



OFFICE *of the* ATTORNEY GENERAL  
GREG ABBOTT

April 1, 2003

Ms. Melissa L. Barloco  
Assistant County Attorney  
Harris County  
1019 Congress, 15th Floor  
Houston, Texas 77002-1700

OR2003-2215

Dear Ms. Barloco:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 178644.

The Harris County Sheriff's Office (the "sheriff's office") received three requests from the same requestor for eleven categories of information relating to three named officers. You state that you do not have information responsive to items seven, eight, ten, and eleven of the request. You claim that portions of the submitted information are excepted from disclosure under sections 552.101, 552.117, and 552.130 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and reviewed the submitted information.

As an initial matter, we note that the submitted information contains medical records, 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:

(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.

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<sup>1</sup>The sheriff's office also raised sections 552.103 and 552.108 as exceptions to disclosure. However, because you did not present any arguments under these sections, the sheriff's office has waived any argument under sections 552.103 and 552.108. See Open Records Decision Nos. 473 (1987) (section 552.103, litigation exception, may be waived by governmental body); 177 at 3 (1977) (section 552.108, law enforcement exception, may be waived by governmental body).

(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.

This office has concluded that the protection afforded by section 159.002 extends only to records either created by a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). Moreover, information that is subject to the MPA includes both medical records and information obtained from those medical records. *See* Ooc. Code §§ 159.002, .004; Open Records Decision No. 598 (1991). The MPA requires that any subsequent release of medical records be consistent with the purposes for which a governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Medical records may be released only as provided under the MPA. ORD 598. We have marked the medical records and the information obtained from medical records that appear in the submitted documents. These documents may be released only in accordance with the MPA.

Next, we note that some of the submitted documents consist of completed investigations that must be released pursuant to section 552.022(a)(1) of the Government Code, which provides in relevant part:

(a) Without limiting the amount or kind of information that is public information under this chapter, *the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:*

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;

Gov't Code § 552.022(a)(1) (emphasis added). Therefore, as prescribed by section 552.022, the completed investigations in Exhibit D must be released unless they are confidential under other law as discussed below.

We note that some of the submitted documents contain information that is protected by section 552.101 in conjunction with common-law privacy. Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 also 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. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). 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 excepted from required public disclosure under 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), and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). The submitted documents contain the type of information considered highly intimate or embarrassing and of no legitimate public interest for purposes of common-law privacy and must therefore be withheld. We have marked this information in the submitted documents for your convenience.

Additionally, we have also marked personal financial information that is confidential under section 552.101 in conjunction with common-law privacy. This office has concluded that financial information concerning an individual is in some instances protected by a common law right to privacy. *See* Open Records Decision Nos. 545 (1990), 523 (1989). Prior decisions of this office have found that financial information relating only to an individual ordinarily satisfies the first requirement of the test for common-law privacy, but that there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. *See* Open Records Decision Nos. 600 (1992), 545 (1990), 373 (1983). For example, a public employee's allocation of his salary to a voluntary investment program or to optional insurance coverage which is offered by his employer is a personal investment decision and information about it is excepted from disclosure under the common law right of privacy. *See* Open Records Decision Nos. 600 (1992) (finding federal tax Form W-4 Employee's Withholding Allowance Certificate, designation of beneficiary of employee's retirement benefits, direct deposit authorization, and forms allowing employee to allocate pretax compensation to group insurance, health care or dependent care related to personal financial decisions), 545 (1990) (deferred compensation plan). In addition, information related to an individual's mortgage payments, assets, bills, and credit history is excepted from disclosure under the common law right to privacy. *See* Open Records Decision Nos. 545 (1990), 523 (1989). However, information revealing that an employee participates in a group insurance plan funded partly or wholly by the governmental body is not excepted from disclosure. *See* Open Records Decision No. 600 at 10 (1992). After examining the submitted information, it is not apparent whether the officer's deductions that we have marked are mandatory or voluntary. Therefore, we would caution you to evaluate the data carefully before releasing it. *See* Gov't Code § 552.352. We have, however, marked certain personal financial information that the sheriff's office

must withhold pursuant to section 552.101 of the Government Code in conjunction with the common law right to privacy. You must withhold the personal financial information that we have marked.

Section 552.101 encompasses information protected by other statutes. Criminal history record information ("CHRI") generated by the National Crime Information Center ("NCIC") or by the Texas Crime Information Center ("TCIC") is confidential. 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. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI 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 chapter 411, subchapter F of the Government Code. *See Gov't Code § 411.083.*

Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; 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). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090 - .127. Thus, any CHRI generated by the federal government or another state may not be made available to the requestor except in accordance with federal regulations. *See Open Records Decision No. 565 (1990).* Furthermore, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F. We have marked the documents and portions of documents in the submitted information that consist of CHRI generated by TCIC and NCIC. You must withhold this information under section 552.101 of the Government Code.

Moreover, when a governmental entity compiles criminal history information pertaining to a particular individual, the compiled information takes on a character that implicates the individual's right of 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 criminal history information that the sheriff's office must withhold under section 552.101 and *Reporters Committee*.

The submitted materials also include fingerprint information that is subject to sections 559.001, 559.002, and 559.003 of the Government Code. They provide as follows:

Sec. 559.001. DEFINITIONS. In this chapter:

- (1) "Biometric identifier" means a retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry.

(2) "Governmental body" has the meaning assigned by Section 552.003 [of the Government Code], except that the term includes each entity within or created by the judicial branch of state government.

Sec. 559.002. DISCLOSURE OF BIOMETRIC IDENTIFIER. A governmental body that possesses a biometric identifier of an individual:

(1) may not sell, lease, or otherwise disclose the biometric identifier to another person unless:

(A) the individual consents to the disclosure;

(B) the disclosure is required or permitted by a federal statute or by a state statute other than Chapter 552 [of the Government Code]; or

(C) the disclosure is made by or to a law enforcement agency for a law enforcement purpose; and

(2) shall store, transmit, and protect from disclosure the biometric identifier using reasonable care and in a manner that is the same as or more protective than the manner in which the governmental body stores, transmits, and protects its other confidential information.

Sec. 559.003. APPLICATION OF CHAPTER 552. A biometric identifier in the possession of a governmental body is exempt from disclosure under Chapter 552.

It does not appear to this office that section 559.002 permits the disclosure of the submitted fingerprint information. Therefore, the sheriff's office must withhold the fingerprints in the submitted documents, which we have marked, under section 552.101 in conjunction with section 559.003 of the Government Code.

The submitted information contains information relating to polygraph examinations. Section 1703.306 of the Occupations Code provides as follows:

(a) A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person other than:

- (1) the examinee or any other person specifically designated in writing by the examinee;
- (2) the person that requested the examination;
- (3) a member, or the member's agent, of a governmental agency that licenses a polygraph examiner or supervises or controls a polygraph examiner's activities;
- (4) another polygraph examiner in private consultation; or
- (5) any other person required by due process of law.

Occ. Code § 1703.306. We find that certain information in the submitted records was acquired from polygraph examinations. It does not appear that any of the exceptions in section 1703.306 apply in this case. *See* Open Records Decision 565 (1990) (construing predecessor statute). Accordingly, we have marked the submitted information that is confidential pursuant to section 1703.306 of the Occupations Code and must therefore be withheld pursuant to section 552.101 of the Government Code.

The submitted information also contains declarations of psychological and emotional health and drug dependency reports that are required by the Texas Commission on Law Enforcement Officer Standards and Education and that are confidential pursuant to Section 1701.306 of the Occupations Code. Section 1701.306 provides as follows:

(a) The commission may not issue a license to a person as an officer or county jailer unless the person is examined by:

- (1) a licensed psychologist or by a psychiatrist who declares in writing that the person is in satisfactory psychological and emotional health to serve as the type of officer for which a license is sought; and
- (2) a licensed physician who declares in writing that the person does not show any trace of drug dependency or illegal drug use after a physical examination, blood test, or other medical test.

(b) An agency hiring a person for whom a license as an officer or county jailer is sought shall select the examining physician and the examining psychologist or psychiatrist. The agency shall prepare a report of each declaration required by Subsection (a) and shall maintain a copy of the report on file in a format readily accessible to the commission. *A declaration is not public information.*

Therefore, the sheriff's office must withhold the declarations and reports under section 552.101 in conjunction with section 1701.306 of the Occupations Code. We have marked the documents accordingly.

We also find that certain information contained in the records submitted is confidential under Title I of the Americans with Disabilities Act of 1990 (the "ADA"), 42 U.S.C. §§ 12101 *et seq.* The ADA 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. 29 C.F.R. § 1630.14(c). *See also* Open Records Decision No. 641 (1996). The 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). We have marked the information that the sheriff's office must withhold under section 552.101 and the ADA.

The submitted documents contain a Form I-9. Section 1324a of title 8 of the United States Code provides that an Employment Eligibility Verification Form I-9 "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). The release of the submitted Form I-9 in response to this request for information would be "for purposes other than for enforcement" of the referenced federal statutes. A Form I-9 may be released only for purposes of compliance with the federal laws and regulations governing the employment verification system. Therefore, the sheriff's office must also withhold the submitted Form I-9 under section 552.101 of the Government Code in conjunction with section 1324a of title 8 of the United States Code.

We note that the submitted documents contain information that must be withheld under section 552.117 of the Government Code. Section 552.117(2) excepts from public disclosure information that reveals a peace officer's home address, home telephone number, social security number, and whether the officer has family members.<sup>2</sup> We have marked the information in the submitted documents that must be withheld under section 552.117(2). To the extent the information we have marked pertains to an individual who does not meet the definition of "peace officer," the information is not confidential under section 552.117(2), but may be confidential under section 552.117(1) as outlined below.

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<sup>2</sup>"Peace officer" is defined by article 2.12 of the Code of Criminal Procedure.

The submitted documents contain information that may be confidential under section 552.117(1) of the Government Code. 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 sheriff's office may not withhold an employee's personal information under section 552.117 if the employee 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. If the employee complied with section 552.024, the sheriff's office must withhold the information we have marked under section 552.117(1).

To the extent that social security numbers we have marked are not protected by section 552.117(2), because an individual is no longer a peace officer, or under section 552.117(1), because an individual did not make a timely section 552.024 election, they may still be confidential under section 552.101 in conjunction with federal law. A social security number or "related record" 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 the social security numbers in the submitted documents 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, you should ensure that no such information was obtained or is maintained by the department pursuant to any provision of law, enacted on or after October 1, 1990.

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. 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 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. Open Records Decision No. 502 (1988). The submitted information includes photographs depicting peace officers and it does not appear that any of the exceptions are applicable. You have not informed us that the peace officers have executed any written consent to disclosure. Thus, the sheriff's office must withhold the photographs depicting peace officers, which we have marked.

Finally, we note that the submitted documents contain information that is excepted from disclosure by 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; or

(3) a personal identification document issued by an agency of this state of a local agency authorized to issue an identification document.

You must withhold the Texas driver's license information and license plate numbers that you have marked, as well as additional information that we have marked, under section 552.130.

In summary, the medical records that we have marked may only be released in accordance with the MPA. You must withhold the information we have marked under section 552.101 in conjunction with common-law privacy. You must withhold the information that we have marked in conjunction with section 552.101 and *Reporters Committee*. You must withhold the CHRI, fingerprints, and information acquired from polygraph examinations that we have marked. We have marked records that must be withheld under section 1701.306 of the Occupations Code. We have marked a Form I-9 that must be withheld under section 552.101 of the Government Code in conjunction with section 1324a of title 8 of the United States Code. We have marked information that must be withheld under section 552.101 and the ADA. We have marked information that must be withheld under section 552.117(2) if it pertains to a peace officer or under section 552.117(1) if it pertains to an employee or former employee who made a timely election under section 552.024. Prior to releasing any social security number, the sheriff's office should ensure that it has not obtained or maintained any of the social security numbers pursuant to any provision of law, enacted on or after October 1, 1990. We have marked photographs that must be withheld under section 552.119. Finally, you have marked and we have marked information that must be withheld under section 552.130. You must release all remaining information to the requestor.

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,



Jennifer E. Berry  
Assistant Attorney General  
Open Records Division

JEB/sdk

Ref: ID# 178644

Enc: Submitted documents

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