



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

November 1, 2004

Ms. Kimberley Mickelson  
Olson & Olson, L.L.P.  
2727 Allen Parkway, Suite 600  
Houston, Texas 77019

OR2004-9274

Dear Ms. Mickelson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 211977.

The Seabrook Police Department (the "department"), which you represent, received a request for (1) personnel records pertaining to a specified police officer and (2) reports on DWI arrests filed by this officer during a certain time period. You state that some information will be released but claim that portions of the submitted information are excepted from disclosure under sections 552.101, 552.103, 552.108, 552.117, 552.1175, 552.130, and 552.136 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that the present request specifically excludes the named officer's social security number, personal bank account number, date of birth, medical records, home address, and home telephone numbers. Therefore, to the extent that you have submitted such information for our review, we find that it is non-responsive. This decision does not address your arguments regarding the non-responsive information, which the department is not required to release. However, we will address your claimed exceptions for the remaining 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" and encompasses information made confidential by other statutes. Criminal history record information ("CHRI") is confidential and not subject to disclosure. 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.”). Section 411.083 provides that any CHRI maintained by the Department of Public Safety (“DPS”) is confidential. Gov’t Code § 411.083(a). Similarly, CHRI obtained from the DPS pursuant to statute is also 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). However, the definition of CHRI does not include driving record information maintained by DPS under chapter 521 of the Transportation Code. *See* Gov’t Code § 411.082(2)(B). The department must withhold any CHRI falling within the ambit of these state and federal regulations pursuant to section 552.101.

You claim that portions of the submitted information are confidential under 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 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, except 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 Public Information Act (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.

You assert that portions of the submitted information are excepted from disclosure under section 552.101 in conjunction with the Americans with Disabilities Act. Title I of the Americans with Disabilities Act of 1990 (the "ADA"), 42 U.S.C. §§ 12101 *et seq.*, 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. 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 or her job, is to be treated as a confidential medical record as well. *See* 29 C.F.R. § 1630.14(c); *see also* Open Records Decision No. 641 (1996). Furthermore, the federal 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 department must withhold under section 552.101 in conjunction with the ADA.

You claim that portions of the remaining submitted information may be confidential pursuant to sections 181.001 and 181.101 of the Health and Safety Code. Section 181.101 of the Health and Safety Code states the following:

A covered entity shall comply with the Health Insurance Portability and Accountability Act and Privacy Standards relating to:

....

(3) uses and disclosures of protected health information, including requirements relating to consent[.]

....

Health & Safety Code § 181.101. We note, however, that section 181.101 was repealed effective September 1, 2003. Acts 2001, 77<sup>th</sup> Leg., R.S., ch. 1511, § 1, 2001 Tex. Gen. Laws 5384, repealed by Act of April 10, 2003, 78<sup>th</sup> Leg., R.S., ch. 3, 2003 Tex. Sess. Law Serv 5. Furthermore, section 181.001 consists of definitions, not provisions under which information is expressly made confidential. *See* Open Records Decision No 658 at 4 (1998) (statutory confidentiality provision must be express; confidentiality will not be inferred from statutory structure). Therefore, the department may not withhold any portion of the submitted information under section 552.101 in conjunction with either section 181.001 or section 181.101 of the Health and Safety Code.

You assert that a portion of the submitted information is excepted from disclosure pursuant to section 552.101 in conjunction with section 411.192 of the Government Code, which governs the release of all information maintained by DPS concerning the licensure of individuals to carry a concealed handgun. Section 411.192 provides:

[DPS] shall disclose to a criminal justice agency information contained in its files and records regarding whether a named individual or any individual named in a specified list is licensed under this subchapter. [DPS] shall, on written request and payment of a reasonable fee to cover costs of copying, disclose to any other individual whether a named individual or any individual whose full name is listed on a specified written list is licensed under this subchapter. Information on an individual subject to disclosure under this section includes the individual's name, date of birth, gender, race, and zip code. Except as otherwise provided by this section and by Section 411.193, all other records maintained under this subchapter are confidential and are not subject to mandatory disclosure under the open records law, Chapter 552, Government Code, except that the applicant or license holder may be furnished a copy of disclosable records on request and the payment of a reasonable fee.

Gov't Code § 411.192. You have marked information in the submitted documents concerning an individual's concealed handgun license. We agree that the department must withhold this information pursuant to section 552.101 in conjunction with section 411.192 of the Government Code.

You assert that the submitted fingerprint information is excepted from disclosure under section 552.101 in conjunction with sections 560.001, 560.002, and 560.003 of the Government Code. Sections 560.001, 560.002, and 560.003 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-.003. Upon review, we find section 560.002 does not permit the disclosure of the submitted fingerprint information in this instance. Therefore, the department must withhold the fingerprint information you have marked under section 552.101 in conjunction with section 560.003 of the Government Code.

You assert that the submitted L-2 Declaration of Medical Condition and L-3 Declaration of Psychological and Emotional Health required by the Texas Commission on Law Enforcement Officer Standards and Education ("TCLEOSE") 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.

Occ. Code § 1701.306(a), (b). Therefore, the department must withhold the submitted declarations, which we have marked, under section 552.101 in conjunction with section 1701.306 of the Occupations Code.<sup>1</sup>

You claim that portions of the remaining submitted information are confidential under the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. Section 159.002 of the MPA provides:

(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. 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). 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). Upon review, we find that no portion of the remaining submitted information constitutes a communication between a patient and a physician or a record created or maintained by a physician. Further, we find that you have not established that any portion of the remaining submitted information was obtained from a medical record.

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<sup>1</sup> As we are able to make this determination, we do not address your remaining arguments against the disclosure of this information.

Therefore, no portion of the remaining submitted information constitutes a medical record for the purposes of the MPA, and it may not be withheld on that basis.

You assert that portions of the remaining submitted information are subject to section 1703.306 of the Occupations Code. Section 1703.306(b) provides that “[a] governmental agency that acquires information from a polygraph examination under this section shall maintain the confidentiality of the information.” The department must withhold the polygraph examination information we have marked under section 552.101 in conjunction with section 1703.306(b) of the Occupations Code.<sup>2</sup>

Section 552.101 also encompasses the doctrine of common-law privacy. Common-law privacy protects information that (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. v. Tex. 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. In addition, this office has found that the following types of information are excepted from required public disclosure under common-law privacy: an individual’s criminal history when compiled by a governmental body, *see* Open Records Decision No. 565 (citing *United States Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989)), personal financial information not relating to a financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990), 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), and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982).

Having reviewed the submitted information, we agree that portions of it are protected by common-law privacy and must be withheld under section 552.101 on that basis. As for the remaining information you have marked, we find that, even if it could be considered highly intimate or embarrassing, it is of legitimate public concern. *See* Open Records Decision Nos. 455 (1987) (public employee’s job performances or abilities generally not protected by privacy), 444 at 5-6 (1986) (public has interest in public employee’s qualifications and performance and circumstances of his resignation or termination), 405 at 2-3 (1983) (public has interest in manner in which public employee performs his job); *see also* Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow). We have

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<sup>2</sup> As we are able to make this determination, we do not address your remaining arguments against the disclosure of this information.

marked the information that the department must withhold under section 552.101 on the basis of common-law privacy.<sup>3</sup>

Next, you contend that the submitted incident reports are excepted from disclosure under sections 552.108(a)(1) and 552.108(a)(2) of the Government Code. Please note that the protections offered by sections 552.108(a)(1) and 552.108(a)(2) are, generally speaking, mutually exclusive. Section 552.108(a)(1) generally applies to information held by law enforcement agencies that pertains to criminal investigations or prosecutions that are currently pending. Section 552.108(a)(2) protects law-enforcement records that pertain to criminal investigations and prosecutions that have concluded in a final result other than a criminal conviction or deferred adjudication.

In this instance, you state that the incidents at issue in the submitted reports “occurred in recent months, and no charges have yet been filed.” Thus, we understand you to argue that the submitted reports pertain to criminal prosecutions that are still pending. This argument is properly asserted under section 552.108(a)(1) of the Government Code. Based upon your representation that the submitted reports relates to pending criminal prosecutions, we determine that the release of these reports would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ’g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th 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). Therefore, section 552.108(a)(1) is applicable in this instance.

We note, however that basic information about an arrested person, an arrest, or a crime is not excepted from disclosure under section 552.108. Gov’t Code § 552.108(c). Such basic information refers to the information held to be public in *Houston Chronicle*, 531 S.W.2d 177. *See Open Records Decision No. 127 (1976)* (summarizing types of information considered to be basic information). Thus, with the exception of basic information, you may withhold the submitted incident reports pursuant to section 552.108(a)(1).<sup>4</sup> We note that you have the discretion to release all or part of the remaining information in these reports that is not otherwise confidential by law. Gov’t Code § 552.007.

You assert that the submitted birth certificate is excepted from disclosure under section 552.115 of the Government Code. Section 552.115 provides that a birth or 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

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<sup>3</sup> As we are able to make this determination, we do not address your remaining argument against the disclosure of this information.

<sup>4</sup> As we are able to make this determination, we do not address your remaining argument against the disclosure of this information, except to note that basic information is generally not excepted from disclosure under section 552.103 of the Government Code. *See Open Records Decision No. 597 (1991)*.

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.” Because section 552.115 only applies to a birth certificate maintained by the bureau of vital statistics or local registration officials, the department may not withhold a birth certificate maintained in its files pursuant to that provision. *See* Open Records Decision No. 338 (1982).

You assert that the officer’s family member information is excepted from disclosure under section 552.117(a)(2) of the Government Code. Section 552.117(a)(2) excepts from required public disclosure the home address, home telephone number, social security number, and the family member information of a peace officer as defined by article 2.12 of the Code of Criminal Procedure. *See* Open Records Decision No. 622 (1994). You indicate that the officer at issue in the submitted information is a currently licensed peace officer. Therefore, the department must withhold the family member information you have marked, as well as the additional information we have marked, under section 552.117(a)(2).

You also assert that portions of the submitted information are excepted from disclosure under section 552.1175 of the Government Code. Section 552.1175 provides in part:

(b) Information that relates to the home address, home telephone number, or social security number of an individual to whom this section applies, or that reveals whether the individual has family members is confidential and may not be disclosed to the public under this chapter if the individual to whom the information relates:

- (1) chooses to restrict public access to the information; and
- (2) notifies the governmental body of the individual's choice on a form provided by the governmental body, accompanied by evidence of the individual's status.

Gov’t Code § 552.1175(b). You state that the information at issue pertains to individuals who “are or were Texas police officers.” However, you do not inform this office, nor does any of the submitted information indicate, whether the individuals whose information is at issue are currently licensed peace officers who have elected with the department in accordance with sections 552.1175(b)(1) and (2).<sup>5</sup> If the individuals are currently licensed peace officers who elect to restrict access to their home address, phone number, and family member information in accordance with section 552.1175(b), the department must withhold that information from disclosure.

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<sup>5</sup> “Peace Officer” is defined by article 2.12 of the Code of Criminal Procedure.

Finally, you assert that portions of the submitted information are subject to section 552.130 of the Government Code. Section 552.130 provides in pertinent part:

(a) Information is excepted from the requirements 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;
- (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 or a local agency authorized to issue an identification document.

Gov't Code § 552.130. The department must withhold the information you have marked pursuant to section 552.130.

In summary, any criminal history record information in the submitted documents must be withheld pursuant to section 552.101 in conjunction with chapter 411 of the Government Code and federal regulations. The department must also withhold the following information under section 552.101: (1) the information you have marked under section 411.192 of the Government Code, (2) the fingerprint information you have marked under section 560.003 of the Government Code, (3) the marked TCLEOSE declarations under section 1701.306 of the Occupations Code, (4) the marked polygraph examination information under section 1703.306 of the Occupations Code, and (5) the information we have marked under the doctrine of common-law privacy. With the exception of basic information, which must be released, the department may withhold the submitted incident reports under section 552.108(a)(1). The department must withhold the information you have marked under section 552.117(a)(2). The department may be required to withhold the information you have marked under section 552.1175. The department must withhold the information you have marked under section 552.130. The remaining submitted information 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).

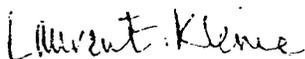
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following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



Lauren E. Kleine  
Assistant Attorney General  
Open Records Division

LEK/jev

Ref: ID# 211977

Enc. Submitted documents

c: Ms. Vicki Armstrong  
ABA Professional Services  
1017 The Cliffs Boulevard  
Montgomery, Texas 77356  
(w/o enclosures)