



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 5, 2011

Ms. Susan Fillion
Assistant County Attorney
County of Harris
1200 Baker
Houston, Texas 77002

OR2011-17830

Dear Ms. Fillion:

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# 436369.

The Harris County Sheriff's Office (the "sheriff") received a request for information pertaining to two specified internal affairs investigations and a specified photograph of a named officer. You state the sheriff has released some information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we 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* Code Crim. Proc. art. 49.18(b). The report was revised in May 2006 and now consists of four pages and an attached 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 generally 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).

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.

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. Section 11 of article 49.25 of the Code of Criminal Procedure 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. Upon review, we find that some of the photographs of the deceased individual we have indicated were taken during an autopsy. Therefore, provided that neither of the statutory exceptions to confidentiality is applicable in this instance, we find that the sheriff must withhold the photographs we have indicated under section 552.101 of the Government Code in conjunction with section 11 of article 49.25 of the Code of Criminal Procedure.

Section 552.101 of the Government Code also encompasses the Medical Practice Act (the “MPA”), subtitle B of title 3 of the Occupations Code. *See* Occ. Code §§ 151.001-165.160. 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.

Id. § 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. We have also found that when a file is created as the result of a hospital stay, all the documents in the file relating to diagnosis and treatment constitute physician-patient communications or “[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician.” Open Records Decision No. 546 (1990). 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 Occ. Code* § 159.001(3). Under this definition, a deceased person cannot be a “patient” under section 159.002 of the MPA. *See Open Records Decision Nos.* 487 (1987), 370 (1983), 343 (1982). Thus, the MPA is applicable only to records relating to a person who was alive at the time of diagnosis, evaluation or treatment to which the records pertain.

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* ORD 598. 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. 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). We have marked and indicated documents in the submitted information that constitute medical records. The sheriff must withhold these records under the MPA, unless the sheriff receives consent for release of those records that complies with sections 159.004 and 159.005(a)(5) of the MPA.¹

Section 552.101 of the Government Code also encompasses section 773.091 of the Health and Safety Code, which makes confidential emergency medical services (“EMS”) records. Section 773.091 provides in part:

(b) Records of the identity, evaluation, or treatment of a patient by emergency medical services personnel or by a physician providing medical supervision that are created by the emergency medical services personnel or physician or maintained by an emergency medical services provider are confidential and privileged and may not be disclosed except as provided by this chapter.

...

¹As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

(g) The privilege of confidentiality under this section does not extend to information regarding the presence, nature of injury or illness, age, sex, occupation, and city of residence of a patient who is receiving emergency medical services.

Health & Safety Code § 773.091(b), (g). Thus, except for the information specified in section 773.091(g), EMS records are deemed confidential under section 773.091 and, therefore, may only be released in accordance with chapter 773 of the Health and Safety Code. *See id.* §§ 773.091-773.094. We note this information may be released to “any person who bears a written consent of the patient or other persons authorized to act on the patient’s behalf.” *Id.* § 773.092(e)(4). When the patient is deceased, the patient’s personal representative may consent to the release of the patient’s records. *Id.* § 773.093(a); *see also* Open Records Decision No. 632 (1995) (defining “personal representative” for purposes of section 773.093 of the Health and Safety Code). The consent must be in writing, signed by the patient, authorized representative, or personal representative, and specify (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. Health & Safety Code § 773.093(a). Upon review, we conclude, with the exception of the information specified in section 773.091(g), the sheriff must withhold the EMS records we have marked under section 552.101 in conjunction with section 773.091(b), unless the deceased individual’s personal representative provides the sheriff with written consent that meets the requirements of section 773.093(a).² *See id.* §§ 773.092, .093; ORD 632.

Section 552.101 of the Government Code also encompasses information protected by chapter 411 of the Government Code, which deems confidential criminal history record information (“CHRI”) generated by the National Crime Information Center or by the Texas Crime Information Center. CHRI means “information collected about a person by a criminal justice agency that consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions.” Gov’t Code § 411.082(2). Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. *See* ORD 565. The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* at 10-12. Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety (“DPS”) maintains, except that 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. *See 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

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

except as provided by chapter 411. *See generally id.* § 411.090-.127. Furthermore, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F. We note section 411.083 does not apply to active warrant information or other information relating to one's current involvement with the criminal justice system. *See id.* § 411.081(b) (police department allowed to disclose information pertaining to person's current involvement in the criminal justice system). Further, CHRI does not include driving record information. *See id.* § 411.082(2)(B) (term CHRI does not include driving record information). Upon review, we find the information we have marked constitutes CHRI and must be withheld under section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code and federal law.³

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which 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 (Tex. 1976). You contend some of the submitted information is protected by common-law privacy on the basis of *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied). In *Morales v. Ellen*, the court applied common-law privacy to records of an investigation of alleged sexual harassment in the workplace. As the submitted information does not include records of such an investigation, the sheriff may not withhold any of the submitted information under section 552.101 in conjunction with common-law privacy on the basis of *Morales v. Ellen*.

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 Fadlo 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). We note 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

³As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

Records Decision No. 272 at 1 (1981) (privacy rights lapse upon death). Thus, because the remaining information relates to a deceased individual, it may not be withheld from disclosure based on his privacy interests. However, the United States Supreme Court has determined 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). In this instance, a member of the deceased individual's family asserts a privacy interest in some of the remaining photographs based on the privacy of the deceased individual's family. Upon review, we find the privacy interests of the deceased individual's family in the photographs we have indicated outweigh the public's interest in the disclosure of this information. Therefore, the sheriff must withhold the photographs we have indicated under section 552.101 in conjunction with constitutional privacy and the holding in *Favish*.

Section 552.102(a) of the Government Code excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."⁴ Gov't Code § 552.102(a). The Texas Supreme Court recently held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, No. 08-0172, 2010 WL 4910163 (Tex. Dec. 3, 2010). Having carefully reviewed the remaining information, we find the sheriff must withhold the information we have marked in the remaining information under section 552.102(a) of the Government Code.⁵

Section 552.108(b)(2) excepts from disclosure "[a]n internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution . . . if . . . the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication[.]" Gov't Code § 552.108(b)(2). A governmental body claiming section 552.108(b)(2) must demonstrate that the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. *See id.* § 552.301(e) (governmental body must provide comments explaining why exceptions raised should apply to information requested). We note section 552.108 is generally not applicable to records of an internal affairs investigation that is purely administrative in nature and does not involve the investigation or prosecution of crime. *See City of Fort Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App.—Austin 2002, no pet.); *Ellen*, 840 S.W.2d at 525-26 (statutory predecessor to section 552.108 not applicable to internal investigation that did not result in criminal investigation or prosecution). The submitted

⁴The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

⁵As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

information consists of the entire internal affairs investigation file pertaining to the death of an inmate. In this instance, you generally state “[t]he criminal investigations/criminal conduct included within these records were not sustained and did not result in conviction or deferred adjudication[.]” We note, however, you have not identified which of the remaining documents relate to criminal investigations that have concluded in a final result other than a conviction or deferred adjudication. *See* Gov’t Code § 552.301(e)(2) (governmental body must label copy of requested information to indicate which exceptions apply to which parts of the copy). Accordingly, you have failed to demonstrate section 552.108(b)(2) applies. Thus, the sheriff may not withhold any portion of the remaining information under section 552.108(b)(2).

Section 552.117(a)(2) of the Government Code excepts from public disclosure a peace officer’s home address and telephone number, social security number, family member information, and emergency contact information, regardless of whether the peace officer made an election under section 552.024 of the Government Code. Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 2 (to be codified as an amendment to Gov’t Code § 552.117(a)(2)). Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. Therefore, the sheriff must generally withhold the personal information of the officers we have marked under section 552.117(a)(2) of the Government Code. However, the submitted information reflects that the named officer may no longer be a licensed peace officer. Thus, if the named officer is currently a licensed peace officer, the department must withhold his personal information, which we have marked, under section 552.117(a)(2); however if he is no longer a licensed peace officer, his personal information may not be withheld under section 552.117(a)(2) of the Government Code.

If the named officer is no longer a licensed peace officer, his personal information may be subject to section 552.117(a)(1) of the Government Code. Additionally, we note the personal information of the nurse we have marked may also be subject to section 552.117(a)(1). Section 552.117(a)(1) excepts from disclosure the home address and telephone numbers, social security number, family member information, and emergency contact information of current or former officials or employees of a governmental body who request this information be kept confidential under section 552.024 of the Government Code. Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 2 (to be codified as an amendment to Gov’t Code § 552.117(a)(1)). Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). The sheriff may only withhold the nurse’s and the named officer’s personal information under section 552.117(a)(1) if they elected confidentiality under section 552.024 prior to the date on which the request for this information was made. Accordingly, if the named officer is no longer a licensed peace officer and made a timely election under section 552.024, the sheriff must withhold his personal information, which we have marked, under section 552.117(a)(1). If the named officer is no longer a licensed peace officer and did not make a timely election under section 552.024, his personal information may not be withheld under section 552.117(a)(1).

If the nurse whose personal information is at issue made a timely election under section 552.024, the sheriff must withhold her personal information, which we have marked, under section 552.117(a)(1). If the nurse did not make a timely election under section 552.024, her personal information may not be withheld under section 552.117(a)(1).

Section 552.130 of the Government Code excepts from disclosure “information [that] relates to (1) a motor vehicle operator’s or driver’s license or permit issued by an agency of this state or another state or country; [or] (2) a motor vehicle title or registration issued by an agency of this state or another state or country[.]” Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 4 (to be codified as an amendment to Gov’t Code § 552.130(a)(1)-(2)). We note section 552.130 protects privacy which, as previously noted, is a personal right that lapses at death. *See Moore*, 589 S.W.2d 489 at 491; *see also Justice v. Belo Broadcasting Corp.*, 472 F. Supp. 145, 146-47 (N.D. Tex. 1979); Attorney General Opinions JM-229, H-917 (1976); ORD 272 at 1. Upon review, we find the sheriff must withhold the motor vehicle record information we have marked in the remaining information under section 552.130 of the Government Code.

Section 552.137 of the Government Code provides that “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act],” unless the owner of the e-mail address has affirmatively consented to its release or the e-mail address is specifically excluded by subsection (c). Gov’t Code § 552.137(a)-(c). Upon review, we find the e-mail address we have marked is not of a type specifically excluded by section 552.137(c) of the Government Code. Accordingly, the sheriff must withhold the e-mail address we have marked under section 552.137 of the Government Code, unless the owner consents to disclosure.⁶

In summary, 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 sheriff must withhold the photographs we have indicated under section 552.101 of the Government Code in conjunction with section 11 of article 49.25 of the Code of Criminal Procedure. The sheriff must withhold the records we have marked and indicated under the MPA, unless the sheriff receives consent for release of those records that complies with sections 159.004 and 159.005(a)(5) of the MPA. With the exception of the information specified in section 773.091(g) of the Health and Safety Code, the sheriff must withhold the EMS records we have marked under section 552.101 in conjunction with section 773.091(b),

⁶We note Open Records Decision No. 684 (2009) is a previous determination authorizing all governmental bodies to withhold ten categories of information, including e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

unless the deceased individual's personal representative provides the sheriff with written consent that meets the requirements of section 773.093(a). The sheriff must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code and federal law. The sheriff must withhold the photographs we have indicated under section 552.101 in conjunction with constitutional privacy and the holding in *Favish*. The sheriff must withhold the information we have marked in the remaining information under section 552.102(a) of the Government Code. The sheriff must generally withhold the personal information of the officers we have marked, under section 552.117(a)(2) of the Government Code. However, if the named officer is no longer a licensed peace officer, his personal information may not be withheld under section 552.117(a)(2). If the named officer is no longer a licensed peace officer and made a timely election under section 552.024 of the Government Code, the sheriff must withhold his personal information, which we have marked, under section 552.117(a)(1). Likewise, if the nurse whose personal information is at issue made a timely election under section 552.024, the sheriff must withhold her personal information, which we have marked, under section 552.117(a)(1). The sheriff must withhold the motor vehicle record information we have marked in the remaining information under section 552.130 of the Government Code. The sheriff must withhold the e-mail address we have marked under section 552.137 of the Government Code, unless the owner consents to disclosure. The sheriff must release the remaining information.

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_or1.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/agn

Ref: ID# 436369

Enc. Submitted documents

c: Requestor
(w/o enclosures)