



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 2, 2013

Ms. Rebecca E. Quinn
Assistant County Attorney
El Paso County Attorney's Office
500 East San Antonio, Room 503
El Paso, Texas 79901

OR2013-07273

Dear Ms. Quinn:

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# 485995 (CA-OP-13-087).

The El Paso County Medical Examiner's Office (the "medical examiner's office") received a request for information related to the transport and autopsies of two named decedents. You state some information has been released to the requestor. You claim 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 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. 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 [the Act], except that a photograph or x-ray of a body taken during an autopsy is excepted from required public disclosure in accordance with [the Act], 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. You contend some of the submitted photographs are confidential under section 11 of article 49.25 of the Code of Criminal Procedure. You state the photographs you have marked were taken during an autopsy. You also state the statutory exceptions to confidentiality are not applicable in this instance. Based on your representations and our review, we conclude the medical examiner's office must withhold the photographs you have marked under section 552.101 in conjunction with section 11 of article 49.25 of the Code of Criminal Procedure.

Section 552.101 of the Government Code also encompasses information protected by 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:

- (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 that is subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004. 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 when a file is created as a result of a hospital stay, all documents in the file relating to diagnosis and treatment constitute physician-patient communications. 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 id.* § 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 related to a person who was alive at the time of diagnosis, evaluation, or treatment to which the records pertain. Upon review, we find the information we have marked constitutes medical records.

Accordingly, the medical examiner's office must withhold the information we have marked under section 552.101 in conjunction with the MPA. However, we find none of the remaining information you seek to withhold constitutes medical records or information obtained from medical records. Accordingly, the medical examiner's office may not withhold any of the remaining information under section 552.101 in conjunction with the MPA.

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 relating to the "zones of privacy" pertaining to marriage, procreation, contraception, family relationships, and child rearing and education the United States Supreme Court has recognized. *See Fadjo 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" and the scope of information protected is narrower than that under the common-law doctrine of privacy. *Id.* at 5 (internal quotations omitted) (quoting *Ramie*, 765 F.2d at 492).

However, we note the right to privacy is a personal right that "terminates upon the death of the person whose privacy is invaded"; therefore, it may not be asserted solely on behalf of a deceased individual. *Moore v. Charles B. Pierce Film Enters.*, 589 S.W.2d 489, 491 (Tex. App.—Texarkana 1979, writ ref'd n.r.e.); *see also* 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). The United States Supreme Court, however, 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) (holding surviving family members have a right to personal privacy with respect to their close relative's death-scene images and such privacy interests outweigh public interest in disclosure).

The remaining photographs pertain to deceased individuals and may not be withheld from disclosure based on their privacy interests. However, you state the deceased individuals' family has asserted a privacy interest in the information at issue. Upon review, we find the family's privacy interests in the photographs of the deceased individuals outweigh the public's interest in the disclosure of this information. We therefore conclude the medical examiner's office must withhold the remaining photographs under section 552.101 in conjunction with constitutional privacy and the holding in *Favish*.

In summary, the medical examiner's office must withhold under section 552.101 of the Government Code: (1) the photographs you have marked in conjunction with section 11 of article 49.25 of the Code of Criminal Procedure; (2) the information we have marked in conjunction with the MPA; and (3) the remaining photographs in conjunction with constitutional privacy and the holding in *Favish*. The medical examiner's office 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_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,

A handwritten signature in black ink, appearing to read "Jennifer Burnett", with a long horizontal flourish extending to the right.

Jennifer Burnett
Assistant Attorney General
Open Records Division

JB/tch

Ref: ID# 485995

Enc. Submitted documents

c: Requestor
(w/o enclosures)