



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 15, 2010

Mr. Erik Brown
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

OR2010-00831

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# 367369.

The Texas Department of Criminal Justice (the "department") received a request for information relating to an investigation of the death of a named inmate. 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. Both the OGC and the OIG have submitted information that the department seeks to withhold under sections 552.101, 552.108, 552.130, and 552.134 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We first note that one of the documents submitted by the OIG was created subsequent to the department's receipt of this request for information. Because the Act does not require a governmental body to release information that did not exist when it received a request or

create responsive information, the document that was created subsequent to the department's receipt of this request is not responsive to the request.¹ This decision does not address the public availability of that document, which we have marked, and it need not be released in response to this request.

We also note that the OIG's documents include a custodial death report. Article 49.18(b) of the Code of Criminal Procedure provides that with the exception of any portion of the custodial death report that the Office of the Attorney General ("OAG") determines is privileged, the OAG shall make the report public. *See* Crim. Proc. Code art. 49.18(b). The format of the report was revised in May 2006 and now consists of four pages and an attached summary of how the death occurred. The OAG has determined that the four-page report and summary must be released to the public but any other documents submitted with the revised report are confidential under article 49.18(b). Therefore, the custodial death report we have marked, along with any attached summary of how the death occurred, must be released pursuant to article 49.18(b) of the Code of Criminal Procedure.

Next, we address sections 552.101 and 552.134 of the Government Code. Section 552.101 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. 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). We note that the MPA defines a "patient" as "a person who, to receive medical care, consults with or is seen by a physician." Occ. Code § 159.001. Based on this definition, a deceased person is not a "patient" under section 159.002 of the MPA. Thus, the MPA is applicable only to records relating to a person who was alive at the time of the diagnosis, evaluation, or treatment to which the

¹*See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

records pertain. 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) the 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). Any subsequent release of medical records must be consistent with the purposes for which the governmental body obtained the records. *See id.* § 159.002(c); Open Records Decision No. 565 at 7 (1990). We have marked medical records in the OIG's documents that must be withheld under section 159.002(b) of the MPA, unless the OIG receives written consent for release of those records that complies with section 159.005(a)(5) of the MPA.

Section 552.101 of the Government Code also encompasses section 773.091 of the Health and Safety Code, which is applicable to records of the provision of emergency medical services ("EMS"). Section 773.091 provides in part:

(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.

(c) Any person who receives information from confidential communications or records as described by this chapter, other than a person listed in Section 773.092 who is acting on the survivor's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was obtained.

Health & Safety Code § 773.091(b)-(c). Section 773.091 further provides, however, that

[t]he 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.

Id. § 773.091(g). We have marked information in the OIG's documents that constitutes confidential EMS records. We note 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, if the OIG receives

proper consent, then the marked EMS records must be released in their entirety in accordance with chapter 773 of the Health and Safety Code. If the OIG does not receive proper consent, then with the exception of the information subject to section 773.091(g), which is not confidential, the marked EMS records must be withheld under section 552.101 of the Government Code in conjunction with section 773.091(b) of the Health and Safety Code. We will address the OIG's claim under section 552.134 of the Government Code for the rest of its information, including the information subject to section 773.091(g).

Both the OIG and the OGC claim section 552.134, which is applicable to information relating to inmates of the department. Section 552.134(a) 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:

(1) the inmate's name, identification number, age, birthplace, department photograph, physical description, or general state of health or the nature of an injury to or critical illness suffered by the inmate;

...

(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(1), (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 the rest of the submitted information. We note, however, that the remaining information includes the deceased inmate's official department photograph, which appears in the OIG's documents, and information pertaining to the inmate's death in custody. The department must release the inmate's photograph and basic information about his death in custody pursuant to section 552.029. The basic information that must be released includes the time and place of the incident, the names of inmates and of department employees who were involved, a brief

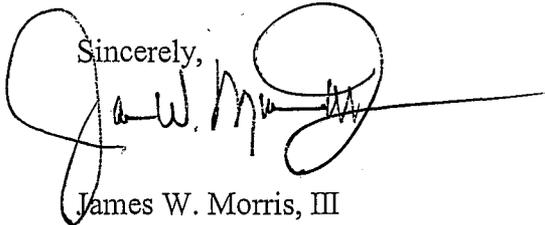
narrative of the incident, a brief description of any injuries sustained by anyone involved, and information regarding any criminal charges or disciplinary actions that were filed as a result of the incident. The rest of the submitted information, including the information subject to section 773.091(g) of the Health and Safety Code, must be withheld under section 552.134.

In summary: (1) the marked custodial death report, along with any attached summary of how the death occurred, must be released pursuant to article 49.18(b) of the Code of Criminal Procedure; (2) the marked medical records must be withheld under section 159.002(b) of the MPA, unless the OIG receives written consent for release of those records that complies with section 159.005(a)(5) of the MPA; (3) if the OIG receives proper consent, then the marked EMS records must be released in their entirety in accordance with chapter 773 of the Health and Safety Code; if the OIG does not receive proper consent, then with the exception of the information subject to section 773.091(g) of the Health and Safety Code, the marked EMS records must be withheld under section 552.101 of the Government Code in conjunction with section 773.091(b) of the Health and Safety Code; and (4) the rest of the submitted information must be withheld under section 552.134 of the Government Code, except for the inmate's photograph and basic information under section 552.029.²

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,



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

JWM/cc

²As we are able to make these determinations, we do not address your other exceptions to disclosure, except to note that basic information under section 552.029(8) corresponds to the basic front-page information that must be released under section 552.108(c) of the Government Code. *See 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).

Ref: ID# 367369

Enc: Submitted information

c: Requestor
(w/o enclosures)