



May 10, 2002

Ms. Ann-Marie P. Sheely
Assistant County Attorney
Travis County
P.O. Box 1748
Austin, Texas 78767

OR2002-2499

Dear Ms. Sheely:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 161905.

The Travis County Attorney (the "county") received two requests for information, including a request for all public information regarding Virginia Glore and a request for any and all documents "regarding cause nos. 575390 and 575390 [sic], each styled *State. vs. Virginia Ruth Glore.*" You indicate that you have released some of the requested information. However, you claim that the remainder of the requested information is excepted from disclosure under sections 552.101, 552.108, 552.115, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.¹

We begin by addressing your contention that the submitted audiotapes, videotapes, and certain DNA information contained in Tab D are excepted from disclosure under section 552.108(a)(2) and (b)(2) of the Government Code. Section 552.108(a)(2) excepts from disclosure information concerning an investigation that concluded in a result other than conviction or deferred adjudication. A governmental body claiming section 552.108(a)(2) must demonstrate that the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. You indicate that the charges against Ms. Glore have been dismissed, and therefore the audiotapes, videotapes, and DNA information pertain to a case that concluded in a result other than conviction or

¹ You indicate that portions of the submitted information consist of representative samples of the requested information. We assume that the "representative sample" of records submitted to this office is truly representative of the requested records at issue. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

deferred adjudication. Based on your assertions and our review of the submitted information, we agree that the county may withhold the audiotapes, videotapes, and DNA information in Tab D it seeks to withhold under section 552.108(a)(2) of the Government Code.

Next, you contend that the information in Tab A is excepted from disclosure under section 552.108(a)(4) and (b)(3) of the Government Code. Section 552.108(a)(4) provides that information is excepted from public disclosure if it is information that is either prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation or information that reflects the mental impressions or legal reasoning of an attorney representing the state. You state that the information in Tab A consists of "attorney notes, attorney witness lists, attorneys' synopses of the case, case progress reports and legal research." Based on your assertions and our review of the information in Tab A, we agree that the information was either prepared by an attorney or reflects an attorney's mental process or legal reasoning. Therefore, the county may withhold the information in Tab A under section 552.108(a)(4).

You also contend that portions of the submitted information are excepted from disclosure under section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses the doctrine of common-law privacy. Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683. This office has found that the following types of information are intimate and embarrassing for the purpose of common-law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps), personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990), information concerning the intimate relations between individuals and their family members, *see* Open Records Decision No. 470 (1987), and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982).

You contend that portions of Tab C may be protected under common-law privacy. Among other things, you ask whether information identifying Ms. Glore as an alleged victim of

sexual assault is confidential. As noted above, the identity of a sexual assault victim is generally considered highly intimate or embarrassing for the purpose of common-law privacy. Open Records Decision No. 339 (1982); *see Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, *writ denied*) (identity of witnesses to and victims of sexual harassment was highly intimate or embarrassing information and public did not have a legitimate interest in such information). However, when an individual voluntarily discloses otherwise private facts in a public forum, the individual waives her privacy interest in that information. *See Star-Telegram, Inc. v. Walker*, 834 S.W.2d 54, 58 (Tex. 1992); *see also Indus. Found.*, 540 S.W.2d at 685. You have submitted a newspaper article in which Ms. Gore has publicly disclosed the fact that she is an alleged victim of sexual assault along with details about the assault. Based on the information you have provided, we find that Ms. Gore's identity as an alleged victim of sexual assault is not protected under common-law privacy. In addition to Ms. Gore's identity, you seek a ruling regarding whether other information in Tab C is excepted under common-law privacy. We agree that some of the other information you have marked under common-law privacy is confidential. We likewise note that the submitted information contains additional information that is confidential under common-law privacy. However, we find that some of the information you have marked either is not highly intimate or embarrassing for the purpose of common-law privacy or is of legitimate interest to the public. *See* Open Records Decision Nos. 622 at 2 (1994) (social security numbers are not protected by common-law privacy), 611 at 1 (1992) (family violence generally not considered private), 405 at 2-3 (1983) (public has interest in manner in which public employee performs his job). We have marked the information that is confidential under common-law privacy and must be withheld under section 552.101 of the Government Code.

We note that social security numbers may be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that any of the submitted social security numbers are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Public Information Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the county pursuant to any provision of law, enacted on or after October 1, 1990.

You also contend that the records in Tab B may constitute confidential criminal history record information. Federal regulations prohibit the release of criminal history record information ("CHRI") maintained in state and local CHRI systems to the general public.

See 28 C.F.R. § 20.21(c)(1) (“Use of criminal history record information disseminated to noncriminal justice agencies shall be limited to the purpose for which it was given.”), (2) (“No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself.”). Section 411.083 provides that any CHRI maintained by the Department of Public Safety (“DPS”) is confidential. Gov’t Code § 411.083(a). Similarly, CHRI obtained from the DPS pursuant to statute is also confidential and may only be disclosed in very limited instances. *Id.* § 411.084; *see also id.* § 411.087 (restrictions on disclosure of CHRI obtained from DPS also apply to CHRI obtained from other criminal justice agencies). Furthermore, where an individual’s criminal history information has been compiled by a governmental entity, the information takes on a character that implicates the individual’s right to privacy. *See United States Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989). We have marked information that constitutes confidential CHRI and, therefore, must be withheld under section 552.101.

You contend that certain counselor notes contained in Tab C are confidential under sections 44.071 and 44.074 of the Health and Safety Code. Section 44.071 provides, in relevant part:

(a) A communication between an advocate and a survivor, or a person claiming to be a survivor, that is made in the course of providing sexual assault advocacy services to the survivor is confidential and may not be disclosed except as provided by this subchapter.

(b) A record of the identity, personal history, or background information of a survivor or information concerning the victimization of a survivor that is created by or provided to an advocate or maintained by a sexual assault program is confidential and may not be disclosed except as provided by this subchapter.

(c) A person who receives information from a confidential communication or record as described by this subchapter may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was obtained.

.....

Section 44.074 provides: “Notwithstanding any other provision of this chapter, a person shall disclose a communication or record that is confidential under this chapter for use in a criminal investigation or proceeding in response to a subpoena issued in accordance with law.” An “advocate,” for the purpose of section 44.071, “means a person who provides advocacy services as an employee or volunteer of a sexual assault program.” Gov’t Code

§ 420.003. A “sexual assault program” is defined as “any local public or private nonprofit corporation, *independent of a law enforcement agency or prosecutor’s office*, that is operated as an independent program or as part of a municipal, county, or state agency and that provides the minimum services established by [chapter 420 of the Government Code].” *Id.* Here, the counselor at issue appears to have worked for Austin Police Department’s Victim Services. Therefore, we find that the confidentiality provisions of section 44.071 of the Health and Safety Code do not apply to the counselor’s notes contained in Tab C.

Next, you contend that portions of Tab C are confidential under section 58.007 of the Family Code. Juvenile law enforcement records relating to conduct that occurred on or after September 1, 1997 are confidential under section 58.007. The relevant language of section 58.007(c) reads as follows:

(c) Except as provided by Subsection (d), law enforcement records and files concerning a child and information stored, by electronic means or otherwise, concerning the child from which a record or file could be generated may not be disclosed to the public and shall be:

- (1) if maintained on paper or microfilm, kept separate from adult files and records;
- (2) if maintained electronically in the same computer system as records or files relating to adults, be accessible under controls that are separate and distinct from controls to access electronic data concerning adults; and
- (3) maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subchapter B.

Portions of the information in Tab C involve juvenile conduct that occurred after September 1, 1997. It does not appear that any of the exceptions in section 58.007 apply; therefore, the information is confidential pursuant to section 58.007(c) of the Family Code. You must withhold this information, which we have marked, under section 552.101 of the Government Code.

Tab C also contains information that is confidential under section 261.201 of the Family Code. Section 261.201(a) of the Family Code provides as follows:

(a) The following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

- (1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and
- (2) except as otherwise provided in this section, the files, reports, records, communications, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Because the documents at issue relate to an allegation of child abuse, the documents are within the scope of section 261.201 of the Family Code. You have not indicated that the county has adopted a rule that governs the release of this type of information. Therefore, we assume that no such regulation exists. Given that assumption, the documents in Tab C pertaining to the alleged child abuse, which we have marked, are confidential pursuant to section 261.201 of the Family Code. See Open Records Decision No. 440 at 2 (1986) (predecessor statute). Accordingly, the county must withhold these documents from disclosure under section 552.101 of the Government Code as information made confidential by law.

We further note that Tab C contains certain tax return information that is confidential under federal law. Section 6103(a) of title 26 of the United States Code renders tax return information confidential. The term "return information" has been interpreted by federal courts to include any information gathered by the Internal Revenue Service regarding a taxpayer's liability under title 26 of the United States Code. *Mallas v. Kolak*, 721 F. Supp. 748 (M.D.N.C. 1989). Our office has specifically held that W-4 forms must be withheld in their entirety. Open Records Decision No. 600 at 9 (1992). Therefore, you must withhold the marked W-4 form under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code.

You contend that portions of Tab D are confidential under the Medical Practice Act (the "MPA"), chapter 159 of the Occupations Code. Section 159.002 of the Occupations Code 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.

Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See* Occ. Code §§ 159.002, .004; Open Records Decision No. 598 (1991). 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). We have further 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).

The medical records must be released upon the patient's signed, written consent, provided that 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. 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. Open Records Decision No. 565 at 7 (1990). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). We agree that the information you have marked as medical records in Tab D is confidential under the MPA and must be withheld under section 552.101 of the Government Code unless the records are required to be released under the MPA.

You further contend that portions of Tab D are confidential under section 411.153 of the Government Code. Section 411.153(a) provides that "[a] DNA record stored in the DNA database is confidential and is not subject to disclosure under the open records law, Chapter 552 [of the Government Code]." Gov't Code § 411.153(a). "'DNA database' means the database that contains forensic DNA records maintained by the [public safety] director." Gov't Code § 411.141(2); *see id.* § 411.001(3). You state that parts of Tab D consist of DNA records. To the extent the DNA records in Tab D that are not otherwise excepted from disclosure under section 552.108 are maintained in the public safety director's DNA database, the county must withhold the DNA records under section 552.101 in conjunction with section 411.153 of the Government Code. If, on the other hand, the DNA records in Tab D are not maintained in the public safety director's DNA database, the records are not confidential under section 411.153 of the Government Code.

We note that Tab D also contains emergency medical service records. Section 773.091 of the Health and Safety Code provides:

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

This confidentiality "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." *Id.* § 773.091(g). It does not appear that any of the exceptions to confidentiality set forth in section 773.092 of the Health and Safety Code apply in this instance. Accordingly, the county must withhold the EMS records contained in Tab D under section 552.101 of the Government Code, except for information required to be released under section 773.091(g).

You contend that the information in Tab E is confidential under section 231.108 of the Family Code. Section 231.108 provides, in relevant part:

(a) Except as provided by Subsection (c), all files and records of services provided under this chapter, including information concerning a custodial parent, noncustodial parent, child, and an alleged or presumed father, are confidential.

(b) Except as provided by Subsection (c), all communications made by a recipient of financial assistance under Chapter 31, Human Resources Code, or an applicant for or recipient of services under this chapter are privileged.

(c) The Title IV-D agency may use or release information from the files and records, including information that results from a communication made by a recipient of financial assistance under Chapter 31, Human Resources Code, or by an applicant for or recipient of services under this chapter, for purposes directly connected with the administration of the child support, paternity determination, parent locator, or aid to families with dependent children programs. The Title IV-D agency may release information from the files and records to a consumer reporting agency in accordance with Section 231.114.

You argue that the information in Tab E is the type of information generally protected under section 231.108. We note, however, that section 231.108 applies only to information in the hands of the Child Support Division of the Office of the Attorney General. Furthermore, the

information in Tab E is public information. *See* Fam. Code § 231.108(c); Gov't Code § 552.022(a)(17). Therefore, we find that the information in Tab E is not confidential under section 231.108.

Nevertheless, we note that Tab E contains social security numbers that may be excepted from disclosure under section 552.101 of the Government Code in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), as discussed above. *See* Open Records Decision No. 622 (1994). Prior to releasing any social security number information from Tab E, you should ensure that no such information was obtained or is maintained by the county pursuant to any provision of law, enacted on or after October 1, 1990.

Next, you assert that Tab F is confidential under section 550.065 of the Transportation Code. You claim that accident report contained in the file is excepted from disclosure by section 550.065(b) of the Transportation Code. Section 550.065(b) states that except as provided by subsection (c), accident reports made under chapter 550 of the Transportation Code or section 601.004 of the Transportation Code are privileged and confidential. The Seventy-seventh Legislature amended section 550.065(c)(4) to provide for release of accident reports to a person who provides two of the following three pieces of information: (1) date of the accident; (2) name of any person involved in the accident; and (3) specific location of the accident. *See* Act of May 22, 2001, 77th Leg., R.S., H.B. 1544, § 5 (to be codified at Transp. Code § 550.065(c)(4)). Under this provision, the Department of Public Safety or another governmental entity is required to release a copy of an accident report to a person who provides the agency with two or more pieces of information specified by the statute. *Id.* The report at issue does not appear to have been made pursuant to section 601.004 of the Transportation Code. Furthermore, we are unable to determine, from the face of the accident report at issue, whether the report was made pursuant to chapter 550 of the Transportation Code. *See* Transp. Code §§ 550.062-.064. To the extent the report was made pursuant to chapter 550, the county must withhold the report under section 550.065(b) because neither requestor provided the county with two of the three pieces of information. To the extent the report was not made pursuant to chapter 550, the report is not confidential under section 550.065(b).

You argue that portions of Tab G are excepted from disclosure under section 552.130 of the Government Code. Section 552.130 provides in relevant part:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

- (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]

(2) a motor vehicle title or registration issued by an agency of this state[.]

We agree that the Texas driver's license number information, vehicle identification numbers, and license plate numbers contained in Tab G are excepted from disclosure under section 552.130. We also note that Tabs C and F contain Texas driver's license number information, vehicle identification numbers, and license plate numbers that must be withheld under section 552.130. We have marked the information in Tabs C, F, and G that must be withheld under section 552.130.

Finally, you contend that Tab H is excepted from disclosure under section 552.115 of the Government Code. Birth or death records maintained by the bureau of vital statistics of the Texas Department of Health or a local registration official are excepted from required public disclosure under section 552.115. Since the birth certificate at issue is held by the county attorney and not the bureau of vital statistics or local registration officials, section 552.115 is inapplicable. Thus, you must release Tab H.

In conclusion, the county may withhold the submitted audiotapes, videotapes, and certain DNA information in Tab D under section 552.108(a)(2) of the Government Code. The county may also withhold the information in Tab A under section 552.108(a)(4). Portions of the submitted information must be withheld under section 552.101 of the Government Code and common-law privacy. However, social security numbers may only be withheld if they were obtained or maintained pursuant to a provision of law enacted on or after October 1, 1990. Most of the information in Tab B must be withheld under section 552.101 as confidential criminal history information. Furthermore, the county must withhold parts of Tab C under section 552.101 of the Government Code and section 58.007 of the Family Code. The county must also withhold a portion of Tab C under section 552.101 of the Government Code and section 261.201 of the Family Code. The county must withhold the W-4 form contained in Tab C under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code. Portions of Tab D consist of medical records and must be withheld according to the MPA. Similarly, portions of Tab D consist of EMS records and must be withheld according to section 773.091 of the Health and Safety Code. The county must withhold the DNA records in Tab D under section 552.101 and section 411.153 of the Government Code if the DNA records are maintained in the public safety director's DNA database. The accident report in Tab F must be withheld under section 550.065 of the Transportation Code only if the report was made pursuant to chapter 550 of the Transportation Code. Finally, the county must withhold the Texas driver's license information, license plate numbers, and vehicle identification numbers contained in Tabs C, F, and G under section 552.130 of the Government Code. The county must release the remainder of the submitted information.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Nathan E. Bowden
Assistant Attorney General
Open Records Division

NEB/sdk

Ref: ID# 161905

Enc. Submitted documents

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