



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 18, 2004

Mr. Bryan Fowler
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OR2004-9822

Dear Mr. Fowler:

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# 213090.

The City of Montgomery Police Department (the "department"), which you represent, received requests for eleven categories of information related to three named police officers. You indicate that you have released some of the requested information but claim that the remaining information is excepted from disclosure under sections 552.101, 552.108, 552.117, 552.119, and 552.130 of the Government Code. You have submitted redacted copies of a representative sample of the requested information for our review.¹ We have considered the exceptions you claim and reviewed the submitted information.²

You assert that some of the submitted information is excepted from public disclosure pursuant to section 552.101. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information that another statute makes

¹You have submitted a redacted copy of the information for this office's review. While it is entirely appropriate that you have marked the specific information that you assert is excepted from disclosure, *see* Gov't Code § 552.301(e)(2), we advise that in the future, such marked information should be visible to this office so that this office may properly determine whether the specific information at issue is, in fact, subject to the claimed exception.

²We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

confidential. The Medical Practice Act ("MPA"), chapter 159 of the Occupations Code governs the disclosure of medical records. 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.

Occ. Code § 159.002(b)-(c). Medical records must be released upon the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. See Occ. Code §§ 159.004, .005. Any subsequent release of medical records must be consistent with the purposes for which the governmental body obtained the records. See *id.* § 159.002(c); Open Records Decision No. 565 at 7 (1990). Medical records may only be released in accordance with the MPA. See Open Records Decision No. 598 (1991). Therefore, the medical record we have marked may be released only in accordance with the MPA.

We note that the submitted information contains a Report of Separation of License Holder (F-5) which is made confidential by section 1701.454 of the Occupations Code. Section 1701.454 provides in relevant part:

(a) A report or statement submitted to the commission under this subchapter is confidential and is not subject to disclosure under Chapter 552 of the Government Code.

Occ. Code § 1701.454. Therefore, the department must withhold the marked F-5 form pursuant to section 552.101 in conjunction with section 1701.454 of the Occupations Code.

Section 552.101 also encompasses the common law right of privacy, which 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. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (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. 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). Accordingly, we have marked financial and medical information in the submitted documents that must be withheld pursuant to section 552.101 and common law privacy. However, we find that some of the information you have marked is not highly intimate or embarrassing for the purpose of common law privacy. *See generally* Open Records Decision Nos. 554 at 3 (1990) (disclosure of person's home address and telephone number is not invasion of privacy), 455 at 7 (1987) (birth dates, names and addresses of character references are not protected by privacy). Accordingly, this information, which we have marked, may not be withheld under section 552.101 on this basis.

Section 552.101 also encompasses criminal history record information ("CHRI") generated by the National Crime Information Center ("NCIC") or by the Texas Crime Information Center ("TCIC"). 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. 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 information submitted for our review includes CHRI generated by TCIC and NCIC. Accordingly, we have marked the CHRI that is excepted from required public disclosure by section 552.101 of the Government Code.

You also claim that some of the submitted information may be excepted from public disclosure pursuant to section 552.108 of the Government Code. Section 552.108 of the Government Code provides as follows:

(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; (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; or . . . (4) it is information that: (A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or (B) reflects the mental impressions or legal reasoning of an attorney representing the state.

....

(c) This section does not except from the requirements of Section 552.021 information that is basic information about an arrested person, an arrest, or a crime.

Gov't Code § 552.108. Generally, 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). First, you have not stated that the information at issue pertains to an ongoing criminal investigation or prosecution, nor have you explained how its release would interfere in some way with the detection, investigation, or prosecution of crime. *See* Gov't Code § 552.108(a)(1). Thus, you have not met your burden under section 552.108(a)(1). A governmental body claiming section 552.108(a)(2) must demonstrate that the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. You have not demonstrated how section 552.108(a)(2) would apply to the information at issue, and therefore, you have not met your burden under section 552.108(a)(2). Lastly, you do not assert that the information at issue was prepared by an attorney representing the state or that it reflects the mental impressions or legal reasoning of an attorney representing the state. *See* Gov't Code § 552.108(a)(4). Thus, you may not withhold any of the submitted information under section 552.108.

Next, you contend that some of the submitted information may be excepted from disclosure under section 552.117 of the Government Code. Section 552.117(a)(2) excepts from public disclosure a peace officer's home address and telephone number, social security number, and family member information regardless of whether the peace officer made an election under section 552.024 of the Government Code. Section 552.117(a)(2) applies to peace officers

as defined by article 2.12 of the Code of Criminal Procedure. You state that the officers whose personnel files are the subject of this request are peace officers under article 2.12 of the Code of Criminal Procedure. Based on this assertion, the department must withhold most of the information it has marked under section 552.117(a)(2). We have also marked additional information subject to section 552.117(a)(2) that the department must also withhold. We note that section 552.117 is applicable only to a personal pager or cellular phone number paid for by the peace officer. *See* Open Records Decision No. 670 at 6 (2001) (statutory predecessor to section 552.117(a)(2) encompassed personal cellular phone numbers and personal pager numbers of peace officers who purchased cellular or pager service with their personal funds). Thus, if the listed pager and cellular phone numbers were provided to a peace officer at public expense, these numbers may not be withheld under section 552.117. *See* Open Records Decision No. 506 at 5-7 (1988) (statutory predecessor to section 552.117 not applicable to cellular mobile phone numbers provided and paid for by governmental body and intended for official use). The remaining information the department has marked, including work telephone numbers, is not protected under section 552.117(a)(2). We have marked this information accordingly, and it must be released to the requestor.

You also claim that some of the submitted information is excepted from disclosure under section 552.130 of the Government Code, which 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[.]

Gov't Code § 552.130(a). Therefore, you must withhold the Texas driver's license numbers you have marked, as well as information we have marked under section 552.130.³

We note that the submitted information contains an insurance policy number and checking account number that are subject to section 552.136 of the Government Code.⁴ Section 552.136 provides:

³ Because we reach this conclusion under section 552.130, we need not reach your section 552.119 claim.

⁴The Office of the Attorney General will raise mandatory exceptions like sections 552.136 and 552.137 on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

(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. The insurance policy number that we have marked and the checking account number that you previously redacted must be withheld under section 552.136.

The submitted information also contains an e-mail address obtained from the public. Section 552.137 makes certain e-mail addresses confidential. Section 552.137 provides:

(a) Except as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

(c) Subsection (a) does not apply to an e-mail address:

(1) provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent;

(2) provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor's agent;

(3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a

governmental body in the course of negotiating the terms of a contract or potential contract; or

(4) provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public.

(d) Subsection (a) does not prevent a governmental body from disclosing an e-mail address for any reason to another governmental body or to a federal agency.

Gov't Code § 552.137. Under section 552.137, a governmental body must withhold the e-mail address of a member of the general public, unless the individual to whom the e-mail address belongs has affirmatively consented to its public disclosure. *See id.* § 552.137(b). You do not inform us that the individual to whom the e-mail address belongs has affirmatively consented to the release of the e-mail address. The department must, therefore, withhold the e-mail address under section 552.137.

In summary, we make the following determinations: 1) the department may only disclose the submitted medical record in accordance with the MPA; 2) the department must withhold the submitted F-5 form pursuant to section 552.101 in conjunction with section 1701.454 of the Occupations Code; 3) the department must withhold information that we have marked pursuant to section 552.101 in conjunction with the common law right to privacy; 4) the department must withhold any CHRI pursuant to section 552.101 in conjunction with chapter 411 of the Government Code; 5) the department must withhold the peace officers' home addresses, home telephone numbers, social security numbers, and family information under section 552.117(a)(2); 6) the department must withhold Texas driver's license numbers pursuant to section 552.130; 7) the department must withhold the submitted insurance policy and bank account numbers pursuant to section 552.136; and 8) the department must withhold the marked e-mail address pursuant to section 552.137. The remaining 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,



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Assistant Attorney General
Open Records Division

LJJ/seg

Ref: ID# 213090

Enc. Submitted documents

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