



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

May 19, 2005

Mr. John T. Patterson  
Assistant City Attorney  
City of Waco  
P.O. Box 2570  
Waco, Texas 76702-2570

OR2005-04364

Dear Mr. Patterson:

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# 224424.

The Waco Police Department (the "department") received a request for information related to the murders of three named individuals that occurred in July, 1982. You claim that the requested information is excepted from disclosure under sections 552.101, 552.114, 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. Section 261.201(a) of the Family Code 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). However, the submitted information does not consist of files, reports, records, communications, or working papers used or developed in an investigation under chapter 261. Therefore, the information is not within the scope of section 261.201 of the Family Code, and the department may not withhold it under section 552.101 of the Government Code on that basis.

You claim that the submitted information contains medical records, access to which is governed by the Medical Practice Act (“MPA”), chapter 159 of the Occupations Code. Section 159.002 provides in pertinent 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). The MPA governs access to medical records. Open Records Decision No. 598 (1991). The MPA requires that any subsequent release of medical records be consistent with the purposes for which a governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Moreover, information that is subject to the MPA includes both medical records and information obtained from those medical records. *See* Occ. Code § 159.002(a), (b), (c); Open Records Decision No. 598 (1991). Based on our review of the submitted information however, we find that the responsive documents do not constitute or reflect a “record of the identity, diagnosis, evaluation, or treatment of a patient by a physician” and thus are not medical records subject to the MPA.

You next assert that polygraph records contained in the submitted information are confidential under section 1703.306 of the Occupations Code, which provides as follows:

(a) A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person other than:

(1) the examinee or any other person specifically designated in writing by the examinee;

(2) the person that requested the examination;

(3) a member, or the member's agent, of a governmental agency that licenses a polygraph examiner or supervises or controls a polygraph examiner's activities;

(4) another polygraph examiner in private consultation; or

(5) any other person required by due process of law.

(b) The [Polygraph Examiners B]oard or any other governmental agency that acquires information from a polygraph examination under this section shall maintain the confidentiality of the information.

(c) A polygraph examiner to whom information acquired from a polygraph examination is disclosed under Subsection (a)(4) may not disclose the information except as provided by this section.

Occ. Code § 1703.306. We have marked the information that is confidential under section 1703.306. As there is no indication that this requestor has a right of access to this information, it must be withheld under section 552.101 of the Government Code.

The submitted information contains fingerprint information. 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). We note that some of the fingerprints in question belong to individuals who are deceased. We note that the laws making this type of information confidential are intended to protect an individual's privacy. *See* Gov't Code § 560.002(1)(A) (individual whose biometric identifier is at issue may consent to its release). Because the right of privacy is purely personal and lapses at death, the fingerprints of the deceased individuals may not be withheld on the basis of sections 560.001, 560.002, and 560.003. *See Moore v. Charles B. Pierce Film Enters. Inc.*, 589 S.W.2d 489 (Tex. Civ. App.—Texarkana 1979, writ ref'd n.r.e.) (right of privacy is purely personal and lapses upon death); *see also* Attorney General Opinions JM-229 (1984); H-917 (1976). You do not inform us and the submitted information does not indicate that section 560.002 permits the disclosure of the remaining fingerprint information. Therefore, the department must withhold this information, which we have marked, under section 552.101 in conjunction with section 560.003 of the Government Code.

Criminal history record information ("CHRI") obtained from the National Crime Information Center or the Texas Crime Information Center is confidential under federal and state law.<sup>1</sup>

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<sup>1</sup>We note that the statutory definition of CHRI does not encompass driving record information maintained by the Texas Department of Public Safety under subchapter C of chapter 521 of the Transportation Code. *See* Gov't Code § 411.082(2).

CHRI means “information collected about a person by a criminal justice agency that consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions.” Gov’t Code § 411.082(2). Federal law governs the dissemination of CHRI obtained from the National Crime Information Center network. Federal regulations prohibit the release to the general public of CHRI maintained in state and local CHRI systems. *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.”). The federal regulations allow each state to follow its own individual law with respect to CHRI that it generates. *See* Open Records Decision No. 565 at 10-12 (1990); *see generally* Gov’t Code ch. 411 subch. F. Sections 411.083(b)(1) and 411.089(a) of the Government Code 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. *See* Gov’t Code § 411.089(b).

Although you assert that the submitted information contains CHRI held by the department, we conclude that the submitted information is not confidential under either the applicable federal law or subchapter F of chapter 411 of the Government Code. Therefore, the department may not withhold any portion of the submitted information on that basis under section 552.101 of the Government Code.

The submitted information also contains social security numbers that may be excepted under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act. *See* 42 U.S.C. § 405(c)(2)(C)(viii)(I); Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See* 42 U.S.C. § 405(c)(2)(C)(viii)(I). We have no basis for concluding that any social security number in the file is 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 Government Code 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 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). 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) (information related to an individual's mortgage payments, assets, bills, and credit history is protected by the common law right to privacy); 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). In Open Records Decision No. 393 (1983), this office concluded that information which either identifies or tends to identify a victim of sexual assault or other sex-related offense must be withheld under common law privacy. Open Records Decision No. 393 at 2 (1983); *see* Open Records Decision No. 339 (1982); *see also Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied) (identity of witnesses to and victims of sexual harassment was highly intimate or embarrassing information and public did not have a legitimate interest in such information). Accordingly, we have marked information that must be withheld pursuant to section 552.101 and common law privacy.

You assert that some of the information in Exhibit 4 is excepted from disclosure under section 552.114 of the Government Code. Section 552.114 excepts from disclosure student records at an educational institution funded completely or in part by state revenue. This office generally applies the same analysis under section 552.114 and the Family Educational Rights and Privacy Act of 1974 (“FERPA”). Open Records Decision No. 539 (1990). FERPA provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information (other than directory information) contained in a student’s education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student’s parent. *See* 20 U.S.C. § 1232g(b)(1). “Education records” means those records that contain information directly related to a student and are maintained by an educational agency or institution or by a person acting for such agency or institution. *Id.* § 1232g(a)(4)(A). We note that the department is not an educational agency or institution attended by students. Consequently, the information that you seek to withhold in Exhibit 4 is not an “education record” as defined by FERPA. *See* Open Records Decision No. 390 (1983). Accordingly, we conclude that FERPA is inapplicable to the information at issue, and it may not be withheld from the requestor on that basis.

The department may be required to withhold some of the submitted information pursuant to section 552.1175 of the Government Code. Section 552.1175 applies to peace officers and provides in pertinent 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). The submitted records contain the home phone number of a peace officer.<sup>2</sup> If the peace officer elects to restrict access to his personal information in accordance with section 552.1175, the department must withhold such information. Otherwise, the department must release this information.

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). We note that section 552.130 is designed to protect the privacy interests of an individual; however, an individual's privacy interests expire upon death. *See Moore*, 589 S.W.2d at 491; *see also Justice v. Belo Broadcasting Corp.*, 472 F. Supp. 145, 146-47 (N.D. Tex. 1979); Attorney General Opinion H-917 at 3-4 (1976); Open Records Decision No. 272 at 1 (1981). Accordingly, motor vehicle record information that pertains to individuals who are living and vehicles in which living individuals have an interest must be withheld under section 552.130. Information from motor vehicle records that were issued to individuals who are now deceased may not be withheld under section 552.130.

Lastly, we note that some of the submitted information is subject to section 552.136 of the Government Code, which states that "[n]otwithstanding 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. Therefore, you must withhold the information we have marked under section 552.136.

In summary, the department must withhold the information that we have marked under section 552.101 of the Government Code in conjunction with (1) section 1703.306 of the Occupations Code, (2) section 560.003 of the Government Code, and (3) common law privacy. Social security numbers may be confidential under federal law. If the peace officer elects to restrict access to his home telephone number under section 552.1175 of the Government Code, such information must be withheld. Motor vehicle record information

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<sup>2</sup>"Peace officer" is defined by Article 2.12 of the Texas Code of Criminal Procedure.

that pertains to individuals who are living and vehicles in which living individuals have an interest must be withheld under section 552.130. The department must withhold the information we have marked under section 552.136. 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,

A handwritten signature in cursive script, appearing to read "Cindy Nettles".

Cindy Nettles  
Assistant Attorney General  
Open Records Division

CN/krl

Ref: ID# 224424

Enc. Submitted documents

c: Ms. Michelle Graham  
1017 Eastridge Circle  
Red Oak, Texas 75154  
(w/o enclosures)