



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

April 20, 2020

Mr. Donnie McGilbra
Assistant County Attorney
El Paso County
500 East San Antonio, Room 503
El Paso, Texas 79901

OR2020-11390

Dear Mr. McGilbra:

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# 822996 (OME File No. 19-0611; County File Nos. OP-20-0086 and OP-20-0102).

The El Paso County Medical Examiner's Office (the "medical examiner's office") received two requests from different requestors for information pertaining to a deceased individual. You state the medical examiner's office is redacting motor vehicle record information pursuant to section 552.130(c) of the Government Code and certain information pursuant to section 552.136(c) of the Government Code.¹ You also state the medical examiner's office has released some information to the requestors. You claim the submitted information is excepted from disclosure under section 552.101 of the Government Code. Additionally, we understand the medical examiner's office has notified the deceased individual's family of the request and of their right to submit comments to this office as to why some of the submitted information should not be released. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have considered the exception you claim and reviewed the submitted information.

¹ Section 552.130(c) of the Government Code allows a governmental body to redact the information described in section 552.130(a) without the necessity of seeking a decision from the attorney general. *See* Gov't Code § 552.130(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.130(e). *See id.* § 552.130(d), (e). Section 552.136 of the Government Code permits a governmental body to withhold the information described in section 552.136(b) without the necessity of seeking a decision from this office. *See id.* § 552.136(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.136(e). *See id.* § 552.136(d), (e).

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” *Id.* § 552.101. This section encompasses information made confidential by other statutes, such as section 773.091 of the Health and Safety Code, which provides, in part:

(b) Records of the identity, evaluation, or treatment of a patient by emergency medical services [“EMS”] personnel or by a physician providing medical supervision that are created by the EMS personnel or physician or maintained by an EMS provider are confidential and privileged and may not be disclosed except as provided by this chapter.

...

(g) The 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.

Health & Safety Code § 773.091(b), (g). The information submitted as Exhibit C consists of records of the identity, evaluation, or treatment of a patient made and maintained by EMS personnel. Thus, section 773.091 is applicable to the information at issue. Accordingly, with the exception of the information subject to section 773.091(g) of the Health and Safety Code, which is not confidential under section 773.091, the medical examiner’s office must withhold Exhibit C under section 552.101 of the Government Code in conjunction with section 773.091(b) of the Health and Safety Code.²

Section 552.101 of the Government Code also encompasses information made confidential by the Medical Practice Act (“MPA”), subtitle B of title 3 of the Occupations Code, which governs release of medical records. Section 159.002 of the MPA provides, in relevant 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

² We note this ruling does not affect an individual’s right of access to EMS records from the EMS personnel who provided treatment under chapter 773 of the Health and Safety Code. *See* Health & Safety Code §§ 773.092-.093; *cf. Abbott v. Tex. State Bd. of Pharmacy*, 391 S.W.3d 253 (Tex. App.—Austin 2012, no pet.).

information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 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. 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). 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. *See* ORDs 487, 370, 343. 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.

You assert the information submitted as Exhibit D is confidential pursuant to the MPA. Upon review, we find most of the information at issue constitutes records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that were created or are maintained by a physician. Accordingly, with the exception of the information we marked for release, the medical examiner’s office must withhold Exhibit D under section 552.101 of the Government Code in conjunction with the MPA.³ However, we find the remaining information at issue does not constitute medical records subject to section 159.002 and the medical examiner’s office may not withhold it under section 552.101 of the Government Code on that basis.

Section 552.101 also encompasses information protected by section 11 of article 49.25 of the Code of Criminal Procedure, which provides:

(a) 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 may not be withheld, subject to a discretionary exception under [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

³ We note this ruling does not affect an individual’s right of access to a patient’s medical records from the physician who provided treatment under the MPA. *See* Occ. Code §§ 159.004-.006; *cf. Tex. State Bd. of Pharmacy*, 391 S.W.3d at 253 (Medical Practice Act, subtitle B of title 3 of the Occupations Code, does not provide patient general right of access to patient’s medical records from governmental body responding to request for information under Public Information Act).

(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(a). You assert some of the remaining information at issue is confidential pursuant to article 49.25 of the Code of Criminal Procedure. Upon review, however, we find the submitted photographs do not consist of photographs or x-rays of a body taken during an autopsy. Therefore, the submitted photographs are not confidential under article 49.25, and the medical examiner's office may not withhold them under section 552.101 on that basis.

Section 552.101 of the Government Code also encompasses the doctrine of constitutional privacy. Constitutional privacy 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 that 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)). We note 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, 491 (Tex. Civ. App.—Texarkana 1979, writ ref'd n.r.e.); Open Records Decision No. 272 at 1 (1981) (privacy rights lapse upon death). However, 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*, 541 U.S. 157 (2004).

As previously noted, we understand the medical examiner's office has notified the surviving family members of the deceased individual of the request for information and of their right to assert a privacy interest in the information at issue. As of the date of this letter, we have not received any correspondence from a family member of the deceased individual. Thus, we have no basis for determining the family's privacy interest in the information at issue. Therefore, none of the remaining information may be withheld under section 552.101 of the Government Code in conjunction with constitutional privacy.

In summary, with the exception of the information subject to section 773.091(g) of the Health and Safety Code, the medical examiner's office must withhold Exhibit C under section 552.101 of the Government Code in conjunction with section 773.091(b) of the Health and Safety Code. With the exception of the information we marked for release, the medical examiner's office must withhold Exhibit D under section 552.101 of the Government Code in conjunction with the MPA. 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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,

Blake Brennan
Assistant Attorney General
Open Records Division

BBX/eb

Ref: ID# 822996

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)