



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 3, 2011

Mr. John C. West
Office of the Inspector General
Texas Department of Criminal Justice
4616 Howard Lane, Suite 250
Austin, Texas 78728

OR2011-03035

Dear Mr. John C. 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# 410887 (OIG ORR # 2010-00284).

The Texas Department of Criminal Justice (the "department") received a request for information pertaining to nine named inmates. You state you have no responsive information for eight of the named inmates. You also state some of the requested records for the remaining inmate have been destroyed pursuant to the department's records retention schedule.¹ You state you will redact information under section 552.147 of the Government Code and the previous determination issued to the department in Open Records Letter No. 2005-01067 (2005).² You state you have released some information to the requestor. You claim portions of the submitted information are excepted from disclosure under

¹We note the Act does not require a governmental body to release information that did not exist at the time the request for information was received or create new information in response to a request. *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), 452 at 3 (1986), 362 at 2 (1983).

²Open Records Letter No. 2005-01067 authorizes the department to withhold the present and former home addresses and telephone numbers, social security numbers, and family member information of its current or former employees under section 552.117(a)(3) of the Government Code, regardless of whether the current or former employee complies with section 552.1175 of the Government Code, without the necessity of requesting a decision under the Act. *See* Open Records Decision No. 673 (2001) (listing elements of first type of previous determination under section 552.301(a) of the Government Code). Further, section 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. *See* Gov't Code § 552.147(b).

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.

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 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). Information subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004; 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).

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 the patient's 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* Occ. Code §§ 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). Upon review, we agree some of the records in files 07-2649 and IF.SA.0627.2007.BC are medical records, access to which is governed by the MPA. We have marked these medical records which may only be released pursuant to the MPA.

Section 552.101 of the Government Code also encompasses section 258.102 of the Occupations Code, which provides in pertinent part as follows:

(a) The following information is privileged and may not be disclosed except as provided by this subchapter:

(1) a communication between a dentist and a patient that relates to a professional service provided by the dentist; and

(2) a dental record.

Occ. Code § 258.102(a). A "dental record" means dental information about a patient that is created or maintained by a dentist and relates to the history or treatment of the patient. *See id.* § 258.101(1). Information that is privileged under chapter 258 of the Occupations Code may be disclosed only under certain specified circumstances. *See id.* § 258.104 (consent to disclosure); *see also id.* §§ 258.105, .106, .107 (exceptions to privilege). The written consent for the release of privileged information required under section 258.104 must specify (1) the information covered by the release, (2) the person to whom the information is to be released, and (3) the purpose for the release. *Id.* § 258.104(c). A person who receives information that is privileged under section 258.102 of the Occupations Code may disclose that information to another person only to the extent that disclosure is consistent with the purpose for which the information was obtained. *See id.* § 258.108. Upon review, we agree some of the records in file 07-2649 are dental records, access to which is governed by chapter 258 of the Occupations Code. We have marked these dental records which may only be released pursuant to chapter 258 of the Occupations Code.

Section 552.101 of the Government Code also encompasses section 1703.306 of the Occupations Code, which provides in part:

(a) A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person other than:

(1) the examinee or any other person specifically designated in writing by the examinee[.]

Id. § 1703.306. We have marked information in file 07-2649 acquired from a polygraph examination that is confidential under section 552.101 in conjunction with section 1703.306. In this instance, the requestor may be the authorized representative of the individual whose polygraph information is at issue. Thus, if the requestor is acting as the authorized representative of the polygraph examinee, the department has the discretion to release the marked information in file 07-2649 to this requestor pursuant to section 1703.306(a)(1). *See* Open Records Decision No. 481 at 9 (1987) (statutory predecessor to Occ. Code § 1703.306 permitted, but did not require, examination results to be disclosed to polygraph examinees).

Section 552.134 of the Government Code relates to inmates of the department and provides in relevant part:

(a) 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 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 . . . an incident involving the use of force, or an alleged crime involving the inmate.

Id. § 552.029(8). Upon review, we find file UF.14.2833.95.MI and the remaining information in files 07-2649 and IF.SA.0627.2007.BC pertain to inmates confined in a facility operated by the department and are, therefore, subject to section 552.134. We note, however, file UF.14.2833.95.MI pertains to an incident involving the use of force and files IF.SA.0627.2007.BC and 07-2649 pertain to an alleged crime involving inmates during their confinement. Thus, while the department must generally withhold file UF.14.2833.95.MI and the remaining information in files IF.SA.0627.2007.BC and 07-2649 under section 552.134, the department must release basic information regarding these files pursuant to section 552.029(8), unless this basic information is otherwise excepted from disclosure under the Act. 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.

Although not excepted from disclosure under section 552.134, we note that some of the basic information at issue is excepted from disclosure under section 552.101 of the Government Code in conjunction with common-law privacy. The doctrine of common-law privacy protects information that (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The type of information considered highly intimate or embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. Information that tends to identify a victim of sexual assault is protected under common-law privacy. See Open Records Decision Nos. 393 at 2 (1983), 339 (1982); *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied) (identity of witnesses to and victims of sexual harassment was highly intimate or embarrassing information and public did not have a legitimate interest in such information). In this

instance, the complainant in files IF.SA.0627.2007.BC and 07-2649 is a victim of an alleged sexual assault. Therefore, when releasing the basic information for files IF.SA.0627.2007.BC and 07-2649, the department must withhold the complainant's identifying information under section 552.101 of the Government Code in conjunction with common-law privacy.

In summary, we have marked medical records in files 07-2649 and IF.SA.0627.2007.BC which may only be released pursuant to the MPA. We have marked dental records in file 07-2649 which may only be released pursuant to chapter 258 of the Occupations Code. We have marked information in file 07-2649 acquired from a polygraph examination that is confidential under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code. If the requestor is acting as the authorized representative of the polygraph examinee, the department has the discretion to release the marked information in file 07-2649 to this requestor pursuant to section 1703.306(a)(1). Except for basic information, the department must withhold file UF.14.2833.95.MI and the remaining information in files 07-2649 and IF.SA.0627.2007.BC under section 552.134 of the Government Code. When releasing the basic information for files IF.SA.0627.2007.BC and 07-2649, the department must withhold the complainant's identifying information under section 552.101 in conjunction with common-law privacy.³

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,



Sean Nottingham
Assistant Attorney General
Open Records Division

SN/eeg

³As our ruling is dispositive, we do not address the department's remaining claims.

Ref: ID# 410887

Enc. Submitted documents

c: Requestor
(w/o enclosures)