



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

December 5, 2002

Ms. April M. Virnig
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Fort Worth, Texas 76107-4654

OR2002-6942

Dear Ms. Virnig:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 173170.

The Haltom City Police Department (the "department"), which you represent, received a request for information relating to internal investigations of police officers from January 1, 2002 to the date of the request, including the names of the officers, the allegations against them, the results of the investigations, and documents, letters, memoranda or reports related to the investigations. You claim that responsive information relating to 12 internal affairs investigations is excepted from disclosure under sections 552.101, 552.102, 552.108, 552.117, and 552.130 of the Government Code.¹ We have considered the exceptions you claim and have reviewed the information you submitted.

We first note that you have not complied with section 552.301 of the Government Code in requesting this decision. Section 552.301 prescribes procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(e) provides in part that "[a] governmental body that requests an attorney general decision . . . must . . . not later than the 15th business day after the date of receiving the written request [for information] . . . submit to the attorney general . . . a copy of the specific information requested, or submit representative samples of the information if a voluminous amount of information was requested[.]" Gov't Code

¹We note that you have also raised section 552.111, but have submitted no arguments in support of that exception. Thus, we do not address the applicability of section 552.111 to any of the submitted information. See Gov't Code § 552.301(e)(1)(A).

§ 552.301(e)(1)(D). Section 552.302 provides that “[i]f a governmental body does not request an attorney general decision as provided by Section 552.301 . . . the information requested in writing is presumed to be subject to required public disclosure and must be released unless there is a compelling reason to withhold the information.”

In this instance, you have not submitted any documents that relate to investigation number 02-04. Thus, with respect to such documents, you have not complied with section 552.301. Therefore, the documents that relate to investigation number 02-04 are presumed to be public and must be released under section 552.302, unless there is a compelling reason to withhold any of the information from the public. *See also Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.--Austin 1990, no writ). The presumption that information is public under section 552.302 can generally be overcome when the information is confidential by law or when third-party interests are at stake. *See Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982)*. You claim that the documents that relate to investigation number 02-04 contain confidential information. However, as you have not submitted the documents in question, we have no basis for finding that they contain confidential information. Thus, we have no choice but to order the documents that relate to investigation number 02-04 released per section 552.302. If you believe that the documents contain information that is confidential and may not lawfully be released, you must challenge the ruling in court as outlined at the conclusion of this ruling.

We also note that you did not submit the audiotapes and videotape that relate to the investigations within the fifteen business days prescribed by section 552.301(e)(1)(D). Therefore, the audiotapes and videotape are presumed to be public and must be released under section 552.302, unless there is a compelling reason to withhold any of the information that they contain. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.--Austin 1990, no writ); *Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982)*. Section 552.108 is a discretionary exception to disclosure that a governmental body may waive. *See Gov't Code § 552.007; Open Records Decision No. 177 (1977) (governmental body may waive law enforcement exception); but see Open Records Decision No. 586 at 3 (1991) (need of governmental body, other than one that failed to timely seek decision, may provide compelling reason for non-disclosure under statutory predecessor to section 552.108)*. In failing to comply with section 552.301, you have waived your claims under section 552.108 with regard to the audiotapes and videotape. However, you also raise sections 552.101, 552.102, 552.117, and 552.130. These sections can provide compelling reasons for non-disclosure under section 552.302. Therefore, we will address the applicability of sections 552.101, 552.102, 552.117, and 552.130 to the information in the audiotapes and videotape.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This exception encompasses the common-law right to privacy. Information must be withheld under section 552.101 in conjunction with common-law privacy if the information is

(1) highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) of no legitimate public interest. See *Industrial Found. v. Texas Ind. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Section 552.102(a) excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]” The test of privacy under section 552.102(a) is the same as the common-law privacy test under section 552.101 in conjunction with *Industrial Foundation*. See *Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.--Austin 1983, writ ref’d n.r.e.). Therefore, we will address your privacy claims with regard to the audiotapes and videotape under section 552.101. In this instance, the information in question relates to the official conduct of employees of the department, including law enforcement officers. The public has a legitimate interest in this information. Therefore, for the most part, the information in the audiotapes and videotape is not protected by common-law privacy under section 552.101. See also Open Records Decision Nos. 470 at 4 (1987) (public employee’s job performance does not generally constitute that individual’s private affairs), 444 at 3 (1986) (public has obvious interest in information concerning qualifications and performance of governmental employees, particularly those involved in law enforcement).

We note, however, that common-law privacy protects the specific types of information held to be intimate or embarrassing in *Industrial Foundation*. See 540 S.W.2d at 683 (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). This office has since concluded that other types of information also are private under section 552.101. See Open Records Decision Nos. 659 at 4-5 (1999) (summarizing information attorney general has determined to be private), 470 at 4 (1987) (illness from severe emotional job-related stress), 455 at 9 (1987) (prescription drugs, illnesses, operations, and physical handicaps), 343 at 1-2 (1982) (references in emergency medical records to a drug overdose, acute alcohol intoxication, obstetrical/gynecological illness, convulsions/seizures, or emotional/mental distress). The audiotape in investigation number 02-05 dated March 11, 2002 contains references to prescription medications that you must withhold under section 552.101 in conjunction with common-law privacy.

Section 552.101 also encompasses constitutional rights to privacy. Constitutional privacy protects two kinds of interests. See Open Records Decision Nos. 600 at 3-5 (1992), 478 at 4 (1987), 455 at 3-7 (1987); see also *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977). The first is the interest in independence in making certain important decisions related to the “zones of privacy,” pertaining to marriage, procreation, contraception, family relationships, and child rearing and education, that have been recognized by the United States Supreme Court. See Open Records Decision No. 455 at 3-7 (1987); see also *Fadjo v. Coon*, 633 F.2d 1172 (5th Cir. 1981). The second constitutionally protected privacy interest is in freedom from public disclosure of certain personal matters. See Open Records Decision No. 455 at 6-7 (1987); see also *Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5th Cir. 1985), *reh’g denied*, 770 F.2d 1081 (1985), *cert. denied*, 474 U.S. 1062 (1986). This aspect of

constitutional privacy requires a balancing of the individual's privacy interest against the public's interest in the information. See Open Records Decision No. 455 at 7 (1987). Constitutional privacy under section 552.101 is reserved for "the most intimate aspects of human affairs." *Id.* at 8 (quoting *Ramie v. City of Hedwig Village*, 765 F.2d at 492). Parts of the audiotapes in investigation numbers 02-11 and 02-12 come within the disclosural aspect of constitutional privacy and thus must be withheld under section 552.101.

You also raise section 552.101 in conjunction with the decision in *Morales v. Ellen*, 840 S.W.2d 519, 525-26 (Tex. Civ. App.--El Paso 1992, writ denied). We note, however, that *Ellen* applies the common-law right to privacy to victim and witness information obtained in connection with an internal affairs investigation of alleged sexual harassment. You assert that the identities of victims and witnesses and their statements are protected from disclosure under *Ellen*. You do not assert, however, nor does it appear to this office, that any of the audiotaped or videotaped information relates to an investigation of alleged sexual harassment. Thus, you may not withhold any of that information under section 552.101 in conjunction with common-law privacy under *Ellen*.

You also raise the "special circumstances" aspect of privacy under section 552.101 with regard to witness information in investigation numbers 02-03 and 02-04. This office has concluded that in certain "special circumstances," common-law privacy will protect information that ordinarily would be subject to public disclosure. See Open Records Decision No. 169 at 6-7 (1977). Such "special circumstances" encompass a very narrow set of situations. *Id.* at 6. They do not include a mere desire for privacy or "a generalized and speculative fear of harassment or retribution." *Id.* Rather, they are limited to situations in which release of the information would likely cause someone to face "an imminent threat of physical danger." *Id.* Whether requested information presents such "special circumstances" is determined on a case-by-case basis. *Id.* at 7. In this instance, you do not inform us of any reason to believe that the release of information relating to investigation numbers 02-03 or 02-04 would place any witness in any danger. Therefore, you have not demonstrated any special circumstances that justify the withholding of any of the audiotaped witness information that relates to those investigations under section 552.101.

Section 552.101 also encompasses information that another statute makes confidential. The Americans with Disabilities Act of 1990 (the "ADA"), 42 U.S.C. §§ 12101 *et seq.*, provides that information about the medical conditions and medical histories of applicants or employees must be (1) collected and maintained on separate forms, (2) kept in separate medical files, and (3) treated as a confidential medical record. In addition, information obtained in the course of a "fitness for duty examination," conducted to determine whether an employee is still able to perform the essential functions of his job, is to be treated as a confidential medical record. See 29 C.F.R. § 1630.14(c); see also Open Records Decision No. 641 (1996). The federal Equal Employment Opportunity Commission (the "EEOC") has determined that medical information for the purposes of the ADA includes "specific

information about an individual's disability and related functional limitations, as well as general statements that an individual has a disability or that an ADA reasonable accommodation has been provided for a particular individual." See Letter from Ellen J. Vargyas, Legal Counsel, EEOC, to Barry Kearney, Associate General Counsel, National Labor Relations Board, 3 (Oct. 1, 1997). You state that investigation number 02-06 involves a fitness for duty examination. We conclude that you must withhold audiotaped information obtained in the course of the fitness for duty examination under section 552.101 in conjunction with the ADA.

Section 552.117(2) of the Government Code excepts from disclosure a peace officer's current and former home addresses, current and former home telephone numbers, social security number, and information that reveals whether the peace officer has family members, regardless of whether the peace officer has complied with sections 552.024 or 552.1175. Section 552.117(2) adopts the definition of peace officer found at article 2.12 of the Code of Criminal Procedure. The audiotapes relating to investigation numbers 02-05, 02-11, and 02-12 contain information that reveals whether peace officers have family members. You must withhold that information under section 552.117(2).

Information in one of the audiotapes may be excepted from disclosure 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 a current or former official or employee of a governmental body who requests 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). Thus, you may only withhold information under section 552.117(1) on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. You may not withhold this information under section 552.117(1) in the case of a person who did not make a timely election to keep the information confidential. The audiotape in investigation number 02-09 dated July 17, 2002 contains personal information of a current or former employee of the department. You must withhold that information under section 552.117(1) if the employee made a timely election under section 552.024 to keep the information confidential.

The videotape in investigation number 02-08 contains photographic images of peace officers. Section 552.119 of the Government Code excepts from public disclosure a photograph of a peace officer that, if released, would endanger the life or physical safety of the officer unless one of three exceptions applies.² The three exceptions are: (1) the officer is under indictment or charged with an offense by information; (2) the officer is a party in a fire or

²Section 552.119 also adopts the definition of peace officer found at article 2.12 of the Code of Criminal Procedure.

police civil service hearing or a case in arbitration; or (3) the photograph is introduced as evidence in a judicial proceeding. This section also provides that a photograph exempt from disclosure under this section may be made public only if the peace officer gives written consent to the disclosure. *See* Open Records Decision No. 502 (1988). You do not inform us that any of the exceptions under section 552.119 are applicable to the officers depicted in the videotape or that any of these officers have executed any written consents to disclosure. Therefore, the portions of the videotape that depict the peace officers' photographic images must be withheld from disclosure under section 552.119.

Next, we address your exceptions to the disclosure of information contained in the documents that you submitted. We begin with section 552.108 of the Government Code, as it is the most inclusive exception you claim. Section 552.108(a)(1) 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[.]" A governmental body that raises section 552.108 must reasonably explain, if the requested information does not supply an explanation on its face, how and why section 552.108 is applicable to that information. *See* Gov't Code § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986).

You state that the documents pertaining to investigation number 02-09 relate to a criminal case that has been referred for prosecution. You assert that release of those documents, including the documents that pertain to the internal affairs investigation, would interfere with the prosecution. Based on your representation and our review of the documents in question, we find that section 552.108(a)(1) is applicable to all of the documents that relate to investigation number 02-09. *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.--Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases).

You also raise section 552.108(a)(2) and (b)(2). Section 552.108(a)(2) excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication[.]" Section 552.108(b)(2) excepts from disclosure "[a]n internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution . . . if . . . the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication[.]" Section 552.108(a)(2) and (b)(2) are applicable only to information relating to a closed case that concluded in a result other than a conviction or a deferred adjudication.

You raise section 552.108(a)(2) and (b)(2) with respect to the documents that relate to investigation numbers 02-01, 02-02, 02-05, 02-07, 02-08, and 02-10. You indicate that these documents relate to concluded criminal investigations that did not result in a conviction or a deferred adjudication. Based on your representation and our review of the information in question, we have marked the documents that come within the scope of section 552.108(a)(2) and (b)(2).

We note that section 552.108 does not except from disclosure "basic information about an arrested person, an arrest, or a crime." Gov't Code § 552.108(c). Section 552.108(c) refers to the basic front-page information held to be public in *Houston Chronicle*. You must release basic information with regard to each criminal investigation, including a detailed description of each offense involved, even if this information does not literally appear on the front page of the documents that fall within the scope of section 552.108. See *Houston Chronicle*, 531 S.W.2d at 186-87; Open Records Decision No. 127 at 3-4 (1976) (summarizing types of information deemed public by *Houston Chronicle*). You may withhold the rest of the information in the marked documents under section 552.108.

The remaining documents that relate to investigation numbers 02-01, 02-02, 02-05, 02-07, 02-08, and 02-10 pertain to completed internal affairs investigations. Generally, section 552.108 is not applicable either to the employment records of law enforcement personnel or to information relating to complaints involving law enforcement personnel. See *City of Fort Worth v. Cornyn*, ___ S.W.3d ___, 2002 WL 31026981 (Tex. App. – Austin 2002, no pet. h.); Open Records Decision No. 562 at 10 (1990). Furthermore, section 552.108 does not encompass information relating to an administrative internal affairs investigation that did not result in a criminal investigation or prosecution. See *Morales v. Ellen*, 840 S.W.2d 519, 525-26 (Tex. Civ. App.--El Paso 1992, writ denied) (statutory predecessor not applicable to internal investigation that did not result in criminal investigation or prosecution). You do not inform us that internal affairs investigation numbers 02-01, 02-02, 02-05, 02-07, 02-08, or 02-10 resulted in any criminal charges. We therefore conclude that you have not shown that section 552.108 is applicable to any of the remaining documents that relate to internal affairs investigation numbers 02-01, 02-02, 02-05, 02-07, 02-08, or 02-10.

You also raise section 552.108 with regard to information that relates to the identities and statements of witnesses in investigation number 02-03. We note, however, that this information relates exclusively to a personnel investigation. You do not inform us, nor does it appear to this office, that the investigation resulted in any criminal charges. Therefore, you may not withhold information that relates to investigation number 02-03 under section 552.108. See *Morales v. Ellen*, 840 S.W.2d at 526 (trial court erred in concluding that statutory predecessor was applicable to information relating to internal affairs investigation of alleged sexual harassment and other misconduct).

Next, we address your claims with regard to the submitted documents under sections 552.101 and 552.102. Section 552.101 encompasses the common-law right to privacy. Common-law privacy protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, *and* (2) of no legitimate public interest. *See Industrial Found. v. Texas Ind. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Section 552.102(a) excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]" The tests of privacy under sections 552.101 in conjunction with *Industrial Foundation* and section 552.102 are the same. *See Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.--Austin 1983, writ ref'd n.r.e.). Therefore, we will address your privacy claims with regard to the submitted documents under section 552.101. In this instance, the submitted documents relate to investigations of the conduct of employees of the department, including law enforcement officers. The public has a legitimate interest in information that relates to employees of a governmental body. Therefore, for the most part, the information in the submitted documents is not protected by common-law privacy under section 552.101. *See also* Open Records Decision Nos. 470 at 4 (1987), 444 at 3 (1986).

We note, however, that one of the documents in investigation numbers 02-11 and 02-12 contains information relating to an individual's criminal history. When a law enforcement agency compiles criminal history information that pertains to a particular individual, the compiled information takes on a character that implicates that individual's right to privacy in a manner that the same information in an uncompiled state does not. *See United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989); *see also* Open Records Decision No. 616 at 2-3 (1993). We have marked the information that you must withhold under section 552.101 of the Government Code in conjunction with *Reporters Committee*.

Common-law privacy also protects the specific types of information held to be intimate or embarrassing in *Industrial Foundation*. *See* 540 S.W.2d at 683 (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). This office has since concluded that other types of information also are private under section 552.101. *See* Open Records Decision Nos. 659 at 4-5 (1999) (summarizing information attorney general has determined to be private), 470 at 4 (1987) (illness from severe emotional job-related stress), 455 at 9 (1987) (prescription drugs, illnesses, operations, and physical handicaps), 343 at 1-2 (1982) (references in emergency medical records to a drug overdose, acute alcohol intoxication, obstetrical/gynecological illness, convulsions/seizures, or emotional/mental distress), 339 at 2-3 (1982) (information that identifies victim of sexual offense). We conclude that portions of the documents that relate to investigation numbers 02-05 and 02-10 are protected by common-law privacy. You must withhold that information under section 552.101.

Portions of the documents that relate to investigation numbers 02-11 and 02-12 are protected by constitutional privacy under section 552.101. Constitutional privacy protects two kinds of interests. See Open Records Decision Nos. 600 at 3-5 (1992), 478 at 4 (1987), 455 at 3-7 (1987); see also *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977). The first is the interest in independence in making certain important decisions related to the “zones of privacy,” pertaining to marriage, procreation, contraception, family relationships, and child rearing and education, that have been recognized by the United States Supreme Court. See Open Records Decision No. 455 at 3-7 (1987); see also *Fadjo v. Coon*, 633 F.2d 1172 (5th Cir. 1981). The second constitutionally protected privacy interest is in freedom from public disclosure of certain personal matters. See Open Records Decision No. 455 at 6-7 (1987); see also *Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5th Cir. 1985), *reh’g denied*, 770 F.2d 1081 (1985), *cert. denied*, 474 U.S. 1062 (1986). This aspect of constitutional privacy requires a balancing of the individual’s privacy interest against the public’s interest in the information. See Open Records Decision No. 455 at 7 (1987). Constitutional privacy under section 552.101 is reserved for “the most intimate aspects of human affairs.” *Id.* at 8 (quoting *Ramie v. City of Hedwig Village*, 765 F.2d at 492). You must withhold some of the information that relates to investigation numbers 02-11 and 02-12 under section 552.101 in conjunction with the disclosural aspect of constitutional privacy. We have marked that information.

You also raise section 552.101 in conjunction with the decision in *Morales v. Ellen*, 840 S.W.2d 519, 525-26 (Tex. Civ. App.--El Paso 1992, writ denied). *Ellen* applies common-law privacy to victim and witness information obtained in connection with an internal affairs investigation of alleged sexual harassment. You claim that the identities of victims and witnesses and their statements are protected from disclosure under *Ellen*. You do not assert, however, nor does it appear to this office that any of the department’s investigations involved allegations of sexual harassment. Thus, you may not withhold information relating to these investigations under section 552.101 in conjunction with common-law privacy under *Ellen*.

You also raise the “special circumstances” aspect of privacy with regard to witness information that relates to investigation numbers 02-03 and 02-04. Under certain “special circumstances,” common-law privacy will protect information that ordinarily would be subject to public disclosure. See Open Records Decision No. 169 at 6-7 (1977). Such “special circumstances” encompass a very narrow set of situations. *Id.* at 6. They do not include a mere desire for privacy or “a generalized and speculative fear of harassment or retribution.” *Id.* Rather, they are limited to situations in which release of the information would likely cause someone to face “an imminent threat of physical danger.” *Id.* Whether requested information presents such “special circumstances” is determined on a case-by-case basis. *Id.* at 7. In this instance, you do not inform us of any reason to believe that the release of information relating to investigation numbers 02-03 or 02-04 would place any witness in any danger. Therefore, you have not demonstrated any special circumstances that justify the withholding under section 552.101 of any of the witness information that relates to investigations 02-03 or 02-04.

The submitted documents also contain information that is made confidential by statute. The Americans with Disabilities Act of 1990 (the "ADA"), 42 U.S.C. §§ 12101 *et seq.*, provides that information about the medical conditions and medical histories of applicants or employees must be (1) collected and maintained on separate forms, (2) kept in separate medical files, and (3) treated as a confidential medical record. In addition, information obtained in the course of a "fitness for duty examination," conducted to determine whether an employee is still able to perform the essential functions of his job, is to be treated as a confidential medical record. *See* 29 C.F.R. § 1630.14(c); *see also* Open Records Decision No. 641 (1996). The federal Equal Employment Opportunity Commission (the "EEOC") has determined that medical information for the purposes of the ADA includes "specific information about an individual's disability and related functional limitations, as well as general statements that an individual has a disability or that an ADA reasonable accommodation has been provided for a particular individual." *See* Letter from Ellen J. Vargyas, Legal Counsel, EEOC, to Barry Kearney, Associate General Counsel, National Labor Relations Board, 3 (Oct. 1, 1997). You assert that investigation number 02-06 involves a fitness for duty examination. We have marked information that you must withhold under section 552.101 of the Government Code in conjunction with the ADA.

Criminal history record information ("CHRI") generated by the National Crime Information Center ("NCIC") or the Texas Crime Information Center ("TCIC") is confidential by law. Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. *See* Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI that it generates. *Id.* Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety ("DPS") maintains, except that the DPS may disseminate this information as provided in subchapter F of chapter 411 of the Government Code. *See* Gov't Code § 411.083.³ Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI from DPS. A criminal justice agency that is authorized to obtain CHRI from DPS also may obtain CHRI that is maintained by another criminal justice agency from that criminal justice agency. *Id.* § 411.087(a)(2). However, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Thus, any CHRI obtained from DPS or another criminal justice agency is confidential under subchapter F of chapter 411 of the Government Code. The documents that relate to investigation number 02-08 include CHRI generated by another criminal justice agency. The department appears to have obtained the CHRI from the other criminal justice agency. You must withhold the CHRI, which we have marked, under section 552.101 of the Government Code.

³Section 411.082(2) of the Government Code defines criminal history record information as "information collected about a person by a criminal justice agency that consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions."

You assert that information relating to investigation numbers 02-09, 02-10, 02-11, and 02-12 is confidential under section 261.201 of the Family Code, which provides in part:

(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, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Fam. Code § 261.201(a). We find that documents relating to investigation number 02-10 consist of files, reports, records, communications, and working papers used or developed in an investigation made under chapter 261 of the Family Code. *See also* Open Records Decision No. 440 at 2 (1986) (construing predecessor statute). You do not inform this office that the department has adopted any rules that would allow the release of these documents in this instance. We therefore assume that no such rules exist. Given that assumption, we have marked documents relating to investigation number 02-10 that are confidential in their entirety under section 261.201 of the Family Code and thus must be withheld from disclosure under section 552.101 of the Government Code. We have reviewed the remaining information that you claim is confidential under section 261.201 and find that this section is not applicable to any additional information.

The documents relating to investigation number 02-05 include medical records. The disclosure of medical records is governed by the Medical Practice Act (the "MPA"), as codified at subtitle B of title 3 of the Occupations Code. *See* Occ. Code § 151.001. 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). This office has determined that in governing access to a specific subset of information, the MPA prevails over the more general provisions of chapter 552 of the Government Code. *See* Open Records Decision No. 598 (1991). We have marked the information that is governed by the MPA. You must not release that information unless the MPA permits you to do so.

Section 552.117(2) of the Government Code is applicable to portions of the documents that relate to investigation numbers 02-05, 02-11, and 02-12. Section 552.117(2) excepts from disclosure a peace officer's current and former home addresses, current and former home telephone numbers, social security number, and information that reveals whether the peace officer has family members, regardless of whether the peace officer has complied with sections 552.024 or 552.1175. Section 552.117(2) adopts the definition of peace officer found at article 2.12 of the Code of Criminal Procedure. We have marked the information that you must withhold under section 552.117(2) if it relates to a peace officer's home address and telephone numbers or reveals whether a peace officer has family members. We note, however, that the pager and mobile numbers in the documents relating to investigation numbers 02-11 and 02-12 are not excepted from disclosure under section 552.117 if the pager and mobile service are provided at public expense. *See* Open Records Decision No. 506 at 5-7 (1988) (statutory predecessor not applicable to cellular mobile phone numbers provided and paid for by governmental body and intended for official use).

We also note that information relating to investigation numbers 02-11 and 02-12 may be excepted from disclosure 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 a current or former official or employee of a governmental body who requests 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). Thus, you may only withhold information under section 552.117(1) on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. You may not withhold this information under section 552.117(1) in the case of employee who did not make a timely election to keep the information confidential. We have marked telephone number, pager, and mobile number information that you must withhold under section 552.117(1) if it relates to a current or former employee who made a timely election under section 552.024 to keep the information confidential. You may not withhold the pager and mobile numbers, however, if they are provided at public expense. *See* Open Records Decision No. 506 at 5-7 (1988).

In summary, you must release the requested documents that relate to investigation number 02-04. The submitted audiotapes and videotape contain information that you must withhold under section 552.101 in conjunction with common-law privacy, constitutional privacy, and the Americans With Disabilities Act, section 552.117(2), and 552.119. Information in one of the audiotapes may be excepted from disclosure under section 552.117(1) if it relates to a current or former employee who timely elected under section 552.024 to keep the information confidential. You must withhold the images of peace officers in the videotape under section 552.119. You may withhold some of the submitted documents under section 552.108; however, you must release basic information in accordance with section 552.108(c). You must withhold other information in the submitted documents under section 552.101 in conjunction with common-law privacy, constitutional privacy, the Americans with Disabilities Act; section 411.089 of the Government Code; and section 261.201 of the Family Code. You must not release the medical records that are governed by the MPA unless the MPA permits you to do so. You must withhold the section 552.117 information that relates to peace officers. You may be required to withhold other information under section 552.117(1) if it relates to a current or former employee who timely elected under section 552.024 to keep the information confidential. You must release the rest of the requested 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

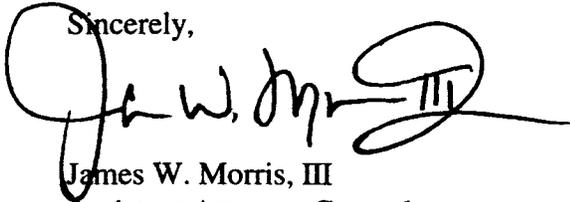
should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

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); *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,

A handwritten signature in black ink, appearing to read "James W. Morris, III". The signature is stylized with a large initial "J" and a prominent "III" at the end.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 173170

Enc: Marked documents

c: Mr. Domingo Ramirez Jr.
Fort Worth Star-Telegram
P.O. Box 915007
Fort Worth, Texas 76115
(w/o enclosures)