



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

September 8, 2003

Ms. Julie Joe
Assistant County Attorney
Travis County
P.O. Box 1748
Austin, Texas 78767

OR2003-6304

Dear Ms. Joe:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 187275.

The Travis County Sheriff's Office (the "Sheriff's Office") received a request for a specific internal affairs investigation. You argue that the requested information is excepted from disclosure under sections 552.101, 552.108 and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

You ask whether release to the requestor, who is an employee of the Sheriff's Office, would waive the Sheriff's Office's exceptions under the Act. A member of a governmental body acting in his or her official capacity is not a member of the public for purposes of access to information. Thus, an authorized official may review records of the governmental body without waiving any exceptions to disclosure. *See* Attorney General Opinion JM-119 at 2 (1983). After reviewing the submitted information, we are unable to determine whether the requestor is acting in his official capacity. If so, then the Sheriff's Office's release of any information would not constitute a release to the public and would not waive any exceptions. If the requestor is acting in a private capacity, release by the Sheriff's Office would waive the its ability to claim any discretionary exceptions under the Act. *See id.*; *see also* Open Records Decision No. 666 at 4 (200) (municipality's disclosure to a municipally-appointed citizen advisory board does not constitute a release to the public as contemplated under section 552.007 of the Government Code).

We begin by noting that the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides in relevant part:

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[.]

The submitted documents comprise a completed internal affairs investigation. As prescribed by section 552.022, the Sheriff's Office must release the investigation unless it is excepted from disclosure under section 552.108 or confidential under other law. Section 552.108 provides in pertinent part:

(b) An 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 is excepted from [required public disclosure] if:

- (1) release of the internal record or notation would interfere with law enforcement or prosecution[.]

In general, a governmental body claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See* Gov't Code §§ 552.108(a)(1), (b)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). In this case, the requested information pertains to a closed internal affairs investigation of the requestor. You argue that release of the information regarding training would interfere with law enforcement by hindering the officer's ability to control persons in his custody. After reviewing your arguments and the submitted information, we find that some of the requested information, if released, would interfere with law enforcement and may be withheld under section 552.108(b)(1). However, you have not shown that release of other marked information would interfere with law enforcement. Therefore, we have marked only those items to be withheld under section 552.108.

Section 552.101 excepts from disclosure "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. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information

relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683. This office has since concluded that other types of information also are private under section 552.101. *See* Open Records Decision No. 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 drug overdose, acute alcohol intoxication, obstetrical/gynecological illness, convulsions/seizures, or emotional/mental distress). We find section 552.101 applicable because some of the information is highly intimate or embarrassing and is not of legitimate public interest. Consequently, the Sheriff's Office must withhold the information we have marked in accordance with section 552.101 as confidential under common-law privacy.

Section 552.101 also encompasses statutes such as the Medical Practice Act (the "MPA"). Section 159.002 of the Occupations Code reads, 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.

Occ. Code § 159.002(a), (b), (c). 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). Information 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). Based on your representations and our review of the information, we conclude that the information you have marked as subject to the MPA was created by a physician or obtained from a medical record created by a physician, and that disclosure of this information would not be consistent with the purposes for which the Sheriff's Office obtained the information. Therefore, the Sheriff's Office must withhold the information we have marked subject to the MPA as confidential under section 552.101.

We note that some of the submitted information consists of mental health records and is governed by chapter 611 of the Health and Safety Code, as encompassed by section 552.101 of the Government Code. Section 611.002 of the Health and Safety Code provides that “[c]ommunications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.” A “professional” is defined as:

- (A) a person authorized to practice medicine in any state or nation;
- (B) a person licensed or certified by this state to diagnose, evaluate, or treat any mental or emotional condition or disorder; or
- (C) a person the patient reasonably believes is authorized, licensed, or certified as provided by this subsection.

We have marked the mental health records that are confidential and may not be disclosed by the Sheriff's Office.

Section 552.130 excepts information relating to a driver's license issued by a Texas agency; therefore, you must withhold the marked Texas driver's license numbers. Gov't Code § 552.130. The requestor has a special right of access to his own information under section 552.023; therefore, you must release this information to the requestor. *See* Gov't Code § 552.023 (person or person's authorized representative has special right of access to information relating to person and protected from public disclosure by laws intended to protect that person's privacy interests).

We note that social security numbers may be withheld in some circumstances under section 552.101 of the Government Code. 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 any of the social security numbers in the file 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 Sheriff's Office pursuant to any provision of law, enacted on or after October 1, 1990. Additionally, one of the social security numbers contained in the submitted information belongs to the requestor; therefore, it must be released. *See* Gov't Code § 552.023.

In summary, the Sheriff's Office may withhold the information we marked under section 552.108. The Sheriff's Office must withhold the information we marked under privacy, the MPA, or section 611.002 of the Health and Safety Code. Similarly, the marked driver's license numbers must be withheld pursuant to section 552.130 of the Government Code. Certain social security numbers may be confidential under federal law. The remainder of the report must be released 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,

A handwritten signature in black ink, appearing to read "Heather R. Rutland". The signature is fluid and cursive, with the first name being the most prominent.

Heather R. Rutland
Assistant Attorney General
Open Records Division

HRR/sdk

Ref: ID# 187275

Enc: Submitted documents

c: Mr. Leo Alex
c/o Julie Joe
Travis County
P.O. Box 1748
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(w/o enclosures)