



OFFICE of the ATTORNEY GENERAL
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Mr. James L. Hall
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P.O. Box 4004
Huntsville, Texas 77342-4004

OR2003-1650

Dear Mr. Hall:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 177694.

The Texas Department of Criminal Justice (the "department") received a request for records relating to two deceased department employees. You inform us that you have released some information to the requestor but claim other requested information is excepted from disclosure under sections 552.101, 552.102, 552.115, 552.117, 552.1175, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976) for information claimed to be protected under the doctrine of common law privacy as incorporated by section 552.101. We will therefore consider your claims regarding section 552.101 and section 552.102 together.

For information to be protected by the common law right to privacy it must be 1) highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and 2) of no legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976). We note, however, that the right of privacy is purely personal and lapses at death. See *Moore v. Charles B. Pierce Film Enters.*

Inc., 589 S.W.2d 489 (Tex. Civ. App.—Texarkana 1979, writ ref'd n.r.e.); *see also* Attorney General Opinions JM-229 (1984); H-917 (1976). On the other hand, if the release of information about a deceased person reveals highly intimate or embarrassing information about living persons, the information must be withheld to protect the living individuals' privacy. *See* Attorney General Opinion JM-229. Having reviewed the submitted information, we find that portions of it pertaining to living persons are protected by common law privacy and must therefore be withheld pursuant to section 552.101.

You also assert that portions of the submitted information are protected by constitutional privacy, which is also incorporated by section 552.101 of the Government Code. Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common law doctrine of privacy and includes only information that concerns the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)). As noted above, the right of privacy lapses at death. Attorney General Opinions JM-229 (1984); H-917 (1976). We have considered your arguments and reviewed the information at issue. We conclude, however, that you have not shown that any of this information comes within one of the constitutional zones of privacy or involves the most intimate aspects of human affairs. *See* Open Records Decision Nos. 470, 455, 444, 423 at 2. We therefore find that none of the submitted information may be withheld on the basis of constitutional privacy.

Section 552.101 also encompasses information made confidential by statute. Section 6103(a) of title 26 of the United States Code provides that tax return information is confidential. *See* 26 U.S.C. § 6103(a)(2), (b)(2)(A), (p)(8); *see also* Open Records Decision No. 600 (1992); Attorney General Op. MW-372 (1981). Accordingly, the department must withhold Exhibit B, which consists of W-2 and W-4 forms, pursuant to section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code. Exhibit A consists of an Employment Eligibility Verification, Form I-9. Form I-9 is governed by title 8, section 1324a of the United States Code, which provides that an I-9 form and "any information contained in or appended to such form, may not be used for purposes other than for enforcement of this chapter" and for enforcement of other federal statutes governing crime and criminal investigations. *See* 8 U.S.C. § 1324a(b)(5); *see also* 8 C.F.R. § 274a.2(b)(4). Release of the I-9 form in this instance would be "for purposes other than for enforcement" of the referenced federal statutes. Accordingly, we conclude that Exhibit A is confidential and may only be released in compliance with the federal laws and regulations governing the employment verification system.

Section 552.101 also encompasses laws that make criminal history record information ("CHRI") confidential. Federal regulations prohibit the release of 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."). Under chapter 411 of the Government Code, a criminal justice agency may obtain CHRI from the Department of Public Safety ("DPS") or from another criminal justice agency. *Id.* §§ 411.083(b)(1), .087(a)(2), .089(a). However, CHRI so obtained is 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). Therefore, assuming that you have CHRI about the former employee in your possession and that it falls within the ambit of these state and federal regulations, you must withhold it from the requestor.

You assert that Exhibit E constitutes medical records. Access to medical records is governed by the Medical Practice Act (the "MPA"), Occ. Code §§ 151.001-165.160, which provides in part:

(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.

We have marked the information that is governed by the MPA. *See* Open Records Decision Nos. 598 (1991), 546 (1990) (because hospital treatment is routinely conducted under supervision of physicians, documents relating to diagnosis and treatment during hospital stay would constitute protected MPA records). As the patient is deceased, the medical records may be released only on the signed consent of the deceased's personal representative. Occ. Code § 159.005(a)(5). That consent must specify (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). Unless the deceased individual's personal representative provides the department with a consent that meets the requirements of section 159.005(a)(5), the department must withhold the medical records that we have marked.

You also contend that the fingerprints contained in Exhibit D are confidential under sections 559.002 and 559.003 of the Government Code and must therefore be withheld under section 552.101. However, the laws making such information confidential are intended to protect individuals' privacy. *See Gov't Code § 559.001(1)(A)* (individual whose biometric identifier is at issue may consent to its release). As noted above, privacy lapses at death; therefore none of the fingerprints may be withheld on the basis of sections 559.002 and 559.003. *See Moore*, 589 S.W.2d 489; *see also* Attorney General Opinions JM-229 (1984); H-917 (1976).

You assert that the death certificate submitted as Exhibit I is excepted under section 552.115. This section provides that a death record maintained by the bureau of vital statistics of the Texas Department of Health or a local registration official is excepted from required public disclosure except that "a death record is public information and available to the public on and after the 25th anniversary of the date of death as shown on the record filed with the bureau of vital statistics or local registration official." Since section 552.115 only applies to a death certificate maintained by the bureau of vital statistics or local registration official, the department may not withhold the certificate of death pursuant to this provision. *See Open Records Decision No. 338* (1982).

We turn now to your claim regarding section 552.117 of the Government Code. Section 552.117(3) requires that a department employee's current and former home address, home telephone number, social security number, and information revealing whether the employee has family members be withheld. *See Gov't Code § 552.117(3)*; *see also* Open Records Decision No. 622 (1994). However, section 552.117(3) does not except from disclosure personal information of former or deceased department employees. Thus, none of the information relating to the deceased employee may be withheld on the basis of section 552.117(3).

Although not excepted under section 552.117(3), information regarding the deceased individual may nevertheless be excepted pursuant to section 552.117(1). This section, which protects information relating to both "current and former" officials or employees, applies if such individuals requested under section 552.024 that their information be kept confidential. To the extent the deceased individual and any other deceased employees elected, prior to the date the department received this request, to keep their home addresses, home telephone numbers, and family member information confidential, the department must withhold this information, which we have marked. We note, however, that section 552.117 does not protect deceased employees' social security numbers.¹

We note, however, that the submitted information includes the deceased employee's personal post office box numbers. Because such an address is not the employee's current or former

¹Because of our decision under section 552.117(1), we need not address your arguments concerning section 552.1175.

“home address,” it is not made confidential by section 552.117 and may not be withheld on that basis. *See* Gov’t Code § 552.117; Open Records Decision No. 622 at 4 (1994) (“The legislative history of section 552.117(1)(A) makes clear that its purpose is to protect public employees from being harassed *at home*. *See* House Committee on State Affairs, Bill Analysis, H.B. 1976, 69th Leg. (1985); Senate Committee on State Affairs, Bill Analysis, H.B. 1976, 69th Leg. (1985).” (Emphasis added.)); *see also* Open Records Decision Nos. 658 at 4 (1998) (statutory confidentiality provision must be express and cannot be implied), 478 at 2 (1987) (language of confidentiality statute controls scope of protection), 465 at 4-5 (1987) (statute explicitly required confidentiality).

We note that even if they are not excepted under section 552.117, social security numbers may nevertheless be excepted from disclosure. The 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), 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* Open Records Decision No. 622 (1994). We have no basis for concluding that the 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 numbers, the department should ensure that it did not obtain or maintain them pursuant to any provision of law enacted on or after October 1, 1990. However, because the laws regarding the confidentiality of social security numbers are intended to protect individuals’ privacy, the deceased employee’s social security number may not be withheld on this basis.

You contend that the information submitted as Exhibit J is excepted under section 552.130 of the Government Code. This section states that “[i]nformation is excepted from [required public disclosure] if the information relates to: (1) a motor vehicle operator’s or driver’s license or permit issued by an agency of this state[.]” However, section 552.130 is designed to protect individuals’ privacy interests, and the right to privacy expires at death. *See Moore*, 589 S.W.2d 489; *see also* Attorney General Opinion H-917 at 3-4 (1976); Open Records Decision No. 272 at 1 (1981). Accordingly, the driver’s license submitted as Exhibit J may not be withheld under section 552.130.

Finally, we note that the submitted information includes bank account numbers. Section 552.136 of the Government Code states that “[n]otwithstanding 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. This provision was enacted to protect individuals’ privacy, and therefore, the protection extinguishes at the individual’s death. *See Moore*, 589 S.W.2d at 491. Thus, pursuant to section 552.136, the department must withhold the marked account numbers only if a living person has an interest in the accounts. Otherwise, the department must release the account numbers.

In summary, the department must withhold the information we have marked as being excepted under section 552.101. The marked medical records may be released only in accordance with the MPA. In addition, the department must withhold the information we have marked as being excepted under section 552.117 only to the extent that the deceased employee had elected to keep such information confidential. Social security numbers of living individuals must be withheld under section 552.101 and federal law if the numbers were obtained or maintained pursuant to a provision of law enacted on or after October 1, 1990. The marked bank account numbers must be withheld under section 552.136 only if a living individual has an interest in the account. All other 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).

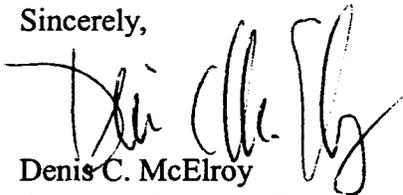
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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 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,



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Open Records Division

DCM/lmt

Ref: ID# 177694

Enc. Submitted documents

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