



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 7, 2005

Ms. Luz E. Sandoval Walker
Assistant City Attorney
The City of El Paso
2 Civic Center Plaza, 9th Floor
El Paso, Texas 79901

OR2005-01948

Dear Ms. Walker:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 219673.

The El Paso Police Department (the "department") received a request for specified internal affairs and complaint files pertaining to a named officer. You state that you will release most of the requested information, with some information redacted pursuant to a previous determination issued by this office in Open Records Decision No. 670 (2001).¹ You also indicate that the department is withholding the originating telephone number and address of a 9-1-1 caller furnished to the department by a service supplier established in accordance with chapter 772 of the Health and Safety Code under section 552.101 in conjunction section 772.318 of the Health and Safety Code pursuant to a previous determination issued in Open Records Letter No. 2003-0708 (2003). *See* Gov't Code § 552.301(a) (allowing governmental body to withhold information subject to previous determination); Open Records Decision No. 673 (2001). You claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.117, 552.1175, 552.119, and 552.130 of the

¹*See* Open Records Decision Nos. 670 at 6 (2001) (authorizing all governmental bodies that are subject to chapter 552 of the Government Code to withhold home addresses and telephone numbers, personal cellular phone numbers, personal pager numbers, social security numbers, and family member information of peace officers without necessity of requesting attorney general decision under section 552.117(a)(2); *see also* Gov't Code § 552.301; Open Records Decision No. 673 (2001) (delineating circumstances under which attorney general decision constitutes previous determination under section 552.301).

Government Code. We have considered the exceptions you claim and reviewed the submitted information.²

Initially, we note that the submitted information includes an accident report form that was completed pursuant to chapter 550 of the Transportation Code. *See* Transp. Code §§ 550.062, .064 (law enforcement officer's written report of a motor vehicle accident, Texas Peace Officer's Accident Report form). Section 550.065(b) of the Transportation Code states that, except as provided by subsection (c), accident reports are privileged and confidential. Section 550.065(c)(4) provides for release of accident reports to a person who provides two of the following three pieces of information: (1) date of the accident; (2) name of any person involved in the accident; and (3) specific location of the accident. Transp. Code § 550.065(c)(4). Under this provision, a governmental entity is required to release a copy of an accident report to a person who provides the law enforcement agency with two or more pieces of information specified by the statute. *Id.* In this instance, the requestor did not provide the department with two of the three requisite pieces of information. Therefore, the department must withhold the ST-3 accident report in its entirety in accordance with section 550.065(c)(4) of the Transportation Code.

You claim that some of the submitted records are medical records, access to which is governed by the Medical Practice Act ("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(a)-(c). Information that is subject to the MPA includes both medical records and information obtained from medical records. *See id.* §§ 159.002, .004; Open Records Decision No. 598 (1991). Medical records may be released only as provided under

²We assume that the "representative sample" of each file submitted to this office is truly representative of the requested files 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.

the MPA. Open Records Decision No. 598 (1991). We have marked the information that may be released only in accordance with the MPA.

Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses criminal history record information ("CHRI") generated by the National Crime Information Center or by the Texas Crime Information Center. 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. 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. *See* Gov't Code § 411.082(2)(B) (term CHRI does not include driving record information). However, section 411.081(b) allows a police department to disclose to the public CHRI "that is related to the offense for which a person is involved in the criminal justice system." Gov't Code § 411.081(b). Therefore, the submitted information that pertains to a person's current involvement in the criminal justice system may not be withheld under section 552.101 in conjunction with chapter 411 of the Government Code. We have marked the information that is CHRI subject to chapter 411. Accordingly, this information is excepted from required public disclosure by section 552.101 of the Government Code.

You also raise section 552.101 in conjunction with Articles 60 and 61 of the Code of Criminal Procedure. Article 60.03 provides in pertinent part:

(a) Criminal justice agencies and the council are entitled to access the data bases of the Department of Public Safety and the Texas Department of Criminal Justice in accordance with applicable state or federal laws or regulations. The access granted by this subsection does not grant an agency or the council the right to add, delete, or alter data maintained by another agency.

...

(c) Neither a criminal agency nor the council may disclose to the public information in an individual's criminal history record if the record is protected by state or federal law or regulation.

Crim. Proc. Code art. 60.03(a), (c). The remaining submitted information does not constitute criminal history, therefore, it may not be withheld under section 552.101 on the basis of article 60 of the Code of Criminal Procedure. Furthermore, article 61 provides for the compilation of "criminal information into an intelligence database for the purpose of investigation or prosecuting the criminal activities of criminal combinations or criminal street gangs." Crim. Proc. Code art. 61.02(a). Criminal information maintained under this chapter may be released to another criminal justice agency, a court, or a defendant in a criminal proceeding who is entitled to the discovery of the information under chapter 39. Crim Proc. Code art. 61.03(a). However, upon review, we find that none of the submitted information is a compilation of information pertaining to criminal combinations and criminal street gangs. Accordingly, it may not be withheld under section 552.101 and article 61 of the Code of Criminal Procedure.

Section 552.101 also encompasses Family Code section 58.007. Juvenile law enforcement records relating to conduct that occurred on or after September 1, 1997 are confidential under section 58.007. The relevant language of section 58.007(c) reads as follows:

(c) Except as provided by Subsection (d), law enforcement records and files concerning a child and information stored, by electronic means or otherwise, concerning the child from which a record or file could be generated may not be disclosed to the public and shall be:

- (1) if maintained on paper or microfilm, kept separate from adult files and records;
- (2) if maintained electronically in the same computer system as records or files relating to adults, be accessible under controls that are separate and distinct from controls to access electronic data concerning adults; and
- (3) maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subchapter B.

Some of the submitted information involves juvenile conduct that occurred after September 1, 1997. It does not appear that any of the exceptions in section 58.007 apply; therefore, the information we have marked is confidential pursuant to section 58.007(c) of the Family Code. You must withhold this information from disclosure under section 552.101 of the Government Code. However, you have not demonstrated that the remaining information constitutes a law enforcement record or file concerning a child that is made confidential under section 58.007(c). We therefore conclude that you may not withhold this information under section 552.101 of the Government Code in conjunction with section 58.007(c) of the Family Code.

The department claims that some of the submitted information is excepted from disclosure under section 552.101 in conjunction with section 261.201(a) of the Family Code. Section 261.201(a) provides as follows:

(a) The following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

(1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and

(2) except as otherwise provided in this section, the files, reports, records, communications, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Fam. Code § 261.201(a). Because some of the submitted information consists of files, reports, records, communications, or working papers used or developed in an investigation under chapter 261, the information is within the scope of section 261.201(a) of the Family Code. You state that the department has no rule that would allow for the release of this type of information. Based on your representation and our review, the information we have marked is confidential pursuant to section 261.201 of the Family Code. *See* Open Records Decision No. 440 at 2 (1986) (predecessor statute). Accordingly, the department must withhold this information from disclosure under section 552.101 of the Government Code as information made confidential by law.

You also argue that the submitted fingerprints are excepted from disclosure under section 552.101 in conjunction with chapter 560 of the Government Code. Chapter 560 of the Government Code provides that a governmental body may not release fingerprint information except in certain limited circumstances. *See* Gov't Code §§ 560.001 (defining "biometric identifier" to include fingerprints), .002 (prescribing manner in which biometric identifiers must be maintained and circumstances in which they can be released), .003 (providing that biometric identifiers in possession of governmental body are exempt from disclosure under Act). You do not inform us and the submitted information does not indicate that section 560.002 permits the disclosure of the submitted fingerprint information. We agree that the submitted fingerprint information is confidential under section 560.003 and must be withheld under section 552.101.

You also raise section 552.101 in conjunction with chapter 573 of the Health and Safety Code. Chapter 573 is applicable to emergency detentions. We note, however, that chapter 573 does not contain a confidentiality provision. *See* Open Records Decision Nos. 658 at 4 (1998) (statutory confidentiality provision must be express, and confidentiality requirement will not be implied from statutory structure), 478 at 2 (1987) (statutory confidentiality requires express language making certain information confidential or stating

that information shall not be released to public). Therefore, you may not withhold the information you have marked under chapter 573.

A social security number is excepted from required public disclosure under section 552.101 of the act in conjunction with 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). We have no basis for concluding that any of the submitted social security numbers are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Public Information Act (the "Act") imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the department pursuant to any provision of law enacted on or after October 1, 1990.

Section 552.101 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).

We note, however, that a person's common-law right of privacy terminates upon death. *Moore v. Charles B. Pierce Film Enters., Inc.*, 589 S.W.2d 489, 491 (Tex. App.—Texarkana 1979, writ ref'd n.r.e.); *see also Justice v. Belo Broadcasting Corp.* 472 F. Supp. 145, 146-47 (N.D. Tex. 1979) ("action for invasion of privacy can be maintained only by a living individual whose privacy is invaded") (quoting Restatement of Torts 2d); *See* Attorney General Opinion JM-229 (1984) ("the right of privacy lapses upon death"), Open Records Decision No. 272 (1981) ("the right of privacy is personal and lapses upon death"). Thus, none of the submitted information pertaining to a deceased individual may be withheld on the basis of the decedent's common-law right of privacy.

Accordingly, the department must withhold the information it has marked under privacy in conjunction with section 552.101, except where we have noted otherwise, as well as the additional information we have marked.

Next, section 552.117(a)(2) excepts from disclosure the present and former home addresses and telephone numbers, social security number, and family member information of a peace officer, regardless of whether the officer requests confidentiality for that information under sections 552.024 or 552.1175 of the Government Code.³ Accordingly, the department must withhold the information you have marked under section 552.117(a)(2), as well as the additional information we have marked.

You also claim that some of the information at issue is excepted under section 552.1175 of the Government Code, which provides in part the following:

(b) Information that relates to the home address, home telephone number, or social security number of [a peace officer as defined by article 2.12 of the Code of Criminal Procedure], 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). The submitted documents contain information pertaining to an "officer" who does not work for the department. If this individual is currently a licensed peace officer who elects to restrict access to this information in accordance with section 552.1175(b), the department must withhold the information, which you have marked, under section 552.1175.

Section 552.119 of the Government Code provides:

(a) A photograph that depicts a peace officer as defined by Article 2.12, Code of Criminal Procedure, or a security officer commissioned under Section 51.212, Education Code, the release of which would endanger the life or physical safety of the officer, is excepted from [required public disclosure] unless:

(1) the officer is under indictment or charged with an offense by information;

³"Peace officer" is defined by article 2.12 of the Code of Criminal Procedure.

(2) the officer is a party in a fire or police civil service hearing or a case in arbitration; or

(3) the photograph is introduced as evidence in a judicial proceeding.

(b) A photograph exempt from disclosure under Subsection (a) may be made public only if the peace officer or security officer gives written consent to the disclosure.

Gov't Code § 552.119. In this instance, you have not demonstrated that the release of the submitted photographs would endanger the life or physical safety of any officer. We therefore determine that the department may not withhold the photographs pursuant to section 552.119 of the Government Code.⁴

Section 552.130 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; 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(a)(1)-(3). You must withhold the Texas driver's license, vehicle identification, and license plate numbers you have marked under section 552.130, as well as the additional information we have marked.

Finally, section 552.136 is applicable to certain account numbers and other "access devices." This section provides as follows:

(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

⁴Section 552.119 also adopts the definition of "peace officer" found at article 2.12 of the Code of Criminal Procedure.

(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 have marked the insurance policy number that the department must withhold under section 552.136.

In summary, the department must withhold 1) the ST-3 accident report under section 550.065(c)(4) of the Transportation Code; 2) the information we have marked under section 552.101 and chapter 411 of the Government Code; 3) the information we have marked under section 552.101 in conjunction with section 58.007(c) of the Family Code; 4) the information we have marked under section 552.101 in conjunction with section 261.201(a) of the Family Code; 5) the submitted fingerprints under section 552.101 in conjunction with section 560.003 of the Government Code; 6) some of the information you have marked under section 552.101 in conjunction with common-law privacy, as well as the additional information we have marked; 7) the information you have marked under section 552.117, as well as the additional information we have marked; 8) the information you have marked under section 552.1175 if it pertains to a peace officer who elects to restrict access to this information in accordance with section 552.1175(b); 9) the information you have marked under section 552.130, as well as the additional information we have marked; and 10) the insurance policy number we have marked under section 552.136. We have marked the information that may only be released in accordance with the MPA. The social security numbers may be confidential under federal law. 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

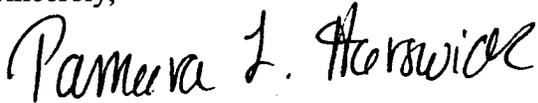
statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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); *Tex. 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,



Tamara L. Harswick
Assistant Attorney General
Open Records Division

TLH/sdk

Ref: ID# 219673

Enc. Submitted documents

c: Ms. Edythe M. Payan
Assistant Public Defender
El Paso County
500 East San Antonio, 5th Floor
El Paso, Texas 79901
(w/o enclosures)