



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 20, 2010

Ms. Janet I. Monteros
Assistant County Attorney
El Paso County
500 East San Antonio, Ste 503
El Paso, Texas 79901

OR2010-15932

Dear Ms. Monteros:

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# 397392 (CA-OP-10-322).

The El Paso Medical Examiner (the "medical examiner") received a request for the autopsy report and pictures, as well as all other information, related to a specified pedestrian fatality. You state you have released some of the requested information. You claim that the remaining information is excepted from disclosure under sections 552.101, 552.111, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note you have submitted two copies of the same CR-3 accident report that was completed pursuant to chapter 550 of the Transportation Code. *See* Transp. Code § 550.064 (officer's accident report). Section 550.065(b) of the Transportation Code states that except as provided by subsection (c) or subsection (e), accident reports are privileged and confidential. *See id.* § 550.065. Section 550.065(c)(4) provides for the release of accident reports to a person who provides two of the following three items of information: (1) the date of the accident; (2) the name of any person involved in the accident; and (3) the specific location of the accident. *See id.* § 550.065(c)(4). Under this provision, the Texas Department of Transportation or another governmental entity is required to release a copy of an accident report to a person who provides the agency with two or more of the items of information specified by the statute. *Id.* In this instance, the requestor has provided the medical examiner with the date of the accident and the name of a person involved in the accident. Accordingly, the requestor in this instance has a statutory right of access to the

submitted accident report pursuant to section 550.065(c)(4). You claim this accident report is excepted from disclosure pursuant to section 552.111 of the Government Code. However, a statutory right of access generally prevails over the Act's general exceptions to disclosure. See Open Records Decision Nos. 623 at 3 (1994) (exceptions in Act inapplicable to information that statutes expressly make public), 613 at 4 (1993) (exceptions in Act cannot impinge on statutory right of access to information), 451 (1986) (specific statutory right of access provisions overcome general exception to disclosure under the Act). Therefore, the medical examiner may not withhold any portion of the CR-3 accident report under section 552.111.

You also assert that portions of the submitted CR-3 crash report are confidential under section 552.130 of the Government Code. As discussed above, our office has found that a specific statutory right of access prevails over general exceptions to disclosure under the Act. ORD 451 at 4. However, because section 552.130 has its own access provisions, we conclude that section 552.130 is not a general exception under the Act. Accordingly, we must address the conflict between the access provided under section 550.065 of the Transportation Code and the confidentiality provided under section 552.130. Where information falls within both a general and a specific provision of law, the specific provision prevails over the general. See *Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 901 (Tex. 2000) ("more specific statute controls over the more general"); *Cuellar v. State*, 521 S.W.2d 277 (Tex. Crim. App. 1975) (under well-established rule of statutory construction, specific statutory provisions prevail over general ones); Open Records Decision Nos. 598 (1991), 583 (1990), 451 (1986). In this instance, section 550.065 specifically provides access only to accident reports of the type at issue in this request, while section 552.130 generally excepts Texas motor vehicle record information maintained in any context. Thus, we conclude that the access to accident reports provided under section 550.065 of the Transportation Code is more specific than the general confidentiality provided under section 552.130. Accordingly, the medical examiner may not withhold any portion of the accident report under section 552.130. Therefore, the medical examiner must release the submitted CR-3 accident report in its entirety to the requestor under section 550.065(c)(4) of the Transportation Code.

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, including section 11 of article 49.25 of the Code of Criminal Procedure, which provides as follows:

The medical examiner shall keep full and complete records properly indexed, giving the name if known of every person whose death is investigated, the place where the body was found, the date, the cause and manner of death, and shall issue a death certificate The records are subject to required public disclosure in accordance with Chapter 552, Government Code, except that a photograph or x-ray of a body taken during an autopsy is excepted from required public disclosure in accordance with Chapter 552, Government Code, but is subject to disclosure:

- (1) under a subpoena or authority of other law; or
- (2) if the photograph or x-ray is of the body of a person who died while in the custody of law enforcement.

Crim. Proc. Code art. 49.25, § 11. You state Attachment B includes photographs of the deceased person taken during an autopsy. You state neither of the statutory exceptions to confidentiality is applicable in this instance. Accordingly, we find the medical examiner must withhold the autopsy photographs we have marked under section 552.101 of the Government Code in conjunction with section 11 of article 49.25 of the Code of Criminal Procedure. However, we note the remaining photographs in Attachment B are either not photographs of a body or were not taken during an autopsy. These remaining photographs are not confidential under article 49.25, and the medical examiner may not withhold them under section 552.101 on that basis.

Next, you claim the remaining photographs in Attachment B and the documents in Attachment C are subject to the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. Section 552.101 of the Government Code also encompasses the MPA, which governs access to medical records. Occ. Code §§ 151.001-165.160. 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 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). Medical records must be released upon the patient's 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. Occ. Code §§ 159.004, .005. After the death of a patient, medical records may be released only on the signed written consent of the deceased

individual'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). Upon review, we conclude the documents we have marked in Attachment C constitute medical records pertaining to a patient who is now deceased. The medical examiner must withhold this information under the MPA, unless the medical examiner receives written consent for release of those records that complies with section 159.005(a)(5) of the MPA.

We note the remaining information you seek to withhold under the MPA consists of photographs of a deceased individual and his belongings. These photographs were taken after the individual's death. 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 id.* § 159.001(3). Under this definition, a deceased individual 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 diagnosis, evaluation, or treatment to which the record pertains. Accordingly, the photographs in Attachment B are not confidential medical records for the purposes of the MPA. Therefore, the medical examiner may not withhold these photographs on the basis of the MPA.

Section 552.101 of the Government Code also encompasses the constitutional right to privacy. Constitutional privacy protects two kinds of interests. *See Whalen v. Roe*, 429 U.S.589, 599-600 (1977); Open Records Decision Nos. 600 at 3-5 (1992), 478 at 4 (1987), 455 at 3-7 (1987). The first is the interest in independence in making certain important decisions related to the "zones of privacy," pertaining to marriage, procreation, contraception, family relationships, and child rearing and education, that have been recognized by the United States Supreme Court. *See Fadjo v. Coon*, 633 F.2d 1172 (5th Cir. 1981); ORD No. 455 at 3-7 (1987). The second constitutionally protected privacy interest is in freedom from public disclosure of certain personal matters. *See Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5th Cir.1985); ORD 455 at 6-7. This aspect of constitutional privacy balances the individual's privacy interest against the public's interest in the information. *See* ORD 455 at 7. Constitutional privacy under section 552.101 is reserved for "the most intimate aspects of human affairs." *Id.* at 8 (quoting *Ramie*, 765 F.2d at 492). The remaining information includes photographs of a deceased individual. The right to privacy is a personal right that lapses at death and therefore may not be asserted solely on behalf of a deceased individual. *See Moore v. Charles B. Pierce Film Enters., Inc.*, 589 S.W.2d 489, 491 (Tex. Civ. App.—Texarkana 1979, writ ref'd n.r.e.); Open Records Decision No. 272 at 1 (1981) (privacy rights lapse upon death).

The United States Supreme Court has determined, however, that surviving family members can have a privacy interest in information relating to their deceased relatives. *See Nat'l Archives & Records Admin. v. Favish*, 124 S. Ct. 1570 (2004). You have provided documentation showing that you notified the deceased individual's surviving family member of this request for information. We understand that the decedent's family member objects to the release of information at issue. Upon review of the remaining information, we find the family member's privacy interests in the photographs of her deceased relative outweigh

the public's interest in the disclosure of this information. We therefore conclude the medical examiner must withhold the photographs we have marked under section 552.101 in conjunction with constitutional privacy and the holding in *Favish*.

You raise section 552.130 for the temporary Texas identification card submitted as Attachment D. Section 552.130 of the Government Code provides information relating to a personal identification document issued by a Texas agency is excepted from public release. Gov't Code § 552.130(a)(3). Thus, the medical examiner must withhold the information in Attachment D under section 552.130 of the Government Code.

In summary, the medical examiner must release the CR-3 accident report in its entirety to the requestor under section 550.065(c)(4) of the Transportation Code. The medical examiner must withhold the autopsy photographs we have marked in Attachment B under section 552.101 of the Government Code in conjunction with section 11 of article 49.25 of the Code of Criminal Procedure. The medical examiner must withhold the information we have marked in Attachment C under the MPA, unless the medical examiner receives written consent for release of those records that complies with section 159.005(a)(5) of the MPA. The medical examiner must withhold the information we have marked under section 552.101 in conjunction with constitutional privacy and the holding in *Favish*. The medical examiner must withhold Attachment D under section 552.130 of the Government Code. The remaining information must be released.

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,



Kate Hartfield
Assistant Attorney General
Open Records Division

KH/em

Ref: ID# 397392

Enc. Submitted documents

c: Requestor
(w/o enclosures)