Justice 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.

Gov't Code § 552.029(8). We conclude that section 552.134(a) is generally applicable to the information you have marked. We note, however, that the information at issue relates to an incident involving the use of force against an inmate. Thus, basic information about this incident must be released under section 552.029(8). 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. With the

exception of basic information, the department must withhold the information it has marked under section 552.134 of the Government Code.<sup>1</sup>

You claim that the remaining submitted information is confidential under section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information deemed confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information protected by other statutes, such as 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).

Medical records must be released on receipt of 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, .005. The medical records of a deceased patient may only be released on the signed written consent of the decedent's personal representative. *See id.* §§ 159.005(a)(5). We agree that the medical records you have marked are subject to the MPA. We note that the requestor appears to be the authorized representative of the deceased inmate at issue, and may have a right of access to his medical records that are subject to the MPA. *See id.* § 159.005(a)(2). The medical records you have marked may only be released in accordance with the MPA. *See* Open Records Decision No. 598 (1991).

In summary, the marked medical records may only be released in accordance with the MPA. With the exception of basic information, the department must withhold the remaining submitted information pursuant to section 552.134 of the Government Code.

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<sup>1</sup>As our ruling is dispositive of this information, we need not address your argument under Texas Rule of Evidence 503.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Karen E. Stack  
Assistant Attorney General  
Open Records Division

KES/jb

Ref: ID# 340238

Enc. Submitted documents

c: Requestor  
(w/o enlosures)