



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 7, 2012

Ms. Judi S. Rawls
Police Legal Counsel
Beaumont Police Department
P.O. Box 3827
Beaumont, Texas 77704-3827

OR2012-08757

Dear Ms. Rawls:

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# 454385.

The Beaumont Fire Department (the "department") received a request for information related to a vehicle fire at a specified location on a particular date. You state some responsive information has been or will be made available to the requestor. You claim some of the submitted information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information made confidential by statute, such as the Medical Practice Act ("MPA"), subtitle B of title 3 of the Occupations Code, which governs release of medical records. *See* Occ. Code §§ 151.001-165.160. Section 159.002 of the MPA provides in part:

- (a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.
- (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(a)-(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). We have further found when a file is created as a result of a hospital stay, all the documents in the file referring 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).

You claim the records submitted in Exhibit B-3 contain information protected under the MPA. Upon review, we find the department failed to demonstrate the records in Exhibit B-3 are medical records or information obtained from medical records that are subject to the MPA. Thus, the department may not withhold any of the information in Exhibit B under the MPA. As you raise no further exceptions to disclosure for these records, they must be released to the requestor.

You also raise section 552.101 in conjunction with article 49.25 of the Code of Criminal Procedure. Section 11 of article 49.25 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. We understand neither of the statutory exceptions to confidentiality is applicable in this instance. Therefore, we agree the department must withhold the submitted autopsy photographs, numbers 289 through 298, under

section 552.101 of the Government Code pursuant to section 11 of article 49.25 of the Code of Criminal Procedure. The remaining photographs are not photographs of a body taken during an autopsy; thus, article 49.25 is not applicable to these photographs, and they may not be withheld under section 552.101 on that basis.

You claim the information in Exhibit B-2 is excepted from public disclosure under section 552.101 of the Government Code in conjunction with section 2702 of title 18 of the United States Code. The Electronic Communications Privacy Act (the "ECPA") concerns access to stored wire and electronic communications and transactional records. 18 U.S.C. §§ 2701-2712. Section 2702 of the ECPA relates to the voluntary disclosure of customer communications or records by certain electronic service providers. *Id.* § 2702. Section 2702(a) provides as follows:

(a) Prohibitions.—Except as provided in subsection (b) or (c)—

(1) a person or entity providing an electronic communication service to the public shall not knowingly divulge to any person or entity the contents of a communication while in electronic storage by that service; and

(2) a person or entity providing remote computing service to the public shall not knowingly divulge to any person or entity the contents of any communication which is carried or maintained on that service—

(A) on behalf of, and received by means of electronic transmission from (or created by means of computer processing of communications received by means of electronic transmission from), a subscriber or customer of such service;

(B) solely for the purpose of providing storage or computer processing services to such subscriber or customer, if the provider is not authorized to access the contents of any such communications for purposes of providing any services other than storage or computer processing; and

(3) a provider of remote computing service or electronic communication service to the public shall not knowingly divulge a record or other information pertaining to a subscriber to or customer of such service (not including the contents of communications covered by paragraph (1) or (2)) to any governmental entity.

Id. § 2702(a). Subsections 2702(a)(1) and 2702(a)(2) pertain to prohibitions on the release of the contents of electronic communications. *See id.* § 2702(a)(1), (2). The records at issue do not consist of the contents of electronic communications. Thus, subsections 2702(a)(1) and 2702(a)(2) do not apply to the information at issue.¹ Section 2702(a)(3) provides that a provider of remote computing service or electronic communication service to the public shall not knowingly divulge a record or other information pertaining to a subscriber to or customer of such service to any governmental entity. *Id.* § 2702(a)(3). The information at issue consists of records pertaining to a customer of AT&T, which we understand is a provider of electronic communication service to the public. *See id.* § 2510(15) (defining “electronic communication service”). Section 2702(c) enumerates specific exceptions to the prohibitions on release of customer records by a provider described in subsection (a) under certain circumstances. *See id.* § 2702(c). You explain the cellular telephone customer records in Exhibit B-2 were obtained by the department from AT&T pursuant to subsection 2702(c)(4). Subsection 2702(c)(4) provides that a provider described in subsection (a) may divulge customer records “to a governmental entity, if the provider, in good faith, believes that an emergency involving danger of death or serious physical injury to any person requires disclosure without delay of information relating to the emergency[.]”² *Id.* § 2702(c)(4).

You seek to withhold the records at issue under section 552.101 of the Government Code in conjunction with section 2702. However, the prohibition on the release of customer records under subsection 2702(a)(3) only applies to a release “to any governmental entity” by “a provider of remote computing service or electronic communication service to the public[.]” *See id.* § 2702(a)(3); *see also id.* §§ 2510(15) (defining “electronic communication service”), 2711(2) (defining “remote computing service”). First, the requestor is not a governmental entity. Second, in this situation, the department is not a provider of remote computing service or electronic communication service. *See Quon v. Arch Wireless Operating Co.*, 445 F. Supp. 2d 1116, 1128-29 (C. D. CA 2006) (finding governmental defendants did not fall within prohibition of section 2702(a) because they did not provide any type of electronic service to public), *aff’d in part, rev’d in part on other grounds*, 529 F.3d 892 (9th Cir. 2008), *rev’d and remanded sub nom. City of Ontario, Cal. v. Quon*, 130 S.Ct. 2619 (2010); *Dyer v. Northwest Airlines Corp.*, 334 F. Supp. 2d 1196, 1199 (D. N.D. 2004) (holding because airline did not sell access to internet it was not “electronic communication service provider”; therefore, ECPA did not prohibit it from releasing customer records to government pursuant to subsection 2702(a)(3)). Moreover, although you argue the statute does not authorize the re-release of customer records a governmental entity receives under subsection 2702(c)(4), section 2702 does not make confidential or prohibit

¹Subsection 2702(b) concerns exceptions to the prohibition on release of the content of communications and is therefore not relevant to your claim.

²You also point to subsection 2702(b)(8); however, that provision applies to the disclosure of the contents of an electronic communication. As noted above, the records at issue do not consist of the contents of electronic communications.

the release of customer records received by a governmental entity pursuant to subsection 2702(c)(4). *See* 18 U.S.C. § 2702. Thus, the department may not withhold any of the records in Exhibit B-2 under section 552.101 of the Government Code on the basis of section 2702. *See* Open Records Decision Nos. 658 at 4 (1998) (statutory confidentiality provision must be express, and confidentiality requirement will not be implied from statutory structure), 478 at 2 (1987) (as general rule, statutory confidentiality under section 552.101 requires express language making information confidential).

Section 552.101 also encompasses constitutional privacy, which consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual's autonomy within "zones of privacy," which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than under the common-law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)). However, 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 (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) ("the right of privacy lapses upon death"), H-917 (1976) ("We are . . . of the opinion that the Texas courts would follow the almost uniform rule of other jurisdictions that the right of privacy lapses upon death."); Open Records Decision No. 272 at 1 (1981) (privacy rights lapse upon death). Nevertheless, 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).

Thus, because the remaining submitted information relates to a deceased individual, it may not be withheld from disclosure based on the decedent's privacy interests. However, you inform us you notified the deceased individual's family of the request for information and of the family's right to assert a privacy interest in the submitted information. You state members of the deceased individual's family assert a privacy interest in the submitted information and object to its release. In addition, an attorney who represents some of the deceased individual's family members has informed this office that the deceased individual's family members object to the release of the information at issue. Upon review, we find the family's privacy interest in some of the remaining information outweighs the public's interest in the disclosure of this information. Therefore, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with constitutional privacy and the holding in *Favish*. However, we find the family has not demonstrated how any of the remaining information falls within the zones of privacy or otherwise implicate an individual's privacy interests for purposes of constitutional privacy.

Thus, none of the remaining information may be withheld from disclosure under section 552.101 of the Government Code on the basis of constitutional privacy.

We note a portion of the information in Exhibit B-2 is subject to section 552.136 of the Government Code.³ This section provides that “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136(b), *see also id.* § 552.136(c) (defining “access device”). Thus, the department must withhold the account number we have marked in Exhibit B-2 under section 552.136 of the Government Code.

In summary, the department must withhold the submitted autopsy photographs, numbers 289 through 298, under section 552.101 of the Government Code pursuant to section 11 of article 49.25 of the Code of Criminal Procedure. The department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with constitutional privacy and the holding in *Favish*. The department also must withhold the account number we have marked in Exhibit B-2 under section 552.136 of the Government Code. The remaining submitted information must be released to the requestor.

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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/dls

³The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Ref: ID# 454385

Enc. Submitted documents

c: Requestor
(w/o enclosures)