



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 29, 2004

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

OR2004-10021

Dear Ms. Joe:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 214824.

The Travis County Constable's Office for Precinct Three (the "constable's office") received a request for information relating to the employment of a named individual. You state that you have released most of the information to the requestor and claim that some of the submitted information is excepted from disclosure under sections 552.101, 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." This section encompasses information protected by other statutes. You state 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 constable's office must withhold the submitted declarations, which we have marked, under section 552.101 in conjunction with section 1701.306 of the Occupations Code.

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 constable's office must withhold any CHRI falling within the ambit of these state and federal regulations pursuant to section 552.101 of the Government Code. We have marked the CHRI that must be withheld.

One of the documents you submitted to this office for review includes an Employment Eligibility Verification, Form I-9. Form I-9 is governed by title 8, section 1324a of the United States Code, which provides that the form "may not be used for purposes other than for enforcement of this chapter" and for enforcement of other federal statutes governing crime and criminal investigations. 8 U.S.C. § 1324a(b)(5); *see* 8 C.F.R. § 274a.2(b)(4). Release of this document under the Public Information Act would be "for purposes other than for enforcement" of the referenced federal statutes. Accordingly, we conclude that Form I-9 is confidential under section 552.101 of the Government Code and may only be

released in compliance with the federal laws and regulations governing the employment verification system.

In addition, section 6103(a) of title 26 of the United States Code provides that tax return information is confidential. This includes the Employee W-4 Form. The federal tax return information must be withheld.

You also assert that the submitted fingerprint information is excepted from disclosure under section 552.101 of the Government Code in conjunction with sections 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 constable's office must withhold the fingerprint information we have marked under section 552.101 in conjunction with section 560.003 of the Government Code.

You have submitted three pages that you assert are confidential under the Medical Practice Act (the "MPA"), chapter 159 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 three submitted documents 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 submitted information was obtained from a medical record. Therefore, the three pages you have marked as medical records for the purposes of the MPA may not be withheld on that basis.

However, 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: 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), and 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).

Having reviewed the submitted information, we find that some of the submitted information is protected by common law privacy and must be withheld under section 552.101 on that basis. Some of the information, however, we find to be of legitimate concern to the public. We have marked the information that the constable's office must withhold under section 552.101 of the Government Code on the basis of common law privacy.

The constable's office also raises section 552.108(b)(1) of the Government Code for a portion of the submitted information. An internal record of a law enforcement agency maintained for internal use in matters relating to law enforcement or prosecution may be withheld under section 552.108(b)(1) if it is demonstrated that "release of the internal record or notation would interfere with law enforcement or prosecution." *See City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet. h.) (section 552.108(b)(1) protects information which, if released, would permit private citizens to anticipate weaknesses in police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate state laws); Open Records Decision No. 636 at 2-3 (1995). The statutory predecessor to section 552.108(b)(1) protected information that would reveal law enforcement techniques. *See, e.g.*, Open Records Decision Nos. 531 (1989) (release of detailed use of force guidelines would interfere with law enforcement), 456 (1987) (release in advance of information regarding location of off-duty police officers would interfere with law enforcement), 413 (1984) (release of sketch showing security measures to be used at next execution would interfere with law enforcement), 409 (1984) (information regarding certain burglaries protected if it exhibits pattern that reveals investigative techniques), 341 (1982) (release of certain information from DPS would interfere with law enforcement because disclosure would hamper departmental efforts to detect forgeries of drivers' licenses), 252 (1980) (statutory predecessor was designed to protect investigative techniques and procedures used in law enforcement), 143 (1976) (disclosure of specific operations or specialized equipment directly related to investigation or detection of crime may be excepted). The predecessor to section 552.108(b)(1) was not applicable to generally known policies and procedures. *See, e.g.*, Open Records Decision Nos. 531 at 2-3 (1989) (Penal Code provisions, common law rules, and constitutional limitations on use of force not protected), 252 at 3 (1980) (governmental body failed to indicate why investigative procedures and techniques requested were any different from those commonly known). A governmental body that relies on section 552.108(b)(1) must sufficiently explain how and why the release of the information at issue would interfere with law enforcement and crime prevention. *See* Open Records Decision Nos. 562 at 10 (1990), 531 at 2 (1989); *see also* Open Records Decision Nos. 434 at 2 (1986) (circumstances of

each case must be examined to determine whether release of particular information would interfere with law enforcement or crime prevention), 409 at 2 (1984) (whether disclosure of particular records will interfere with law enforcement or crime prevention must be decided on case-by-case basis).

You state that disclosure of the information you seek to withhold under section 552.108(b)(1) would endanger the safety of a law enforcement officer and gives a person an advantage in evading arrest. However, after reviewing the information at issue, we conclude that the constable's office may not withhold the information that you have marked under section 552.108(b)(1) as the release of this information would not interfere with law enforcement and crime prevention and would not jeopardize an officer's safety or give a person an advantage over an officer.

You assert that the named deputy constable's personal 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 do not indicate that the officer at issue in the submitted information is a currently licensed peace officer. If the officer at issue is a currently licensed peace officer, the department must withhold the information we have marked under section 552.117(a)(2) and the previous determination set forth in Open Records Decision No. 670 (2001). If the individual at issue is not a currently licensed peace officer, the constable's office must withhold the home address, home telephone number, social security number, and the family member information of the named individual if he is a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Gov't Code § 552.117(a)(1). The constable's office may not withhold this information under section 552.117(a)(1) if the employee did not make a timely election to keep the information confidential.¹

Section 552.130 of the Government Code excepts from public disclosure information that 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

¹A social security number is excepted from required public disclosure under section 552.101 of the Government Code in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), if it was obtained or is maintained by a governmental body pursuant to any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 (1994). Prior to releasing any social security number, you should ensure that no such information was obtained or is maintained by the constable's office pursuant to any provision of law, enacted on or after October 1, 1990.

(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(a). We have marked the information that must be withheld from the public under section 552.130.

In summary, the constable's office must withhold the following information under section 552.101: (1) the marked TCLEOSE declarations under section 1701.306 of the Occupations Code, (2) the marked criminal history record information made confidential under chapter 411 of the Government Code, (3) the marked Form I-9 under section 1324a of title 8 of the United States Code, (4) the marked W-4 form under section 6103(a) of title 26 of the United States Code, (5) the marked fingerprint information under section 560.003 of the Government Code, and (6) the information we have marked under the doctrine of common law privacy. The constable's office must withhold the information we have marked under section 552.117(a)(2) of the Government Code, if the named individual is a currently licensed peace officer as defined in article 2.12 of the Code of Criminal Procedure. If he is not a currently licensed police officer, the information we have marked as excepted under section 552.117(a)(2) must be withheld under section 552.117(a)(1) if the individual made a timely election to withhold that information under section 552.024 of the Government Code. The constable's office must withhold the information we have marked under section 552.130 of the Government Code. 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,



Amanda Crawford
Assistant Attorney General
Open Records Division

AEC/sdk

Ref: ID# 214824

Enc. Submitted documents

c: Ms. Michelle Warren Childs
5217 Old Spicewood Springs #303
Austin, Texas 78731
(w/o enclosures)