OFFICE OF THE ATTORNEY GENERAL · STATE OF TEXAS
JOHN CORNYN

November 13, 2002

Mr. Randy Traylor
Captain - West Division
Williamson County Sheriff
508 South Rock Street
Georgetown, Texas 78626

OR2002-6478

Dear Mr. Traylor:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 172064.

The Williamson County Sheriff's Department (the "department") received two requests for information related to a former deputy, including any complaints filed against him, his personnel file, and information regarding two specified incidents. You claim that the requested information is excepted from disclosure under chapter 552 of the Government Code. We have reviewed the submitted information.

As an initial matter, we note that section 552.301 of the Government Code prescribes procedures that a governmental body must follow when it believes that requested information may be withheld from the public. Section 552.301(b) provides that "[t]he governmental body must ask for the attorney general's decision and state the exceptions that apply . . . not later than the 10th business day after the date of receiving the written request [for information]."

Further, pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate

which exceptions apply to which parts of the documents. You did not submit correspondence to this office stating which exceptions apply to except the requested information, or comments stating reasons why exceptions to disclosure apply to the submitted information. Thus, you have failed to comply with the procedural requirements of section 552.301(e).

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the requirements of section 552.301 results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). Compelling reasons exist when the information is made confidential by law or affects the interest of a third party. Open Records Decision No. 630 at 3 (1994). The application of sections 552.101, 552.117, 552.1175, 552.130, and 552.136 provide such compelling reasons. The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

We next note that certain information has been redacted from the submitted documents. You do not assert, nor has our review of our records indicated, that you have been granted a previous determination to withhold any such information without seeking a ruling from this office. Because we can discern the specific categories of information that have been redacted, being deprived of this information does not inhibit our ability to make a ruling *in this instance*. Nevertheless, be advised that a failure to provide this office with requested information generally deprives us of the ability to determine whether information may be withheld and leaves this office with no alternative other than ordering that the redacted information be released. *See* Gov't Code § 552.301(e)(1)(D) (governmental body must provide this office with copy of "specific information requested").

Section 552.101 of the Government Code protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." We note that a portion of the submitted information constitutes a medical record, access to which is governed by the Medical Practice Act (the "MPA"), chapter 159 of the Occupations Code. 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.

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).

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 have marked the submitted document that constitutes a medical record that is subject to the MPA. This information may be released only in accordance with the MPA.

Further, included among the submitted documents are accident report forms that appear to have been completed pursuant to chapter 550 of the Transportation Code. *See* Transp. Code § 550.064 (officer's accident report). Section 550.065(b) of the Transportation Code states that except as provided by subsection (c), accident reports are privileged and confidential. Section 550.065(c)(4) provides 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. 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.* In the situation at hand, neither requestor has provided the department with two of the three pieces of information relating to these reports. Thus, you must withhold the accident reports we have marked under section 552.101 of the Government Code in conjunction with section 550.065(b).

Additionally, the submitted documents contain information that is 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.

Case report numbers C02-08-2260 J and 02-08-00208 include information involving juvenile conduct that occurred after September 1, 1997. It does not appear that any of the exceptions in section 58.007 apply; therefore, this information is confidential pursuant to section 58.007(c) of the Family Code. You must withhold this information from disclosure in its entirety under section 552.101 of the Government Code.

Furthermore, we note that one of the purposes of section 58.007 confidentiality is to protect the privacy interests of juveniles. Section 552.101 also encompasses the common-law right of privacy. For information to be protected from public disclosure by the common-law right of privacy under section 552.101, the information must meet the criteria set out in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). In *Industrial Foundation,* the Texas Supreme Court stated that information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. 540 S.W.2d at 685. Thus, we have marked additional information that the department must withhold to protect juveniles' privacy interests in accordance with section 552.101 and the common-law right of privacy. *See* Open Records Decision No. 394 at 4 (1994); *cf.* Family Code § 58.007.[1]

We note that such confidential information is contained in one of the submitted audiotapes. You must redact the information identifying juveniles within the audiotape we have marked. However, to the extent that the department does not maintain the technological capability to

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[1] In this respect, we note that section 58.007 does not make traffic offenses confidential. *See* Fam. Code §§ 51.02(16) (definition of traffic offense), 51.03(a) (delinquent conduct does not include traffic offense), 51.03(b) (conduct indicating need for supervision does not include traffic offense), 58.007(b) (section applies to records and files relating to child who is party to proceeding under Title 3 of Family Code).

redact the information at issue contained in this audiotape, we conclude that you must withhold the audiotape from disclosure in its entirety.

The submitted documents contain additional information that may be confidential under section 552.117. Section 552.117(2) excepts from public disclosure a peace officer's home address, home telephone number, social security number, and information indicating whether the peace officer has family members, regardless of whether the peace officer made an election under section 552.024 of the Government Code. Section 552.117(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. However, we note that the individual who is the subject of the instant request has been terminated by the department. If the terminated deputy remains a licensed police officer as defined by article 2.12 of the Code of Criminal Procedure or a security officer commissioned under section 51.212 of the Education Code, his personal information must not be released under section 552.117(2).

If the terminated deputy is no longer a licensed officer, his personal information may nevertheless be excepted under section 552.117(1). Section 552.117(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the department may not withhold the terminated officer's personal information under section 552.117 if he is no longer a licensed peace officer and he did not make a request for confidentiality under section 552.024 of the Government Code prior to the date on which the request for this information was received. We have marked the information that may be confidential under section 552.117. Section 552.117 likewise applies to except the home telephone number of a department lieutenant contained in the information if he is either currently a licensed peace officer, or made a timely election under section 552.024.

Otherwise, personal information regarding the former deputy may still be excepted from disclosure under section 552.1175 of the Government Code. Section 552.1175 provides in pertinent part:

> (a) This section applies only to:
>
> . . .
>
> (2) peace officers as defined by Article 2.12, Code of Criminal Procedure;
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> . . .

> (b) Information that relates to the home address, home telephone number, or social security number of an individual to whom this section applies, or that reveals whether the individual has family members is confidential and may not be disclosed to the public under this chapter if the individual to whom the information relates:
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> > (1)chooses to restrict public access to the information; and
> >
> > (2) notifies the governmental body of the individual's choice on a form provided by the governmental body, accompanied by evidence of the individual's status.

Gov't Code § 552.1175(a), (b). Thus, if the former deputy is not currently a peace officer and did not make a request for confidentiality under section 552.024 of the Government Code for this information prior to the date on which the present request was received by the department, the department must still withhold from disclosure the information that we have marked regarding this individual pursuant to section 552.1175 of the Government Code, if he otherwise made a proper section 552.1175 election with the department at a time when he was a peace officer. Otherwise, we conclude that the department may not withhold any portion of the marked information pursuant to section 552.1175 of the Government Code.

We further note that the pager and "alternate" telephone numbers of the former deputy are excepted under section 552.117 or section 552.1175 only to the extent the pager and telephone were purchased and privately owned by the former deputy and the deputy is currently a peace officer, made a timely election under section 552.024, or made a proper section 552.1175 election. *See* Open Records Decision No. 506 at 5-6 (1988) (predecessor to section 552.117 does not apply to cellular phone numbers paid for by county and intended for use at *work* for county business).

In any case, with respect to social security numbers belonging to the former deputy and another individual, this information may be confidential under federal law. A social security number may be withheld in some circumstances 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 these social security numbers are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 of the Public Information Act (the "Act") on the basis of that federal provision. We caution, however, that section 552.352 of the Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security numbers, you should ensure that they were not obtained or are not maintained by the department pursuant to any provision of law enacted on or after October 1, 1990.

Further, portions of the submitted information are excepted 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:
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> > (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[.]

Accordingly, we have marked driver's license, license plate, and vehicle registration numbers, as well as a copy of a driver's license, that must be withheld under section 552.130.

The department also claims that some information is excepted from disclosure under section 552.136. Section 552.136 makes certain account numbers confidential. It provides as follows:

> Sec. 552.136. CONFIDENTIALITY OF CREDIT CARD, DEBIT CARD, CHARGE CARD, AND ACCESS DEVICE NUMBERS.
>
> (a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:
>
> > (1) obtain money, goods, services, or another thing of value; or
> >
> > (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.
>
> (b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Gov't Code § 552.136. The department must withhold the marked account numbers pursuant to section 552.136.

In summary, we have marked a medical record that may only be released in accordance with the MPA. You must withhold the accident reports we have marked under section 552.101 and section 550.065(b) of the Transportation Code. You must withhold case report numbers

C02-08-2260 J and 02-08-00208 under section 552.101 and section 58.007 of the Family Code, and the additional information we have marked under section 552.101 and common-law privacy. Information identifying juveniles contained in the audiotape we have marked must be withheld. If the department lacks the capability to redact this information, you must withhold the entire audiotape. We have marked the information that must be withheld under section 552.117 or section 552.1175 if either of those provisions is applicable. Regardless of the applicability of section 552.117 or section 552.1175, the former deputy's social security number, as well as the social security number of another individual contained in the information, may be confidential under section 552.101 and the federal Social Security Act. You must withhold the information we have marked under section 552.130, and must withhold account numbers under section 552.136. The remaining submitted information must be released.

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).

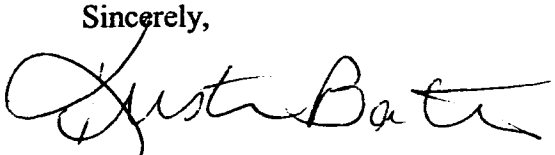
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental

body. *Id.* § 552.321(a); *Texas Department of Public 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,



Kristen Bates
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KAB/seg

Ref: ID# 172064

Enc. Submitted documents

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