



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

July 12, 2010

Mr. John C. West  
General Counsel  
TDCH - Office of the Inspector General  
4616 West Howard Lane, Suite 250  
Austin, Texas 78728

ATTORNEY GENERAL OF TEXAS

OR2010-10247

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# 386235.

The Texas Department of Criminal Justice (the "department") received a request for twenty categories of information related to a named former inmate and department policies. You state that the department plans to release some of the requested information. You also state the department is withholding certain addresses, telephone numbers, social security numbers, and personal family information pursuant to sections 552.117 and 552.147(b) of the Government Code, as well as the previous determination issued by this office in Open Records Letter No. 2005-01067 (2005).<sup>1</sup> You claim that some of the requested information is excepted from disclosure under sections 552.101, 552.103, 552.108, and 552.134 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

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<sup>1</sup>We note Open Records Letter No. 2005-01067 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. Further, section 552.147(b) of the Government Code authorizes a governmental body to redact the social security number of a living person from public release without the necessity of requesting a decision from this office under the Act.

Initially, we note that the submitted information consists of completed reports and investigations subject to section 552.022 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 claim that this information is excepted from disclosure under section 552.103 of the Government Code, this section is a discretionary exception that protects a governmental body's interests and may be waived. *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 Gov't Code § 552.103); Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.103 is not other law that makes information confidential for the purposes of section 552.022(a)(1). Therefore, the submitted information may not be withheld under section 552.103. However, we will consider your argument under section 552.108 of the Government Code, as well as your arguments under sections 552.101 and 552.134 of the Government Code for this information, as these sections are "other law" for the purposes of section 552.022(a)(1).

Next, we note the submitted records include a custodial death report. Article 49.18(b) of the Code of Criminal Procedure provides that the attorney general shall make the custodial death report available to any interested person, with the exception of any portion of the report that the attorney general determines is privileged. *See* Code Crim. Proc. art. 49.18(b). The Office of the Attorney General has determined that the report and summary of how death occurred must be released to the public but that any other documents submitted with the report are confidential under article 49.18(b). In this instance, you have submitted a custodial death report. We find this report is public pursuant to article 49.18(b) of the Code of Criminal Procedure. To the extent this report, which we have marked, has not been released, it must be released at this time pursuant to article 49.18(b).

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, such as the Medical Practice Act ("MPA"), subtitle B of title 3 of the Occupations Code, which governs release of medical records. *See* Occ. Code §§ 151.001-165.160. Section 159.002 of the MPA provides, in relevant 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). This office has determined in governing access to a specific subset of information, the MPA prevails over the more general provisions of the Act, such as sections 552.108 and 552.134 of the Government Code. *See* Open Records Decision No. 598 (1991). This office has concluded 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). Information subject to the MPA includes both medical records and information obtained from those medical records. *See id.* We have further found when a file is created as a result of a hospital stay, all the documents in the file referring 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). We note 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).

You claim the submitted investigation documents include medical records protected by the MPA. We have marked the information that constitutes medical records subject to the MPA. We note, however, some of this information pertains to a deceased individual, and the requestor is the deceased individual’s guardian’s attorney. Medical records pertaining to a deceased patient may only be released upon the signed consent of the deceased’s personal representative. *See* Occ. Code § 159.005(a)(5). The consent must specify (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. *Id.* §§ 159.004, .005. 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). Accordingly, the marked medical records may only be released in accordance with the MPA. ORD 598.

You assert portions of the remaining records are confidential under section 611.002(a) of the Health and Safety Code, which pertains to mental health records. Section 552.101 also encompasses section 611.002(a), which provides that “[c]ommunications 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.” Health & Safety Code § 611.002(a). Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals. *See* Open Records Decision No. 565 (1990). These sections permit disclosure of mental health records to a patient, a person authorized to act on the patient’s behalf, or a person who has the written consent of the patient. Health & Safety Code §§ 611.004, .0045. We have marked information in the remaining documents that is confidential under section 611.002 of the Health and Safety Code. However, as previously noted, the requestor may be the authorized representative of the person whose mental health records are at issue. Thus, the requestor may have a right of access to the marked

information. *See id.* §§ 611.004, .0045. Therefore, the department may only release the mental health records we have marked in accordance with sections 611.004 and 611.0045 of the Health and Safety Code.

Next, we address section 552.134 of the Government Code, which encompasses information relating to inmates of the department and states, 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, however:

[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.

You claim section 552.134 for the remaining information. We note although the inmate to whom the remaining information pertains is deceased, section 552.134 is applicable to information that relates to the decedent as an inmate. Thus, we find section 552.134 is generally applicable to the remaining information. We note, however, some of the information in question is related to the death of an inmate in custody and use of force incidents. Basic information about these incidents is subject to disclosure under section 552.029(8). Basic information under section 552.029(8) 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. Therefore, with the exception of the basic information that

must be released under section 552.029(8), the department must withhold the remaining information under section 552.134 of the Government Code.<sup>2</sup>

In summary, to the extent the marked custodial death report has not been released, it must be released at this time pursuant to section 49.18(b). The marked medical records may only be released in accordance with the MPA. The marked mental health records may only be released in accordance with sections 611.004 and 611.0045 of the Health and Safety Code. With the exception of basic information, the remaining information must be withheld 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](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,



Tamara Wilcox  
Assistant Attorney General  
Open Records Division

TW/dls

Ref: ID# 386235

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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<sup>2</sup>As our ruling under section 552.134 of the Government Code is dispositive, we need not address your remaining arguments against disclosure for this information, except to note basic information may not generally be withheld under section 552.108. *See* Gov't Code § 552.108(c).