



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

September 7, 2006

Ms. Rebecca H. Brewer  
Abernathy, Roeder, Boyd & Joplin, P.C.  
P.O. Box 1210  
McKinney, Texas 75070-1210

OR2006-10439

Dear Ms. Brewer:

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# 258699.

The City of Wylie Police Department (the "department") received a request for all personnel records, including disciplinary actions and records related to job performance, of a named officer. The requestor indicates that she does not seek the officer's social security number. You claim that the requested information is excepted from disclosure under sections 552.101, 552.102, 552.108, 552.117, 552.130, 552.136, and 552.140 of the Government Code or, in the alternative, under the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). We have considered the exceptions you claim and reviewed the submitted information.

Because your claim under HIPAA is the broadest of your arguments, we address it first. 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 exception encompasses information that other statutes make confidential. You contend that the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 42 U.S.C. §§ 1320d-1320d-8, is applicable in this instance. At the direction of Congress, the Secretary of Health and Human Services ("HHS") promulgated regulations setting privacy standards for medical records, which HHS issued as the Federal Standards for Privacy of Individually Identifiable Health Information. *See* Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 1320d-2 (Supp. IV 1998) (historical & statutory note); Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. Pts. 160, 164 ("Privacy Rule"); *see also* Attorney General Opinion

JC-0508 at 2 (2002). These standards govern the releasability of protected health information by a covered entity. *See* 45 C.F.R. pts. 160, 164. Under these standards, a covered entity may not use or disclose protected health information, excepted as provided by parts 160 and 164 of the Code of Federal Regulations. *See* 45 C.F.R. § 164.502(a). This office addressed the interplay of the Privacy Rule and the Act in Open Records Decision No. 681 (2004). In that decision, we noted that section 164.512 of title 45 of the Code of Federal Regulations provides that a covered entity may use or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law. *See* 45 C.F.R. § 164.512(a)(1). We further noted that the Act “is a mandate in Texas law that compels Texas governmental bodies to disclose information to the public.” *See* Open Records Decision No. 681 at 8 (2004); *see also* Gov’t Code §§ 552.002, .003, .021. We therefore held that disclosures under the Act come within section 164.512(a). Consequently, the Privacy Rule does not make information confidential for the purpose of section 552.101 of the Government Code. *See* Open Records Decision No. 681 at 9 (2004); *see also* Open Records Decision No. 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). Because the Privacy Rule does not make confidential information that is subject to disclosure under the Act, the department may withhold requested protected health information from the public only if an exception in subchapter C of the Act applies.

We now turn to your alternative arguments. First, we address your claims under section 552.101 of the Government Code. Section 552.101 encompasses information protected by other statutes, such as section 1703.306 of the Occupations Code. Section 1703.306 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 reviewed the submitted information and marked the portions that must be withheld under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code.

Next, you claim that portions of the submitted information are excepted from disclosure under section 552.101 of the Government Code in conjunction with 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.

*Id.* § 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 have not found any information to which the MPA applies. Therefore, you may not withhold any of the submitted information under section 552.101 on that basis.

You also claim that some of the submitted information is subject to chapter 611 of the Health and Safety Code, which provides for the confidentiality of records created or maintained by a mental health professional. Section 611.002 provides in part the following:

Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.

Health & Safety Code § 611.002(a). However, upon review, we find that none of the submitted information includes mental health records subject to chapter 611 and none of the information at issue may be withheld under section 552.101 of the Government Code in conjunction with section 611.002.

You also assert that some of the submitted information is excepted by section 552.101 of the Government Code in conjunction with 1701.306 of the Occupations Code. Section 1701.306 makes confidential L-2 Declarations of Medical Condition and L-3 Declarations of Psychological and Emotional Health required by the Texas Commission on Law Enforcement Officer Standards and Education. *See* Occ. Code § 1701.306. However, the submitted information does not include any L-2 or L-3 declarations. Therefore, we find that section 1701.306 is inapplicable to any of the submitted information and none of it may be withheld under section 552.101 of the Government Code on that basis.

You argue that portions of the submitted information are confidential under common-law privacy. Section 552.101 also incorporates the common-law right to privacy. Common-law privacy protects information that is highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and of no legitimate public interest. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Section 552.102 excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]” Gov’t Code § 552.102(a). Section 552.102(a) is applicable to information that relates to public officials and employees. The privacy analysis under section 552.102(a) is the same as the common-law-privacy test under section 552.101 of the Government Code. *See Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref’d n.r.e.) (addressing statutory predecessor to Gov’t Code § 552.102). Therefore, we will consider whether any of the submitted information is private under section 552.101.

Common-law privacy protects the specific types of information that are held to be intimate or embarrassing in *Industrial Foundation*. *See* 540 S.W.2d at 683 (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).

This office has determined that other types of information also are private under section 552.101. *See* Open Records Decision No. 659 at 4-5 (1999) (summarizing information attorney general has held to be private), 470 at 4 (1987) (illness from severe emotional job-related stress), 455 at 9 (1987) (prescription drugs, illnesses, operations, and physical handicaps), 343 at 1-2 (1982) (references in emergency medical records to drug overdose, acute alcohol intoxication, obstetrical/gynecological illness, convulsions/seizures, or emotional/mental distress).

Common-law privacy also protects certain types of personal financial information. This office has determined that financial information that relates only to an individual ordinarily satisfies the first element of the common-law-privacy test, but the public has a legitimate interest in the essential facts about a financial transaction between an individual and a governmental body. *See* Open Records Decision Nos. 600 at 9-12 (1992) (identifying public and private portions of certain state personnel records), 545 at 4 (1990) (attorney general has found kinds of financial information not excepted from public disclosure by common-law privacy to generally be those regarding receipt of governmental funds or debts owed to governmental entities), 523 at 4 (1989) (noting distinction under common-law privacy between confidential background financial information furnished to public body about individual and basic facts regarding particular financial transaction between individual and public body), 373 at 4 (1983) (determination of whether public's interest in obtaining personal financial information is sufficient to justify its disclosure must be made on case-by-case basis). Thus, a public employee's allocation of part of the employee's salary to a voluntary investment program offered by the employer is a personal investment decision, and information about that decision is protected by common-law privacy. *See, e.g.,* Open Records Decision Nos. 600 at 9-12 (1992) (participation in TexFlex), 545 at 3-5 (1990) (deferred compensation plan). Likewise, the details of an employee's enrollment in a group insurance program, the designation of the beneficiary of an employee's retirement benefits, and an employee's authorization of direct deposit of the employee's salary are protected by common-law privacy. *See* Open Records Decision No. 600 at 9-12. But where a transaction is funded in part by a governmental body, it involves the employee in a transaction with the governmental body, and the basic facts about that transaction are not private under section 552.101. *See id.* at 9 (basic facts of group insurance provided by governmental body not protected by common-law privacy). We have marked personal financial information that is protected by common-law privacy and must be withheld under section 552.101 of the Government Code.

Next, we address your claims under section 552.108 of the Government Code in conjunction with section 411.083 of the Government Code. We note for purposes of accuracy that section 411.083 of the Government Code is encompassed by section 552.101 rather than section 552.108. Therefore, we will address your argument under section 552.101. Criminal history record information ("CHRI") generated by the National Crime Information Center ("NCIC") or by the Texas Crime Information Center ("TCIC") is confidential. Section 411.083 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 in conjunction with Government Code chapter 411, subchapter F.

Common law privacy 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). In addition, this office has found that an individual's criminal history is subject to common law privacy when compiled by a governmental body. *See Open Records Decision No. 565 (1990) (citing U. S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989)). After reviewing the submitted information, we conclude that no portion of it consists of CHRI, nor does it implicate the privacy concerns expressed in *Reporters Committee*. Thus, you may not withhold the information under section 552.101 on that basis.

Next, we address your arguments under section 552.117(a)(2) of the Government Code, which excepts from disclosure the present and former home addresses and personal telephone numbers, social security number, and family member information of a peace officer regardless of whether the officer requests confidentiality for that information under section 552.024 of the Government Code.<sup>1</sup> Gov't Code § 552.117(a)(2). The personal information we have marked belongs to a licensed peace officer.<sup>2</sup> Therefore, based on our review, we find that the department must withhold the personal information we have marked under section 552.117(a)(2) of the Government Code. The department must also withhold the types of information we have marked under section 552.117(a)(2) from the submitted DVD. We note, however, that if the department lacks the technical capability to redact the personal information in the DVD, it must withhold the DVD in its entirety. *See Open Records Decision No. 364 (1983).*

---

<sup>1</sup>"Peace Officer" is defined by article 2.12 of the Code of Criminal Procedure.

<sup>2</sup>We note that section 552.117 is applicable only to a personal pager or cell phone number paid for by the employee or peace officer. *See Open Records Decision No. 670 at 6 (2001)* (statutory predecessor to section 552.117 (a)(2) encompassed personal cellular phone numbers and personal pager numbers of peace officers who purchased cellular or pager service with their personal funds). A pager or cell phone number provided to an employee or peace officer at public expense may not be withheld under section 552.117. *See Open Records Decision No. 506 at 5-7 (1988)* ( statutory predecessor to section 552.117 not applicable to cellular mobile phone numbers provided and paid for by governmental body and intended for official use).

Next, we address your argument under section 552.130 of the Government Code. Section 552.130 excepts from disclosure information that “relates to . . . a motor vehicle operator’s or driver’s license or permit issued by an agency of this state [or] a motor vehicle title or registration issued by an agency of this state.” Gov’t Code § 552.130. In accordance with section 552.130 of the Government Code, the department must withhold the Texas driver’s license number we have marked.

You raise section 552.136 of the Government Code, which provides:

(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.

*Id.* § 552.136. None of the information you have submitted contains the type of information excepted from disclosure by section 552.136. Therefore, you may not withhold any of the submitted information under section 552.136.

Finally, we note that you have also raised section 552.140 of the Government Code as an exception to disclosure. Section 552.140 of the Government Code provides in relevant part:

(a) This section applies only to a military veteran’s Department of Defense Form DD-214 or other military discharge record that is first recorded with or that otherwise first comes into the possession of a governmental body on or after September 1, 2003.

Gov’t Code § 552.140(a). The submitted information does not contain a Form DD-214. We note that information derived from a DD-214 form is not subject to section 552.140 and may not be withheld on that basis. *Id.*

In summary, the department must withhold the polygraph examination results we have marked under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code. The department must withhold the personal, financial information we have marked under section 552.101 and common-law privacy. The department must also

withhold the peace officer's personal information we have marked under section 552.117(a)(2) of the Government Code as well as the peace officer's personal information that appears on the DVD. The department must release the remainder of the submitted information 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 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. 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,



Jennifer E. Berry  
Assistant Attorney General  
Open Records Division

JEB/dh

Ref: ID# 258699

Enc: Submitted documents

c: Ms. Sharon Curtis  
Attorney & Mediator  
Law Office of Sharon Curtis  
1216 North Central Expressway, Suite 101  
McKinney, Texas 75070  
(w/o enclosures)