



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

January 30, 2004

Mr. Robert R. Ray  
Assistant City Attorney  
City of Longview  
P.O. Box 1952  
Longview, Texas 75606-1952

OR2004-0692

Dear Mr. Ray:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 195425.

The City of Longview (the "city") received a request for information pertaining to a named firefighter, including "all complaints, personnel or criminal, filed against [the individual]." The requestor also specifies a particular incident for which he seeks information. You state that most of the requested information has been provided to the requestor but claim that other requested information is excepted from disclosure under sections 552.101, 552.103, 552.108, 552.117, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." You claim that portions of the submitted information are not subject to release under regulations promulgated pursuant to the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), and that the information is therefore excepted from disclosure under section 552.101 of the Government Code in conjunction with these regulations. At the direction of Congress, the Secretary of Health and Human Services ("HHS") promulgated regulations setting privacy standards for medical records, which HHS issued as the Federal Standards for Privacy of Individually Identifiable Health Information. *See* Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 1320d-2 (Supp. IV 1998) (historical & statutory note); Standards for Privacy of Individually Identifiable Health Information,

45 C.F.R. Pts. 160, 164; *see also* Attorney General Opinion JC-0508 at 2 (2002). These standards govern the releasability of protected health information by a covered entity. *See* 45 C.F.R. Pts. 160, 164. Under these standards, a covered entity may not use or disclose protected health information, excepted as provided by parts 160 and 164 of the Code of Federal Regulations. 45 C.F.R. § 164.502(a).

Section 160.103 defines a covered entity as a health plan, a health clearinghouse, or a health care provider who transmits any health information in electronic form in connection with a transaction covered by subchapter C, Subtitle A of Title 45. 45 C.F.R. § 160.103. In this instance, you state that “the city appears to be an entity subject to the provisions of HIPAA.” However, regardless of whether the city is a covered entity for purposes of section 160.103, we find that the submitted information is not protected health information under HIPAA.

Section 160.103 of title 45 of the Code of Federal Regulations defines the following relevant terms as follows:

Health information means any information, whether oral or recorded in any form or medium, that:

- (1) Is created or received by a health care provider, health plan, public health authority, employer, life insurer, school or university, or health clearinghouse; and
- (2) Relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual.

....

Individually identifiable health information is information that is a subset of health information, including demographic information collected from an individual, and:

- (1) Is created or received by a health care provider, health plan, employer, or health care clearinghouse; and
- (2) Relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual; and
  - (i) That identifies the individual; or

(ii) With respect to which there is a reasonable basis to believe the information can be used to identify the individual.

....

Protected health information means individually identifiable health information:

(1) Except as provided in paragraph (2) of this definition, that is:

- (i) Transmitted by electronic media;
- (ii) Maintained in electronic media; or
- (iii) Transmitted or maintained in any other form or medium.

(2) Protected health information *excludes* individually identifiable health information in:

- (i) Education records covered by the Family Educational Rights and Privacy Act, as amended, 20 U.S.C. 1232g;
- (ii) Records described at 20 U.S.C. 1232g(a)(4)(B)(iv); and
- (iii) *Employment records held by a covered entity in its role as employer.*

45 C.F.R. § 160.103. You state that “the city is self-insured under the provisions of chapter 172 of the Texas Local Government Code. Accordingly, it appears that information the city collects in its capacity as a provider of health coverage is subject to HIPAA.” The health information at issue is contained in an employment application and “Time Off Report for Evaluation Process” forms. Because these records are employment records held by the city in its role as employer, the information they contain is not “protected health information” for purposes of HIPAA. *See* 45 C.F.R. § 160.103. Accordingly, HIPAA does not apply and the submitted information may not be withheld on that basis.

Section 552.101 also encompasses the common law right to privacy, which protects information if it is highly intimate or embarrassing such that its release would be highly objectionable to a reasonable person and the public has no legitimate interest in it. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). The types 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. *Id.* at 683. Where an individual's criminal history information has been compiled by a governmental entity, the information takes on a character that implicates the individual's right to privacy. See *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989). However, information that refers to an individual solely as a victim, witness, or involved person is not private under *Reporters Committee* and may not be withheld under section 552.101 on that basis. In addition, when a requestor asks for information relating to a particular incident, the request does not implicate the privacy concerns expressed in *Reporters Committee* because complying with the request does not require the governmental body to compile unspecified records.

In this instance, the requestor asks the city for all criminal records concerning a named individual. In so doing, the requestor implicates the individual's right to privacy. However, the requestor also seeks information relating to a particular incident, a request that does not implicate the privacy concerns discussed in *Reporters Committee*. Therefore, to the extent the city maintains records, other than those that pertain to the specified incident or routine traffic violations, in which the named individual is portrayed as a suspect, defendant, or arrestee, it must withhold such records pursuant to section 552.101 and the common law privacy concerns expressed in *Reporters Committee*. However, information pertaining to the specifically requested incident and any incidents in which the named individual is portrayed solely as a victim, witness, or involved person is not considered confidential under the holding in *Reporters Committee* and may not be withheld under section 552.101 on that basis. In addition, we have marked medical information that the city must withhold pursuant to section 552.101 and common law privacy.

We turn now to your arguments regarding section 552.108 of the Government Code. This section provides in part:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of Section 552.021 if:

- (1) release of the information would interfere with the detection, investigation or prosecution of crime; [or]
- (2) 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[.]

Gov't Code § 552.108(a)(1), (2). Generally speaking, subsection 552.108(a)(1) is mutually exclusive of subsection 552.108(a)(2). Subsection 552.108(a)(1) protects information that pertains to a specific pending criminal investigation or prosecution. In contrast,

subsection 552.108(a)(2) protects information that relates to a concluded criminal investigation or prosecution that did not result in conviction or deferred adjudication.

You state that the information you seek to withhold under this exception relates to an "active criminal prosecution." Based on your representation and our review of the information you wish to withhold, we conclude that the release of this information "would interfere with the detection, investigation, or prosecution of crime." Gov't Code § 552.108(a)(1); *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14<sup>th</sup> 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); Open Records Decision No. 216 at 3 (1978).

However, 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). We believe such basic information refers to the information held to be public in *Houston Chronicle*, including a detailed description of the offense and the social security number of an arrestee. See 531 S.W.2d at 185. Thus, the city may not withhold the description of the offense or the social number of an arrestee under section 552.108. See Open Records Decision No. 127 (1976) (summarizing types of information made public by *Houston Chronicle*). Although section 552.108(a)(1) authorizes the city to withhold the remaining information, it may choose to release all or part of it that is not otherwise confidential by law. See Gov't Code § 552.007.<sup>1</sup>

Although not excepted from disclosure under section 552.108, an arrestee's social security number, and the other social security numbers contained in the submitted information, may be confidential under federal law. Section 552.101 encompasses amendments to the Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), that make confidential social security numbers and related records that are obtained or 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 number at issue is 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 Government Code imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that such information is not obtained or maintained by the city pursuant to any provision of law enacted on or after October 1, 1990.

---

<sup>1</sup>Because of our ruling on section 552.108, we need not address your arguments regarding section 552.103 except to note that basic information held to be public in *Houston Chronicle* is generally not excepted from public disclosure under section 552.103 of the Government Code. See Open Records Decision No. 597 (1991) (predecessor statute).

You also contend that the submitted records include information that is protected by section 552.117 of the Government Code. Section 552.117(a)(1) excepts from public disclosure the present and former home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of governmental body who timely request that such information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, pursuant to section 552.117(a)(1), the city must withhold the above-listed information for all current or former officials or employees who elected, prior to the city's receipt of this request, to keep such information confidential. We have marked the information that must be withheld if section 552.117 applies.

Finally, you contend that a portion of the submitted information is excepted under section 552.130. This section excepts from disclosure "information [that] relates to . . . a motor vehicle operator's or driver's license or permit issued by an agency of this state [or] a motor vehicle title or registration issued by an agency of this state." Pursuant to section 552.130, the city must withhold the information we have marked.

In summary, to the extent the city maintains records, other than those that pertain to the specified incident or routine traffic violations, in which the named individual is portrayed as a suspect, defendant, or arrestee, it must withhold such records pursuant to section 552.101 and common law privacy. The medical information we have marked must also be withheld under section 552.101 and common law privacy. The information the city seeks to withhold pursuant to section 552.108(a)(1) may be withheld on that basis. However, basic information must be released, with the possible exception of an arrestee's social security number, which may be confidential under federal law along with the other social security numbers contained in the submitted information. We have marked information that must be withheld if section 552.117 applies. Pursuant to section 552.130, the city must withhold the motor vehicle record information we have marked. The remaining submitted information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general

have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

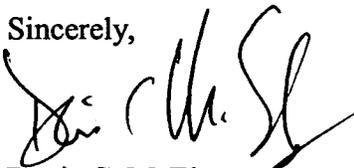
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas 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,



Denis C. McElroy  
Assistant Attorney General  
Open Records Division

DCM/seg

Ref: ID# 195425

Enc. Submitted documents

c: Mr. John Lynch  
Longview News-Journal  
320 East Methvin Street  
Longview, Texas 75601  
(w/o enclosures)