



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

November 7, 2005

Ms. J. Middlebrooks  
Assistant City Attorney  
Criminal Law & Police Section  
City of Dallas  
1400 S. Lamar Street #300A  
Dallas, Texas 75215-1801

OR2005-10023

Dear Ms. Middlebrooks:

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# 234890.

The Dallas Police Department (the "department") received a request for all 2005, pending or complete, Internal Affairs Investigation records regarding twelve named police officers. You claim that the submitted information is excepted from disclosure under sections 552.101, 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 representative sample of information.<sup>1</sup>

Initially, we note that while you also raise sections 552.103, 552.127, and 552.137 of the Government Code, you have provided no comments explaining why these exceptions are applicable and you have not marked any portion of the submitted documents to indicate information that you claim is so excepted. We therefore presume the department no longer intends to claim sections 552.103, 552.127, and 552.137 as exceptions to disclosure. *See* Gov't Code § 552.301(e)(1)(A).

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<sup>1</sup>We 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.

Next, you state that the internal investigation against Brian Payne was the subject of a previous ruling issued by this office. In Open Records Letter No. 2005-07825 (2005) we concluded that the department could withhold investigation information pertaining to Brian Payne under section 552.108(a)(1) of the Government Code based on a then pending prosecution. However, we note that the requestor whose request was the subject of Open Records Letter No. 2005-07825 did not seek the named officer's social security number, health information, family information or home address. Thus, that type of information was not responsive to that request, and, thus, not addressed in Open Records Letter No. 2005-07825. Therefore, we find that the four criteria for a "previous determination" established by this office in Open Records Decision No. 673 (2001) have not been met.<sup>2</sup> Accordingly, we conclude that the department may not continue to rely on our decision in Open Records Letter No. 2005-07825 with respect to the internal investigation of Brian Payne. *See* Gov't Code § 552.301(f). Thus, we will address your section 552.108 arguments for this information.

Section 552.108(a) excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime." 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). However, section 552.108 is generally not applicable to the records of an internal investigation that is purely administrative in nature. *See City of Fort Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App. 2002, no pet.); *Morales v. Ellen*, 840 S.W.2d 519, 525-26 (Tex. Civ. App.—El Paso 1992, writ denied) (statutory predecessor not applicable to internal investigation that did not result in criminal investigation or prosecution); Open Records Decision No. 350 at 3-4 (1982). You state that the criminal prosecution by the Tarrant County District Attorney's Office of Brian Payne is ongoing and that office still objects to the release of the information at issue because it would interfere with a pending criminal prosecution. Based upon this representation, we conclude that the release of this information would interfere with the detection, investigation, or prosecution of crime. *See* Open Records Decision Nos. 474 (1987), 372 (1983) (where incident involving allegedly criminal conduct is still under active investigation or prosecution, section 552.108 may be invoked by any proper custodian of information relating to incident).

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<sup>2</sup>The four criteria for this type of "previous determination" are 1) the records or information at issue are precisely the same records or information that were previously submitted to this office pursuant to section 552.301(e)(1)(D) of the Government Code; 2) the governmental body which received the request for the records or information is the same governmental body that previously requested and received a ruling from the attorney general; 3) the attorney general's prior ruling concluded that the precise records or information are or are not excepted from disclosure under the Act; and 4) the law, facts, and circumstances on which the prior attorney general ruling was based have not changed since the issuance of the ruling. *See* Open Records Decision No. 673 (2001).

Accordingly, the department may withhold the information at issue under section 552.108(a)(1) of the Government Code.

Now we turn to the remaining requested information. We note that this information includes an arrest warrant. Article 15.26 of the Code of Criminal Procedure states “[t]he arrest warrant, and any affidavit presented to the magistrate in support of the issuance of the warrant, is public information.” Crim. Proc. Code art. 15.26. We note, that you have marked the arrested officer’s home address to withhold under section 552.117(a)(2) of the Government Code. However, as a general rule, the exceptions to disclosure found in the Act do not apply to information that is made public by other statutes. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Therefore, the department must release the submitted arrest warrant, without redactions, to the requestor.

You claim that some of the responsive information consists of medical records. Section 552.101 of the Government Code excepts from public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This section encompasses information made confidential by other statutes. Access to medical records is governed by the Medical Practice Act (“MPA”), chapter 159 of the Occupations Code. Section 159.002 of the Occupations Code 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). Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 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). We have further found that when a file is created as the result of a hospital stay, all the documents in the file relating to diagnosis and treatment constitute physician-patient communications or “[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician.” Open Records Decision No. 546 (1990).

Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). Such 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. Occ. Code §§ 159.004, .005. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). We have reviewed the submitted information and agree that portions of the information, which you have marked, consist of medical records. These marked medical records may only be released in accordance with the MPA.<sup>3</sup>

You contend that the originating address and telephone number of a 9-1-1 caller contained in one document are excepted under 552.101 in conjunction with chapter 772 of the Health and Safety Code. Chapter 772 authorizes the development of local emergency communications districts. Section 772.318 applies to an emergency 9-1-1 district established in accordance with chapter 772, and makes confidential the originating telephone numbers and addresses of 9-1-1 callers that are furnished by a service supplier. *See* Open Records Decision No. 649 (1996). We understand the City of Dallas to be part of an emergency communication district that was established under section 772.318.<sup>4</sup> Thus, based on your representations and our review, we determine that the originating telephone number and address you have marked in the submitted document must be withheld under section 552.101 in conjunction with section 772.318 of the Health and Safety Code.

You claim that the psychological information is excepted from public disclosure.<sup>5</sup> Section 552.101 also encompasses section 1701.306 of the Occupations Code, which 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

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<sup>3</sup>Because our ruling is dispositive as to this information, we need not address your remaining argument under section 552.101 against disclosure.

<sup>4</sup>Section 772.318 applies to an emergency communication district for a county with a population of more than 20,000.

<sup>5</sup>We note that you cite to section 415.057 of the Government Code, which was repealed by the 76th Legislature. *See* Act of May 13, 1999, 76th Leg., R.S. ch. 388, § 6(b)(1), 1999 Tex. Gen. Laws 1431, 2440. Section 1701.306 of the Occupations Code is the current statute covering this type of information.

(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. This statute makes confidential the information contained in an L-2 Declaration of Medical Condition form and an L-3 Declaration of Psychological and Emotional Health form. However, after reviewing the submitted information and your arguments, we find that you do not seek to withhold an L-2 or L-3 form, but instead seek to withhold written statements made by officers to internal affairs investigators. Thus, the information you have marked is not confidential under section 1701.306(b), and the department may not withhold it under section 552.101 on that ground.

Next, you claim that portions of the submitted information you have marked are excepted from public disclosure under common-law privacy, which is also encompassed by section 552.101 of the Government Code. Common-law privacy 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 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. *Id.* at 683. This office has also found that some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). We have marked the information that must be withheld under section 552.101 of the Government Code in conjunction with common-law privacy. However, common-law privacy does not protect information about public employees' alleged misconduct on the job or complaints made about public employees' job performance. *See* Open Records Decision Nos. 562 at 10 (1990); *see also* 423 at 2 (1984) (scope of public employee privacy is narrow). Therefore, the department may not withhold the remaining information you have marked under common-law privacy.

You also claim that the officers' cellular telephone and pager numbers you have marked are excepted from disclosure pursuant to section 552.108 of the Government Code.

Section 552.108(b)(1) excepts from disclosure an internal record of a law enforcement agency that is maintained for internal use in matters relating to law enforcement or prosecution if “release of the internal record or notation would interfere with law enforcement or prosecution.” Generally, a governmental body claiming section 552.108(b)(1) must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See* Gov’t Code §§ 552.108(b)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). This office has on numerous occasions concluded that section 552.108 excepts from public disclosure information relating to the security or operation of a law enforcement agency. *See, e.g.*, Open Records Decision Nos. 531 (1989) (holding that predecessor to section 552.108 excepts detailed guidelines regarding a police department’s use of force policy), 508 (1988) (holding that release of dates of prison transfer could impair security), 413 (1984) (holding that predecessor to section 552.108 excepts sketch showing security measures for execution).

You state that the submitted officers’ cellular telephone and pager numbers are used in the field to carry out their law enforcement responsibilities. You further claim that release of this information would interfere with law enforcement because it would interfere with the ability of the officers to perform their job duties. Having reviewed your arguments and the submitted information, we agree that release of the officers’ cellular telephone and pager numbers would interfere with law enforcement or crime prevention. *See* Open Records Decision No. 506 at 2 (1988) (statutory predecessor to section 552.108(b) excepted from disclosure the cellular mobile phone numbers assigned to Harris County officials and employees with specific law enforcement responsibilities). Accordingly, the department may withhold this information you have marked under section 552.108(b)(1) of the Government Code.

We next address your claim 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. Accordingly, we have marked information that the department must withhold under section 552.117(a)(2) of the Government Code.<sup>6</sup>

You also claim that some of the remaining information is excepted under section 552.130 of the Government Code. In relevant part, section 552.130 provides:

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<sup>6</sup>Because our ruling is dispositive as to this information, we need not address your remaining arguments under sections 552.101 and 552.1175 against disclosure.

(a) Information is excepted from required public disclosure 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)(1), (2). Upon review, we agree that the department must withhold the Texas-issued motor vehicle record information you have marked, as well as the additional information we have marked, under section 552.130 of the Government Code.

You argue that section 552.136 is applicable to an employee number. This exception 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

(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. You state that a police officer's employee number is also used as the officer's city credit account number. Based on your representation, we agree that the department must withhold the police officer's employee number you have marked under section 552.136 of the Government Code.

In summary, the department may withhold the requested internal investigation against Brian Payne under section 552.108(a)(1) of the Government Code. The department must release the submitted arrest warrant, without redactions, in accordance with article 15.26 of the Code of Criminal Procedure. The marked medical records may only be released in accordance with the MPA. The department must withhold the originating address and telephone number you have marked under section 552.101 in conjunction with section 772.318 of the Health and Safety Code. The department must withhold the information we have marked under

section 552.101 in conjunction with common-law privacy. The department may withhold the officers' cellular telephone and pager numbers you have marked under section 552.108(b)(1) of the Government Code. The department must withhold the information we have marked under section 552.117(a)(2) of the Government Code. The department must withhold the marked Texas-issued motor vehicle record information under section 552.130 of the Government Code. Additionally, the department must withhold the police officer's employee number you have marked under section 552.136 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, 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).

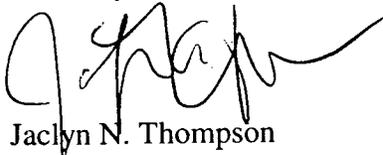
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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 Office of the Attorney General 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. 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,



Jaclyn N. Thompson  
Assistant Attorney General  
Open Records Division

JNT/krl

Ref: ID# 234890

Enc. Submitted documents

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