



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 14, 2004

Ms. Caroline Kelley
Assistant City Attorney
1522 Texas Parkway
Missouri City, Texas 77489

OR2004-3964

Dear Ms. Kelley:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 201517.

The Missouri City Police Department (the "department") received a request for information related to a named department officer. You state that "the majority" of the responsive information has been released to the requestor. You claim that portions of the remaining requested information are excepted from disclosure under sections 552.101, 552.102, 552.117, 552.1175, 552.122, 552.130, and 552.136 of the Government Code.¹ 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." This section encompasses information protected by other statutes. You claim that the information submitted in Exhibit C is confidential under section 552.101 in conjunction with the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 42 U.S.C. §§ 1320d-1320d-8.

At the direction of Congress, the Secretary of Health and Human Services ("HHS") promulgated regulations setting privacy standards for medical records, which HHS issued

¹We note that although you also raised sections 552.108, 552.115, and 552.140 in your March 9, 2004 letter to this office, you make no arguments under these sections in your March 16, 2004 letter. Accordingly, we do not address the applicability of these exceptions to the requested information.

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 (“Privacy Rule”); *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).

This office recently addressed the interplay of the Privacy Rule and the Act. Open Records Decision No. 681 (2004). In that decision, we noted that section 164.512 of title 45 of the Code of Federal Regulations provides that a covered entity may use or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law. *See* 45 C.F.R. § 164.512(a)(1). We further noted that the Act “is a mandate in Texas law that compels Texas governmental bodies to disclose information to the public.” *See* Open Records Decision No. 681 at 8 (2004); *see also* Gov’t Code §§ 552.002, .003, .021. We therefore held that the disclosures under the Act come within section 164.512(a). Consequently, the Privacy Rule does not make information confidential for the purpose of section 552.101 of the Government Code. Open Records Decision No. 681 at 9 (2004); *see also* Open Records Decision No. 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). Because the Privacy Rule does not make confidential information that is subject to disclosure under the Act, the department may withhold requested protected health information from the public only if an exception in subchapter C of the Act applies.

Next, we address your claim that the information submitted in Exhibit C is confidential under section 552.101 of the Government Code in conjunction with the Medical Practice Act (“MPA”).² Section 159.002 of the MPA 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.

²Occ. Code §§ 151.001-165.160

Information that is 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). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). Based on your representations and our review of this particular information, we agree that portions of the information in Exhibit C constitute medical records and are therefore subject to the MPA. We have marked the information that may be released only in accordance with the MPA.

The submitted information also contains mental health records. 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.” *See also* Health & Safety Code § 611.001 (defining “patient” and “professional”). We have marked mental health records that are within the scope of section 611.002 and may not be released except in accordance with sections 611.004 and 611.0045 of the Health and Safety Code. Health & Safety Code § 611.002(b); *see id.* §§ 611.004, 611.0045.

Criminal history record information (“CHRI”) is confidential. CHRI “means 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” but does not include “driving record information maintained by [the Department of Public Safety (“DPS”)] under Subchapter C, Chapter 521, Transportation Code.” Gov’t Code § 411.082(2).

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 DPS or from another criminal justice agency. Gov’t Code §§ 411.083(b)(1), .087(a)(2), .089(a). However, CHRI so obtained is confidential and may only be disclosed in very limited instances. Gov’t Code § 411.084; *see also* Gov’t Code § 411.087 (restrictions on disclosure of CHRI obtained from DPS also apply to CHRI obtained from other criminal justice agencies). Therefore, to the extent that the submitted documents contain CHRI that was obtained pursuant to these state and federal regulations, such information must be withheld under section 552.101 as information made confidential by law.

Fingerprint information is subject to sections 560.001, 560.002, and 560.003 of the Government Code. These provisions of the Government Code provide as follows:

Sec. 560.001. 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. 560.002. 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. 560.003. APPLICATION OF CHAPTER 552. A biometric identifier in the possession of a governmental body is exempt from disclosure under Chapter 552.

Gov't Code §§ 560.001, .002, .003. It does not appear to this office that section 560.002 permits the disclosure of the submitted fingerprint information. Therefore, the department must withhold the fingerprints, which we have marked, under section 552.101 in conjunction with section 560.003 of the Government Code.

Next, we address your privacy claims under sections 552.101 and 552.102 of the Government Code. Section 552.102 of the Government Code 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). Section 552.102(a) is generally applicable to information relating to a public official or employee. *See* Open Records Decision No. 327 at 2 (1982) (anything relating to employee's employment and its

terms constitutes information relevant to person's employment relationship and is part of employee's personnel file). 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, 683-85 (Tex. 1976), for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the Government Code. See *Indus. Found.*, 540 S.W.2d at 683-85. Accordingly, we will consider your section 552.101 and section 552.102 claims together.

Common-law privacy protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found.*, 540 S.W.2d at 685. 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 the following types of information also are protected from disclosure under section 552.101 in conjunction with 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 a financial transaction between an individual and a governmental body, see Open Records Decision Nos. 545 (1990), 523 (1989) (individual's mortgage payments, assets, bills, and credit history), certain personal choices relating to financial transactions between the individual and the governmental body, see Open Records Decision No. 600 (1992) (designation of beneficiary of employee's retirement benefits and optional insurance coverage; choice of particular insurance carrier; direct deposit authorization; and forms allowing employee to allocate pretax compensation to group insurance, health care, or dependent care), and identities of victims of sexual abuse, see Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). After reviewing your arguments and the submitted information, we find that some of it is protected by common-law privacy and therefore must be withheld under sections 552.101 and 552.102 of the Government Code. We have marked the information accordingly.

You next assert that the information submitted in Exhibit D is excepted from public disclosure under section 552.122(b) of the Government Code. Section 552.122(b) excepts test items developed by a licensing agency or governmental body. In Open Records Decision No. 626 (1994), this office determined that the term "test item" in section 552.122 includes any standard means by which an individual's or group's knowledge or ability in a particular area is evaluated, but does not encompass evaluations of an employee's overall job performance or suitability. Whether information falls within the section 552.122 exception

must be determined on a case-by-case basis. Open Records Decision No. 626 at 6 (1994). Traditionally, this office has applied section 552.122 where release of "test items" might compromise the effectiveness of future examinations. *Id.* at 4-5; *see also* Open Records Decision No. 118 (1976). Additionally, when answers to test questions might reveal the questions themselves, the answers may be withheld under section 552.122(b). *See* Open Records Decision No. 626 at 8 (1994).

After reviewing your arguments and the information submitted in Exhibit D, we find that the records at issue consist solely of general questions that evaluate an applicant's overall suitability for employment and do not test the specific knowledge of an applicant in a particular area. Accordingly, we determine that the records at issue do not constitute test items for purposes of section 552.122 of the Government Code, and may not be withheld from disclosure on that basis.

You also contend that some of the submitted information is excepted under section 552.117(a)(2) of the Government Code. This section excepts from disclosure "information that relates to the home address, home telephone number, or social security number" of a peace officer, or that reveals whether the peace officer has family members. We note that a former or future spouse does not constitute a family member for purposes of section 552.117(a)(2). Further, we note that an individual's personal post office box number is not a "home address" and therefore may not be withheld under section 552.117. *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). Therefore, we agree that the department must withhold most of the types of information you have marked under section 552.117(a)(2) of the Government Code, as well as the types of additional information we have marked. However, we have marked the information that is not subject to this section.³

We next address your claim under section 552.130 of the Government Code. This section excepts from disclosure information that relates to:

³As section 552.117 is dispositive, we do not address your section 552.1175 claim for this information, except to note that a former or future spouse and an individual's personal post office box number are also not excepted under section 1175 of the Government Code.

(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[.]

Gov't Code § 552.130(a)(1)-(2). Section 552.130(a)(1) is applicable to information that relates to a Texas driver's license. Section 552.130(a)(2) is applicable to information that relates to a Texas motor vehicle title, vehicle registration, or vehicle identification number. We have marked the types of information that you must withhold under section 552.130.

Finally, we address your claim that some of the submitted information is excepted from disclosure under section 552.136 of the Government Code. Section 552.136 makes certain account numbers confidential and provides in relevant part:

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

(1) obtain money, goods, services, or another thing of value; or

(2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding 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. We therefore conclude that the department must withhold the account number we have marked pursuant to section 552.136 of the Government Code.

In summary: (1) absent the applicability of an MPA access provision, the department must withhold the marked medical record information pursuant to the MPA; (2) mental health records may not be released except in accordance with sections 611.004 and 611.0045 of the Health and Safety Code; (3) CHRI must be withheld under section 552.101 of the Government Code in conjunction with federal law and subchapter F of chapter 411 of the Government Code; (4) the department must withhold the marked fingerprint information under section 552.101 in conjunction with section 560.003 of the Government Code; (5) the department must withhold the information that is confidential under sections 552.101 and 552.102 in conjunction with common-law privacy; and (6) the department must withhold the information that is excepted from disclosure under sections 552.117(a)(2), 552.130, and 552.136 of the Government Code. The rest of the 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,

A handwritten signature in black ink, appearing to read "Cindy Nettles". The signature is fluid and cursive, with the first name "Cindy" being more prominent than the last name "Nettles".

Cindy Nettles
Assistant Attorney General
Open Records Division

CN/jh

Ref: ID# 201517
Enc. Submitted documents

c: Ms. Roma Khanna
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(w/o enclosures)