



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 23, 2012

Mr. John C. West
General Counsel
Office of the Inspector General
Texas Department of Criminal Justice
4616 Howard Lane, Suite 250
Austin, Texas 78728

OR2012-13440

Dear 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# 463191.

The Texas Department of Criminal Justice Office of the Inspector General (the "department") received a request for information on the death of a named inmate. You state you will redact certain information subject to sections 552.117 and 552.147 of the Government Code.¹ You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.108, 552.130, and 552.134 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note the submitted information includes a custodial death report. Article 49.18(b) of the Code of Criminal Procedure provides that with the exception of any portion of the custodial death report the Office of the Attorney General ("OAG") determines

¹We note section 552.147(b) of the Government Code authorizes a governmental body to redact the social security number of a living person from public release without the necessity of requesting a decision from this office under the Act. *See* Gov't Code § 552.147(b). We also note Open Records Letter No. 2005-01067 serves as a previous determination that the present and former home addresses and telephone numbers, social security numbers, and family member information of current or former employees of the department, regardless of whether the current or former employee complies with section 552.1175 of the Government Code, are excepted from disclosure under section 552.117(a)(3) of the Government Code.

is privileged, the OAG shall make the report public. *See* Crim. Proc. Code art. 49.18(b). The format of the report was revised in May 2006 and now consists of four pages and an attached summary of how the death occurred. The OAG has determined the four-page report and summary must be released to the public but any other documents submitted with the revised report are confidential under article 49.18(b). Therefore, the department must release the custodial death report we have marked in the submitted information pursuant to article 49.18(b) of the Code of Criminal Procedure.

Next, you assert portions of the submitted information consist of shift rosters that are excepted from disclosure pursuant to a previous determination issued by this office to the department in Open Records Letter No. 2004-6370 (2004). In that ruling, this office ruled the department may withhold shift rosters for its prison units from public disclosure for security reasons under section 552.108(b)(1) of the Government Code. Therefore, the department may withhold the shift rosters we have marked under section 552.108(b)(1) pursuant to the previous determination issued in Open Records Letter No. 2004-6370. *See* Gov't Code § 552.301(a); Open Records Decision No. 673 at 7-8 (2001) (listing elements of second type of previous determination under Gov't Code § 552.301(a)).

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 the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. *See* Occ. Code §§ 151.001-168.202. 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. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). 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. Occ. Code § 159.001(3). Under this definition, a deceased person cannot be a “patient” under section 159.002 of the MPA. Thus, the MPA is applicable only to records relating to a person who was alive at the time of the diagnosis, evaluation, or treatment to which the records pertain.

Medical records must be released upon the patient’s signed, written consent, provided the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. *Id.* §§ 159.004, .005. When a patient is deceased, as is the case here, medical records pertaining to the deceased patient may only be released upon the signed consent of the deceased’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). Upon review, we have marked medical records that are confidential under the MPA. We note this office has determined that in governing access to a specific subset of information, the MPA prevails over the more general provisions in the Act. *See* ORD 598. You inform us that the department received a document from the requestor which purports to be a release; however, you state the document is “virtually unreadable and does not appear to meet the requirements of [section] 159.005.” Accordingly, the submitted medical records, of which we have marked a representative sample, must be withheld under the MPA, unless the department receives written consent for the release of this information that complies with section 159.005(a)(5) of the MPA.

Section 552.101 also encompasses section 611.002(a) of the Health and Safety Code, which provides, “[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. *See id.* § 611.001(2). Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals. *See* Open Records Decision No. 565 at 7 (1990). These sections permit disclosure of mental health records to a patient, a person authorized to act on the patient’s behalf, or a person who has the written consent of the patient. *See* Health & Safety Code §§ 611.004, .0045. Upon review, we have marked information that constitutes confidential mental health records under section 611.002 of the Health and Safety Code. Access to mental health records is governed by the provisions of sections 611.004 and 611.0045, rather than the Act. Open Records Decision Nos. 598 (1991), 451 at 4 (1986). Therefore, the submitted mental health records, of which we have marked a representative sample, must be withheld under section 552.101 of the Government Code in conjunction with section 611.002 of the Health and Safety Code unless the requestor is authorized to obtain the records under 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 encompasses common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. This office has found that personal financial information not relating to a financial transaction between an individual and a governmental body is generally intimate or embarrassing. See Open Records Decision Nos. 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history). Upon review, we find the information we have marked is highly intimate or embarrassing and of no legitimate public concern. Accordingly, the department must withhold the information we have marked under section 552.101 in conjunction with common-law privacy.

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." Gov't Code § 552.102(a). The Texas Supreme Court 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.*, 354 S.W.3d 336 (Tex. Dec. 3, 2010). Having carefully reviewed the information at issue, we have marked the information that must be withheld pursuant to 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 at 327 (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). The statutory predecessor to section 552.108(b)(1) protected information that would reveal law enforcement techniques. See, e.g., Open Records Decision Nos. 531 (1989) (detailed use of force guidelines), 456 (1987) (information regarding location of off-duty police officers), 413 (1984) (sketch showing security measures to be used at next execution). The statutory predecessor to section 552.108(b)(1) was not applicable to generally known policies and procedures. See e.g. Open Records Decision Nos. 531 at 2-3 (Penal Code provisions, common-law rules, and constitutional limitations on use of force not protected), 252 at 3 (1980) (governmental body failed to indicate why investigative procedures and techniques requested were any different from those commonly known).

The department states the submitted records contain information that, if released would undermine the security of correctional facilities and jeopardize the safety of inmates and department staff members. The department contends the information in question could be used in the planning and execution of a crime or in facilitating an escape. We have marked information the department may withhold under section 552.108(b)(1). However, we find the department has not demonstrated release of any of the remaining information at issue would interfere with law enforcement or crime prevention. We therefore conclude the department may not withhold any of the remaining information at issue under section 552.108(b)(1) of the Government Code.

The department raises section 552.108(b)(2) of the Government Code. 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). However, the department provides no arguments explaining how the information at issue relates to a criminal investigation that concluded in a result other than conviction or deferred adjudication. We therefore conclude the department may not withhold any of the submitted information under section 552.108(b)(2) of the Government Code.

Section 552.134 of the Government Code provides, in relevant part:

(a) Except as provided by Subsection (b) or by Section 552.029, information obtained or maintained by the [department] is excepted from the requirements of Section 552.021 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 the following:

Notwithstanding [s]ection . . . 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:

(1) the inmate’s name, identification number, age, birthplace, department photograph, physical description, or general state of health or the nature of an injury to or critical illness suffered by the inmate; [or]

...

(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(1), (8). A portion of the remaining information consists of administrative and employee training information, which does not reference a department inmate. As such, this information, which we have marked for release, is not “about an inmate” for the purposes of section 552.134, and may not be withheld on that basis. Upon review, we conclude section 552.134(a) is generally applicable to the remaining information. In this instance, however, the information at issue concerns an inmate’s death in custody, as well as injuries suffered by inmates, alleged crimes involving inmates, and incidents involving the use of force. Therefore, the department must release basic information about the inmate’s death, the alleged crimes, and incidents involving the use of force, and information concerning the nature of the inmates’ injuries pursuant to section 552.029. The basic information that must be released includes the time and place of the incident, the names of inmates and of department employees who were involved, a brief narrative of the incident, a brief description of any injuries sustained by anyone involved, and information regarding any criminal charges or disciplinary actions that were filed as a result of the incident. Accordingly, except for information that must be released under section 552.029 of the Government Code and the information we have marked for release, the department must withhold the remaining information under section 552.134 of the Government Code.²

In summary, the department must release the custodial death report we have marked pursuant to article 49.18(b) of the Code of Criminal Procedure. The department may withhold the shift rosters we have marked under section 552.108(b)(1) pursuant to the previous determination issued in Open Records Letter No. 2004-6370. The medical records, of which we have marked a representative sample, may only be released in accordance with the MPA. The mental health records, of which we have marked a representative sample, must be withheld under section 552.101 of the Government Code in conjunction with section 611.002 of the Health and Safety Code unless the requestor is authorized to obtain the records under sections 611.004 and 611.0045. The department must withhold the information we have marked under section 552.101 in conjunction with common-law privacy, and the information we have marked under section 552.102(a). The department may withhold the information we have marked under section 552.108(b)(1). With the exception of the information that must be released under section 552.029 of the Government Code, and the information we have marked for release, the department must withhold the remaining information under section 552.134 of the Government Code.

²As our ruling is dispositive, we need not address the department’s remaining arguments against disclosure of this 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_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,



Kristi L. Wilkins
Assistant Attorney General
Open Records Division

KLW/ag

Ref: ID# 463191

Enc. Submitted documents

c: Requestor
(w/o enclosures)