



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 8, 2011

Mr. David A. Mendoza
Assistant District Attorney
Hays County District Attorney's Office
110 East Martin Luther King
San Marcos, Texas 78666

OR2011-11365

Dear Mr. Mendoza:

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# 426273.

The Hays County Sheriff's Office (the "sheriff") received a request for six categories of information related to the death of a named inmate of the Hays County Jail. You claim the submitted information is excepted from disclosure under section 552.108 of the Government Code. We have considered the claimed exception and reviewed the submitted information.

Initially, we note you have not submitted any information responsive to the first or sixth categories of the request. To the extent information responsive to these parts of the request existed on the date the sheriff received the request, we assume you have released it. *See* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible). If you have not released any such records, you must do so at this time. *See* Gov't Code §§ 552.301(a), .302.

We next note the submitted documents 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* Crim. Proc. Code art. 49.18(b). The report was revised in May 2006 and now consists of four pages, including a summary of how

the death occurred. The Office of the Attorney General has determined that the four-page report and summary must be released to the public but that any other documents submitted with the revised report are confidential under article 49.18(b). Although you claim this information is protected by section 552.108 of the Government Code, the exceptions to disclosure found in the Act do not generally apply to information that other statutes make public. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Thus, the sheriff must release the submitted custodial death report and summary, which we have marked, pursuant to article 49.18(b) of the Code of Criminal Procedure.

The remaining submitted information also contains fingerprints subject to section 552.101 of the Government Code.¹ Section 552.101 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 other statutes such as section 560.003 of the Government Code, which provides “[a] biometric identifier in the possession of a governmental body is exempt from disclosure under [the Act].” *Id.* § 560.003; *see id.* § 560.001(1) (“biometric identifier” means retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry). Section 560.002 of the Government Code provides, however, that “[a] governmental body that possesses a biometric identifier of an individual . . . may not sell, lease, or otherwise disclose the biometric identifier to another person unless . . . the individual consents to the disclosure[.]” *Id.* § 560.002(1)(A). Accordingly, a person, or the person’s authorized representative, has a right of access under section 560.002(1)(A) to that person’s biometric information. The submitted information contains the fingerprints of the deceased inmate at issue, which we have marked. We are unable to determine whether the requestor’s client is the authorized representative of the deceased inmate. Accordingly, we must rule conditionally. If the requestor’s client is the authorized representative of the inmate whose fingerprints are at issue, then he has a right of access to this information under section 560.002(1)(A) and the information we have marked must be released to him. However, if the requestor’s client is not the authorized representative of the deceased inmate at issue, then the sheriff must withhold this information under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code.

We also note the remaining submitted information contains court-filed documents subject to section 552.022 of the Government Code. Section 552.022(a)(17) provides “information that is also contained in a public court record” is subject to required release unless it is confidential under “other law[.]” Gov’t Code § 552.022(a)(17). Although you claim the court-filed documents are excepted from disclosure under section 552.108 of the Government Code, that is a discretionary exception that protects only a governmental body’s interests and may be waived. *See* Open Records Decision Nos. 665 at 2 n.5 (2000)

¹The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

(discretionary exceptions generally), 586 (1991) (governmental body may waive section 552.108). Therefore, section 552.108 is not “other law” that makes information expressly confidential for purposes of section 552.022. Accordingly, the sheriff may not withhold the court-filed documents, which we have marked, under section 552.108 of the Government Code. As you raise no additional exceptions to disclosure for this information, it must be released to the requestor. However, we will address your argument under section 552.108 for the remaining submitted information not subject to section 552.022.

Section 552.108(a)(1) 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[.]” Gov’t Code § 552.108(a)(1). A governmental body must reasonably explain how release of the information at issue would interfere with the detection, investigation, or prosecution of crime. *See id.* § 552.301(e)(1)(A) (governmental body must provide comments explaining why exceptions raised should apply to information requested); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state the incident at issue is still under criminal investigation. Based on your representation and our review, we conclude release of the remaining submitted information would interfere with the detection, investigation, or prosecution of a crime. *See Houston Chronicle Publ’g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975) (court describes law enforcement interests that are present in active cases), *writ ref’d per curiam*, 536 S.W.2d 559 (Tex. 1976). Therefore, section 552.108(a)(1) of the Government Code applies to the remaining information.

We note, however, section 552.108 does not except from disclosure “basic information about an arrested person, an arrest, or a crime.” Gov’t Code § 552.108(c). Section 552.108(c) refers to the basic information held to be public in *Houston Chronicle*. *See* 531 S.W.2d at 186-88; *see also* Open Records Decision No. 127 (1976) (summarizing types of information deemed public by *Houston Chronicle*). Therefore, with the exception of basic information, which must be released, the sheriff may withhold the remaining submitted information under section 552.108(a)(1) of the Government Code.

In summary, the sheriff must release the marked custodial death report under article 49.18(b) of the Code of Criminal Procedure. If the requestor’s client is the authorized representative of the inmate at issue, the sheriff must release the marked fingerprints to him pursuant to section 560.002 of the Government Code. If the requestor’s client is not the authorized representative of the inmate, the sheriff must withhold the marked fingerprints under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code. The sheriff must release the court-filed documents we have marked under section 552.022(a)(17) of the Government Code. With the exception of basic information, which must be released, the sheriff may withhold the remaining information under section 552.108(a)(1) 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, 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,



Misty Haberer Barham
Assistant Attorney General
Open Records Division

MHB/tf

Ref: ID # 426273

Enc. Submitted documents

c: Requestor
(w/o enclosures)