



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

January 18, 2012

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OR2012-00871

Dear Ms. Towe 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# 442615.

The Texas Department of Criminal Justice (the "department") received a request for the final investigation report pertaining to the requestor's son. 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 sets of responsive information that each seeks to withhold from disclosure. The OGC states it will provide some of its responsive information to the requestor, and the OIG states it will provide some of its responsive information to the requestor with social security numbers redacted pursuant to the previous determination issued to the department in Open Records Letter No. 2005-01067 (2005) and pursuant to

section 552.147 of the Government Code.<sup>1</sup> The OGC claims the information it has submitted is excepted from disclosure under sections 552.101, 552.108, and 552.134 of the Government Code, while the OIG claims the information it has submitted is excepted from disclosure under sections 552.101, 552.102, 552.108, and 552.134 of the Government Code. We have considered the submitted arguments 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. The OGC and the OIG both claim portions of their submitted information are confidential under section 552.101 in conjunction with the Medical Practice Act (“MPA”), subtitle B of title 3 of the Occupations Code, which governs the public availability of medical records. Section 159.002 of the MPA provides in pertinent 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. 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

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<sup>1</sup>Open 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). 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 under the Act. Gov’t Code § 552.147(b).

(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.

We note the requestor is the mother of the individual whose information is at issue. 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 note in governing access to a specific subset of information, the MPA prevails over the more general provisions of the Act. *See* ORD 598. Both the OGC's inmate records and the OIG's investigation records include medical records protected by the MPA. We have marked these records. Accordingly, the marked medical records may only be released in accordance with the MPA.<sup>2</sup> *See id.* However, the remaining information at issue does not consist of medical records for purposes of the MPA and may not be withheld on that basis under section 552.101.

Section 552.101 of the Government Code also encompasses chapter 611 of the Health and Safety Code, which provides for the confidentiality of records created or maintained by a mental health professional. Section 611.002(a) states “[c]ommunications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.” Health & Safety Code § 611.002(a). Section 611.001 defines a “professional” as (1) a person authorized to practice medicine, (2) a person licensed or certified by the state to diagnose, evaluate or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. *Id.* § 611.001(b). Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals. *See* ORD 565. A portion of the remaining information constitutes mental health records of the deceased inmate. We note a statutory right of access overcomes general exceptions to disclosure under the Act. *See* Open Records Decision Nos. 613 at 4 (1993) (exceptions in Act cannot impinge on statutory right of access to information), 451 (1986) (specific statutory right of access provisions overcome general exceptions to disclosure under the Act). Therefore, the department may only release these mental health records, which we have marked, in accordance with sections 611.004 and 611.0045. *See* Health & Safety Code § 611.004(a)(5) (professional may disclose confidential information to patient's personal representative if patient is deceased).

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

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

(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.

(c) Any person who receives information from confidential communications or records as described by this chapter, other than a person listed in Section 773.092 who is acting on the survivor's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was obtained.

*Id.* § 773.091(b)-(c). Section 773.091 further provides that

[t]he 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.

*Id.* § 773.091(g). The EMS records we have marked are confidential under section 773.091. We note these records may be disclosed to “any person who bears a written consent of the patient or other persons authorized to act on the patient’s behalf for the release of confidential information.” *Id.* §§ 773.092(e)(4), .093. Among the individuals authorized to act on the patient’s behalf in providing written consent is a “personal representative” if the patient is deceased. *Id.* Section 773.093 of the Health and Safety Code provides that a consent for release of EMS records must specify (1) the information or records to be covered by the release; (2) the reasons or purpose for the release; and (3) the person to whom the information is to be released. We note a specific statutory right of access provision prevails over general exceptions to disclosure under the Act. *See* ORD 451 at 4 (specific statutory right of access provisions overcome general exceptions to disclosure under statutory predecessor to Act). Thus, if the department receives the required consent, the marked EMS records must be released in their entirety pursuant to sections 773.092 and 773.093 of the Health and Safety Code. If the department does not receive the required consent for release, then except for any information subject to section 773.091(g), which is not confidential, the marked EMS records must be withheld under section 552.101 of the Government Code in conjunction with section 773.091 of the Health and Safety Code.

The OIG seeks to withhold a portion of the information it has submitted as Exhibit B under section 552.102(a) of the Government Code. Section 552.102(a) excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” 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). The OIG has marked correctional officers’ dates of birth in Exhibit B.

Upon review, we agree the OIG must withhold the correctional officers' dates of birth it has marked in Exhibit B under section 552.102(a) of the Government Code.

Section 552.108(b)(1) of the Government Code 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 . . . release of the internal record or notation would interfere with law enforcement or prosecution[.]” Gov’t Code § 552.108(b)(1); *see City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App. — Austin 2003, no pet.) (Gov’t Code § 552.108(b)(1) protects information that, if released, would permit private citizens to anticipate weaknesses in police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate state laws). Generally, a governmental body claiming section 552.108(b)(1) must reasonably explain how and why the release of the requested information would interfere with law enforcement and crime prevention. *See* Gov’t Code §§ 552.108(b)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). This office has on numerous occasions concluded that section 552.108 excepts from public disclosure information relating to the security or operation of a law enforcement agency. *See, e.g.,* Open Records Decision Nos. 531 (1989) (holding that predecessor to section 552.108 excepts detailed guidelines regarding police department’s use of force policy), 508 (1988) (holding that release of dates of prison transfer could impair security), 413 (1984) (holding that predecessor to section 552.108 excepts sketch showing security measures for execution). The OGC informs us that release of some of the remaining information at issue would reveal security threat group information and that release of the information at issue could lead to violence against correctional officers or inmates. Based on these arguments and our review, we conclude that release of the information the OGC has marked would interfere with law enforcement and crime prevention. Therefore, that information may be withheld under section 552.108(b)(1) of the Government Code.

The OGC and the OIG claim some of the remaining information is 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:

Notwithstanding 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 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). We find the information the OGC has marked and OIG's remaining information at issue pertains to the deceased inmate; therefore, we conclude section 552.134(a) is generally applicable to this information. We note, however, some of the information at issue pertains to the named inmate's death in custody. Therefore, the OGC and OIG must release basic information about the inmate's death pursuant to section 552.029(8). 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 OIG states it has released basic information about the inmate's death at issue. Therefore, the OIG must withhold its remaining investigation records pursuant to section 552.134 of the Government Code. Additionally, the OGC must release basic information about the inmate's death at issue and withhold the remainder of the information it has marked pursuant to section 552.134 of the Government Code.<sup>3</sup>

Next, the OGC claims the remaining information it has marked is protected by the doctrine of constitutional privacy. The constitutional right to privacy is also encompassed by section 552.101 of the Government Code. 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 Fado 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.*

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<sup>3</sup>As our ruling under section 552.134 of the Government Code is dispositive, we do not address the OGC's or OIG's remaining arguments against disclosure of this information, 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); *Houston Chronicle Publ'g Co. v. City of Houston*, 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).

*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.* (list of inmate visitors protected by constitutional privacy of both inmate and visitors). We note some of the submitted visitor information lists the requestor as an inmate’s visitor. The requestor has a special right of access to her private information under section 552.023 of the Government Code.<sup>4</sup> Additionally, although the inmate at issue would ordinarily also have a privacy interest in his own visitor information, 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 visitor may not be withheld on the basis of the inmate’s right to privacy.<sup>5</sup> Therefore, the requestor’s visitor information is not confidential under section 552.101 in conjunction with constitutional privacy and must be released. However, the department must withhold the information we have marked, which does not pertain to the requestor, under section 552.101 of the Government Code in conjunction with the constitutional right to privacy. However, we find that the OGC has not demonstrated that the remaining information at issue falls within the constitutional zones of privacy or otherwise implicates an individual’s constitutional privacy interests. Thus, the department may not withhold the remaining information at issue under section 552.101 of the Government Code in conjunction with constitutional privacy.

In summary, the marked medical records in the OGC’s and OIG’s information may be released only in accordance with the MPA. The marked mental health records in the OGC’s and OIG’s remaining information may be released only in accordance with sections 611.004 and 611.0045 of the Health and Safety Code. The department must withhold the marked EMS records under section 552.101 of the Government Code in conjunction with section 773.091 of the Health and Safety Code, except as specified by section 773.091(g), unless the department receives the required written consent for release under

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<sup>4</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>5</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).

sections 773.092 and 773.093. The OIG must withhold the correctional officers' dates of birth it has marked in Exhibit B under section 552.102(a) of the Government Code, and release the remaining information in Exhibit B. The OGC must withhold the information it has marked under section 552.108(b)(1) of the Government Code. The OIG must withhold its remaining investigation records pursuant to section 552.134 of the Government Code. With the exception of basic information, the OGC must withhold the inmate records it has marked under section 552.134 of the Government Code. The department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with the constitutional right to privacy. 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.

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,



Nneka Kanu  
Assistant Attorney General  
Open Records Division

NK/em

Ref: ID# 442615

Enc. Submitted documents

cc: Requestor  
(w/o enclosures)