



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

January 27, 2011

Ms. Patricia Fleming  
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Mr. John C. West  
General Counsel  
Office of the Inspector General  
Texas Department of Criminal Justice  
4616 Howard Lane Suite 250  
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OR2011-01434

Dear Ms. Fleming 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# 407126 (OIG ORR File No. 2010-00248).

The Texas Department of Criminal Justice (the "department") received a request for records pertaining to a named inmate. The department's Office of the General Counsel (the "OGC") and its Office of the Inspector General (the "OIG") have submitted separate briefs, as well as separate responsive documents that each seeks to withhold from disclosure. The OGC states it will provide some requested information to the requestor. The OIG also states it is withholding certain addresses, telephone numbers, social security numbers, and personal family information pursuant to section 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> The OGC claims the information it has submitted is excepted from disclosure under sections 552.101 and 552.134 of the Government Code, while the OIG claims the information it has submitted is excepted from disclosure under sections 552.101, 552.108, and 552.134 of the Government Code. We have considered the claimed exceptions and reviewed the submitted information.

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 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). 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). The information the OGC has marked in its documents must be withheld under section 159.002(b) of the MPA, unless the

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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.

OGC receives written consent for release of those records that complies with sections 159.004 and 159.005(a)(5) of the MPA.<sup>2</sup>

Section 552.101 of the Government Code also encompasses chapter 411 of the Government Code, which makes confidential criminal history record information (“CHRI”) generated by the National Crime Information Center or by the Texas Crime Information Center. *See id.* § 411.083(a). Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual laws with respect to the CHRI it generates. *See id.* Section 411.083 of the Government Code deems confidential CHRI the Texas Department of Public Safety (“DPS”) maintains, except DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See Gov’t Code* § 411.083. Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090-.127. Similarly, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 in conjunction with chapter 411, subchapter F of the Government Code. Upon review, we agree the information the OGC marked constitutes CHRI that is confidential under chapter 411 of the Government Code. Thus, the department must withhold this information under section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code.

Section 552.101 also encompasses article 42.12 of the Code of Criminal Procedure. Article 42.12 of the Code of Criminal Procedure is applicable to pre-sentence investigation reports and provides in part:

(j) The judge by order may direct that any information and records that are not privileged and that are relevant to a report required by Subsection (a) or Subsection (k) of this section be released to an officer conducting a presentence investigation under Subsection (i) of this section or a postsentence report under Subsection (k) of this section. The judge may also issue a subpoena to obtain that information. A report and all information obtained in connection with a presentence investigation or postsentence report are confidential and may be released only to those persons and under those circumstances authorized under Subsections (d), (e), (f), (h), (k), and (l) of this section and as directed by the judge for the effective supervision of the defendant. Medical and psychiatric records obtained by court order shall

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<sup>2</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

be kept separate from the defendant's community supervision file and may be released only by order of the judge.

Crim. Proc. Code art. 42.12 § 9(j). Accordingly, the department must withhold the presentence investigation report the OGC has marked pursuant to section 552.101 in conjunction with article 42.12 of the Code of Criminal Procedure.

Next, the OGC claims some of the remaining information is protected by the doctrine of constitutional privacy. The constitutional right to privacy is also encompassed by section 552.101. 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 455 at 3-7. 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).

This office has applied privacy to protect certain information about incarcerated individuals. See Open Records Decision Nos. 430 (1985), 428 (1985), 185 (1978). Citing *State v. Ellefson*, 224 S.E.2d 666 (S.C. 1976) as authority, this office held those individuals who correspond with inmates possess a "first amendment right . . . to maintain communication with [the inmate] free of the threat of public exposure," and this right would be violated by the release of information that identifies those correspondents, because such a release would discourage correspondence. ORD 185. The information at issue in Open Records Decision No. 185 was the identities of individuals who had corresponded with inmates. Our office found "the public's right to obtain an inmate's correspondence list is not sufficient to overcome the first amendment right of the inmate's correspondents to maintain communication with him free of the threat of public exposure." *Id.* Implicit in this holding is the fact an individual's association with an inmate may be intimate or embarrassing. In Open Records Decision Nos. 428 and 430, our office determined inmate visitor and mail logs that identify inmates and those who choose to visit or correspond with inmates are protected by constitutional privacy because people who correspond with inmates have a First Amendment right to do so that would be threatened if their names were released. ORD 430. The rights of those individuals to anonymity was found to outweigh the public's interest in this information. *Id.*; see ORD 430 (list of inmate visitors protected by constitutional privacy of both inmate and visitors).

We note some of the submitted visitor information lists the requestor's clients as the inmate's visitors. The requestor has a special right of access to his clients' private information under section 552.023 of the Government Code.<sup>3</sup> Although the inmate at issue would ordinarily also have a privacy interest in her own visitor information, the department informs us that the inmate in question is deceased. Thus, because privacy is a personal right that lapses at death, the information that relates to the requestor as the deceased inmate's visitors may not be withheld on the basis of the inmate's right to privacy.<sup>4</sup> Therefore, the requestor's clients' visitor information is not confidential under section 552.101 in conjunction with constitutional privacy. However, the department must withhold the information we have marked, which does not pertain to the requestor's clients, under section 552.101 of the Government Code in conjunction with the constitutional right to privacy. The OGC also seeks to withhold under section 552.101 in conjunction with constitutional privacy information relating to the inmate's family members when those family members are not listed as visitors, but only as relatives of the inmate. However, the OGC has failed to demonstrate how this information falls within the zones of privacy or implicates an individual's privacy interests for purposes of constitutional privacy. Therefore, the remaining information the OGC seeks to withhold under constitutional privacy may not be withheld under section 552.101 on this basis. As no further exceptions to the disclosure have been claimed for this information, it must be released.

The OGC claims some of its remaining information and the OIG claims all of its submitted information are excepted under section 552.134(a) of the Government Code, which relates to inmates of the department and provides:

Except 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 552.134 is explicitly made subject to section 552.029, which provides, in relevant part:

[n]otwithstanding [s]ection . . . 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:

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<sup>3</sup>See Gov't Code § 552.023(a); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning himself).

<sup>4</sup>See *Moore v. Charles B. Pierce Film Enters. Inc.*, 589 S.W.2d 489 (Tex. Civ. App.—Texarkana 1979, writ ref'd n.r.e.); *Justice v. Belo Broadcasting Corp.*, 472 F. Supp. 145 (N.D. Tex. 1979); Attorney General Opinions JM-229 (1984); H-917 (1976); Open Records Decision No. 272 (1981).

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(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). Upon review, we agree, in this instance, the information the OGC has marked and the information submitted by the OIG consists of records pertaining to an individual confined as an inmate in a facility operated by the department. Thus, we conclude section 552.134(a) is generally applicable to the information at issue. We note, however, the OIG's submitted file pertains to an investigation of an alleged crime involving an inmate. Therefore, the OIG must release basic information about the alleged crime pursuant to section 552.029. 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. The rest of the information at issue must be withheld under section 552.134.<sup>5</sup>

In summary, the marked medical records must be withheld under section 552.101 of the Government Code in conjunction with section 159.002(b) of the MPA, unless the OGC receives written consent for release of those records that complies with sections 159.004 and 159.005(a)(5) of the MPA. The department must withhold the CHRI the OGC has marked under section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code. The department must withhold the pre-sentence investigation report the OGC has marked pursuant to section 552.101 in conjunction with article 42.12 of the Code of Criminal Procedure. The department must withhold the information we have marked in the OGC's documents under section 552.101 of the Government Code in conjunction with the constitutional right to privacy. The department must withhold the information the OGC has marked, along with the information the OIG has submitted, under section 552.134 of the Government Code, except for the basic information pertaining to the investigation of an alleged crime involving an inmate under section 552.029 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.

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<sup>5</sup>As 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).

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,

A handwritten signature in black ink, appearing to read "T. Wilcox", written in a cursive style.

Tamara Wilcox  
Assistant Attorney General  
Open Records Division

TW/vb

Ref: ID# 407126

Enc. Submitted documents

c: Requestor  
(w/o enclosures)