



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

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Mr. Erik Brown
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Texas Department of Criminal Justice
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Mr. John C. West
General Counsel
Texas Department of Criminal Justice
Office of the Inspector General
P.O. Box 13084
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OR2010-00135

Dear Mr. Brown 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# 366598.

The Texas Department of Criminal Justice (the "department") received a request for all records pertaining to the imprisonment of a named individual. The department's Office of the General Counsel (the "OGC") and the department's Office of the Inspector General (the "OIG") have submitted separate briefs to this office. The OGC states that it will release a portion of the requested information and claims that the remaining responsive information it has submitted to this office for review is excepted from disclosure under sections 552.108 and 552.134 of the Government Code. The OIG states that some responsive information has

been destroyed pursuant to the department's record retention schedule.¹ The OIG states that it will release some of the requested information to the requestor with redactions pursuant to the previous determination issued by this office in Open Records Letter No. 2005-01067 (2005).² The OIG also states that it is withholding social security numbers under section 552.147(b) of the Government Code.³ The OIG claims that the information it has submitted is excepted from disclosure under sections 552.101, 552.108, 552.117, 552.1175, 552.134, 552.136, and 552.147 of the Government Code.⁴ We have considered the submitted arguments and reviewed the submitted information.⁵

We note the OIG did not fully comply with section 552.301 of the Government Code. Subsection (b) of section 552.301 requires a governmental body requesting an open records ruling from this office to "ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the tenth business day after the date of receiving the written request." Gov't Code § 552.301(b). While the OIG raised sections 552.101, 552.108, 552.117, 552.1175, 552.134, and 552.147 within the ten-business-day time period as required by subsection 552.301(b), the OIG did not raise section 552.136 until after the ten-business-day deadline had passed. Generally, if a governmental body fails to timely raise an exception, that exception is waived. *See id.* § 552.302; Open Records Decision No. 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions). However, mandatory exceptions to

¹The Act does not require a governmental body to release information that did not exist when a request for information was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.--San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

²Open Records Letter No. 2005-01067 (2005) serves as a previous determination that the present and former home addresses and telephone numbers, social security numbers, and family member information of current or former employees of the department, regardless of whether the current or former employee complies with section 552.1175 of the Government Code, are excepted from disclosure under section 552.117(a)(3) of the Government Code.

³Section 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.

⁴Although you initially raised sections 552.103, 552.122, 552.130, and 552.137 of the Government Code as exceptions to disclosure, you did not submit to this office written comments stating the reasons why these sections would allow the information to be withheld; we therefore assume you no longer assert these exceptions. *See* Gov't Code §§ 552.301, 302.

⁵The OGC states they have submitted a representative sample of a portion of the requested information. We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

disclosure cannot be waived by a governmental body. *See* Gov't Code § 552.352; Open Records Decision No. 574 at n.4 (2001) (mandatory exceptions). Because section 552.136 is a mandatory exception, we will consider the OIG's argument under section 552.136 notwithstanding its violation of section 552.301(b) in raising that exception.

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 information made confidential by statute. Medical records are confidential under 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.

Occ. Code § 159.002(b)-(c). 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). 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 have also found that when a file is created as the result of a hospital stay, all the documents in the file relating to diagnosis and treatment constitute physician-patient communications or "[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician." Open Records Decision No. 546 (1990). 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. We have marked medical records that may only be released in accordance with the MPA.

Section 552.101 also encompasses section 611.002 of the Health and Safety Code, which governs the public availability of mental health records and 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 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. We have marked mental health records that the department must withhold under section 611.002, unless the requestor is authorized to obtain that information under sections 611.004 and 611.0045 of the Health and Safety Code.

Section 552.134 relates to information about inmates of the department and provides in relevant part:

(a) Except as provided by Subsection (b) or by Section 552.029, information obtained or maintained by the [department] is excepted from the requirements of Section 552.021 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). Both the OIG and the OGC raise section 552.134 for the remaining information. Upon review, we agree that section 552.134 of the Government Code is applicable to the remaining information. However, we note that portions of the information at issue relate to incidents involving the use of force and alleged crimes involving the inmate. Therefore, basic information about these incidents must be released pursuant to section 552.029. *Id.* For purposes of section 552.029(8), basic information 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. We also note the requestor, who represents the inmate who is the subject of the request, has submitted an “Authorization for Release of Information” signed by the inmate. Section 552.023 of the Government Code gives a person or that person’s authorized representative a “special right of access, beyond the right of the

general public, to information held by a governmental body that relates to the person and that is protected from public disclosure by laws intended to protect that person's privacy interests." *Id.* § 552.023. However, section 552.134 not only protects the inmate's privacy interest, but also protects the interests of the governmental body. As such, the requestor does not have a special right of access to this information under section 552.023. *See id.* § 552.023(b) (governmental body may assert provisions of Act or other law that are not intended to protect person's privacy interests to withhold information to which requestor may otherwise have a special right of access). Accordingly, with the exception of the information that must be released under section 552.029, the department must withhold the remaining information under section 552.134 of the Government Code.⁶

In summary, the department may only release the medical records we have marked in accordance with the MPA. The mental health records we have marked may only be released in accordance with sections 611.004 and 611.0045 of the Health and Safety Code. With the exception of the information that must be released under section 552.029, the department must withhold the remaining information under section 552.134 of the Government Code.

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, 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, toll free, at (888) 672-6787.

Sincerely,



Adam Leiber
Assistant Attorney General
Open Records Division

ACL/rl

⁶As our ruling is dispositive, we need not address the remaining arguments against disclosure except to note that basic information under section 552.029(8) corresponds to basic front-page information under section 552.108(c) of the Government Code. *See Gov't Code 552.108(c); 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).*

Ref: ID# 366598

Enc. Submitted documents

c: Requestor
(w/o enclosures)