



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 12, 2011

Ms. Donna L. Clarke
Assistant Criminal District Attorney
Lubbock County
P.O. Box 10536
Lubbock, Texas 79408-3536

OR2011-06599

Dear Ms. Clarke:

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# 417423.

The Lubbock County Medical Examiner's Office (the "medical examiner") received a request for an autopsy report, toxicology report, and photographs of a named decedent. You state the autopsy report has yet to be completed.¹ You claim the submitted information is excepted from disclosure pursuant to sections 552.101 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered comments from the requestor. See Gov't Code § 552.304

¹We note that the Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

(interested party may submit comments stating why information should or should not be released).

Initially, we address the requestor's contention the request was not submitted to the medical examiner pursuant to the Act. The requestor's comments to this office state he seeks information under the authority of section 161.203 of the Health and Safety Code and the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). The request does not specify the request was not made under the Act. Further, the medical examiner has submitted information it deems responsive for our review and raised exceptions to disclosure under the Act for this information. Thus, we consider the medical examiner to have made a good-faith effort to identify the information that is responsive to the request, and we will address the applicability of the claimed exceptions to the submitted information.

We understand the requestor to argue he has a right of access to the requested information based on section 161.203 of the Health and Safety Code. Section 161.202 of the Health and Safety Code governs requests for medical records by a person's authorized representative "for use in supporting an application for disability benefits or other benefits or assistance the patient or former patient may be eligible to receive based on that patient's or former patient's disability[.]" Health & Safety Code § 161.202(a). Section 161.203 provides a "health care provider or health care facility" that receives a request under section 161.202 "shall provide to the requestor a medical or mental health record requested under section 161.202 not later than the 30th day after the date on which the provider or facility receives the request." *Id.* § 161.203. Section 161.201 defines "health care provider" as "a person who is licensed, certified, or otherwise authorized by the laws of this state to provide or render health care in the ordinary course of business or practice of a profession." *Id.* § 161.201. In this instance, the toxicology report and photographs at issue are maintained by the medical examiner. The requestor has not demonstrated the medical examiner is a health care provider or health care facility for the purposes of section 161.203, nor has the requestor demonstrated the toxicology report and photographs are medical or mental health records for the purposes of chapter 161. Thus, we conclude chapter 161 of the Health and Safety Code does not apply to the information at issue and the requestor does not have a right of access to this information on that basis.

The requestor also indicates he has a right of access to the submitted information pursuant to the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 42 U.S.C. §§ 1320d-1320d-8. At the direction of Congress, the Secretary of Health and Human Services ("HHS") promulgated regulations setting privacy standards for medical records, which HHS issued as the Federal Standards for Privacy of Individually Identifiable Health Information. *See* Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 1320d-2 (Supp. IV 1998) (historical & statutory note); Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. pts. 160, 164 ("Privacy Rule"); *see also* Attorney General Opinion JC-0508 at 2 (2002). These standards govern the releasability of protected health information by a covered entity. *See* 45 C.F.R. pts. 160, 164. Under

these standards, a covered entity may not use or disclose protected health information, except as provided by parts 160 and 164 of the Code of Federal Regulations. 45 C.F.R. § 164.502(a). However, it is beyond the scope of this office's authority to render a decision under HIPAA. *See Gov't Code § 552.301(a)* (open records division's authority is limited to determining, upon a governmental body's request, whether requested information falls within an exception to disclosure); Attorney General Opinion GA-0138 at 10 (2004). In this instance, the medical examiner has requested a decision from this office pursuant to the Act. Thus, we will address the applicability of the medical examiner's arguments under the Act.

Section 552.108 of the Government Code excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]" *Id.* § 552.108(a)(1). A governmental body must reasonably explain how and why section 552.108 is applicable to the information at issue. *See id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). Section 552.108 may be invoked by the proper custodian of information relating to a pending investigation or prosecution of criminal conduct. *See Open Records Decision No. 474 at 4-5* (1987). Where a non-law enforcement agency has custody of information that would otherwise qualify for exception under section 552.108 as information relating to the pending case of a law enforcement agency, the custodian of the records may withhold the information if it provides this office with a demonstration that the information relates to the pending case and a representation from the law enforcement agency that it wishes to have the information withheld.

You state the submitted information relates to an ongoing criminal case, and the Lubbock County District Attorney objects to its release. Based on your representations and our review, we conclude the medical examiner may withhold the submitted information under section 552.108(a)(1) of the Government Code. *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975) (court delineates law enforcement interests present in active cases), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976).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,

²As our ruling is dispositive, we need not address your remaining argument against disclosure.

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 cursive script that reads "Jennifer Burnett". The signature is written in black ink and extends across the width of the page.

Jennifer Burnett
Assistant Attorney General
Open Records Division

JB/dls

Ref: ID# 417423

Enc. Submitted documents

c: Requestor
(w/o enclosures)