



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 28, 2012

Ms. Holly C. Lytle
Assistant County Attorney
El Paso County
500 East San Antonio
El Paso, Texas 79901

OR2012-15500

Dear Ms. Lytle:

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# 467820.

The El Paso County Attorney's Office and the El Paso County Jail (collectively, the "county") received a request for all jail records and videotapes pertaining to a named inmate. You state the El Paso County Attorney's Office does not have any records responsive to the request.¹ You claim that 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 information includes a court-filed document, which we have marked. Section 552.022(a)(17) of the Government Code provides for required public disclosure of "information that is also contained in a public court record," unless the information is made confidential under the Act or other law. Gov't Code § 552.022(a)(17). Although you claim section 552.108 of the Government Code for this information, we note section 552.108 is a discretionary exception that protects a governmental body's interests and

¹The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dism'd); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

may be waived. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 177 at 3 (1977) (statutory predecessor to section 552.108 subject to waiver). As such, section 552.108 does not make information confidential for purposes of section 552.022(a)(17). Thus, the county may not withhold the court-filed document we have marked under section 552.108 of the Government Code. As the county raises no further exceptions for this information, it must be released.

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. Section 552.101 encompasses 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].” Gov’t Code § 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 remaining information contains the fingerprints of the deceased inmate at issue, which we have marked. In this instance, as an attorney representing the family of the deceased inmate, the requestor has a right of access to the fingerprints at issue. *See id.* § 560.002(1). Although you seek to withhold the fingerprints under section 552.108 of the Government Code, the exceptions to disclosure found in the Act are generally not applicable to information that other statutes make public. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Thus, the marked fingerprints must be released to the requestor pursuant to section 560.002(1)(A). *See* Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning himself).

Section 552.101 of the Government Code also encompasses the Medical Practice Act (“MPA”), subtitle B of title 3 of the Occupations Code, which governs release of medical records. *See* Occ. Code §§ 151.001-168.202. Section 159.002 of the MPA provides:

(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.

Occ. Code § 159.002. Section 159.001 of the Occupations Code defines a "patient" as a person who consults with or is seen by a physician to receive medical care. Occ. Code § 159.001. Based on this definition, a deceased individual cannot be a "patient" under section 159.001. Thus, section 159.002 protects only the medical records of an individual who was alive at the time the records were created. Information that is subject to the MPA includes both medical records and information obtained from those medical records. See Occ. Code §§ 159.002, .004; ORD 598. This office has concluded that 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).

In this case, the patient at issue is deceased. Medical records pertaining to a deceased individual may be released only on the signed consent of the personal representative of the deceased. Occ. Code § 159.005(a)(5). The consent must specify (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. Occ. Code §§ 159.004, .005. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. ORD 565. Upon review, we find the information we have marked consists of medical records subject to the MPA. We note in governing access to a specific subset of information, the MPA prevails over the more general provisions of the Act. Open Records Decision Nos. 613 at 4, 451. As previously noted, the requestor is the authorized representative of the individual whose medical records are at issue. Thus, the marked medical records must be withheld under section 552.101 of the Government Code in conjunction with the MPA, unless the county receives written consent for release of those records that complies with sections 159.004 and 159.005 of the MPA.

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). Generally, a governmental body claiming section 552.108(a)(1) must reasonably explain how and why the release of the requested information would interfere with law enforcement. See *id.* §§ 552.108(a)(1), .301(e)(1)(A); see also *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You inform us that the remaining information relates to a pending criminal investigation being conducted by the El Paso County Sheriff's Office Criminal Investigation Division. Based upon your representation and our review, we conclude the release of this information would interfere with the detection, investigation, or prosecution of crime. See

Houston Chronicle Publ'g Co. v. City of Houston, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975) (court delineates law enforcement interests that are present in active cases), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Thus, the county may withhold the remaining information under section 552.108(a)(1) of the Government Code.

In summary, the county must release the court-filed document we have marked pursuant to section 552.022(a)(17) of the Government Code. The marked fingerprints must be released to the requestor pursuant to section 560.002(1)(A) of the Government Code. The marked medical records must be withheld under section 552.101 of the Government Code in conjunction with the MPA, unless the county receives written consent for release of those records that complies with sections 159.004 and 159.005 of the MPA. The county 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,



Sean Opperman
Assistant Attorney General
Open Records Division

SO/som

Ref: ID# 467820

Enc. Submitted documents

c: Requestor
(w/o enclosures)