



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 15, 2006

Ms. Bertha A. Ontiveros
Assistant County Attorney
El Paso County
500 East San Antonio, Room 503
El Paso, Texas 79901

OR2006-13545

Dear Ms. Ontiveros:

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# 264726.

The El Paso County Sheriff's Office (the "sheriff's office") received a request for a named individual's personnel file. You state that you will release some of the requested information to the requestor. You indicate that the sheriff's office will withhold social security numbers pursuant to section 552.147(b) of the Government Code.¹ You claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.108, 552.117, 552.1175, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Because your claim under section 552.108 of the Government Code is potentially the broadest, we will address it first. Section 552.108 of the Government Code 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." Gov't Code § 552.108(a)(1). Generally, a governmental body claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law

¹Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

enforcement. *See id.* §§ 552.108(a)(1), (b)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977).

The submitted information consists of a current or former deputy's personnel file. Although you raise section 552.108, you do not explain how release of the submitted information would interfere with the detection, investigation, or prosecution of crime. Therefore, the sheriff's office may not withhold the submitted information under section 552.108(a)(1). *See* Open Records Decision Nos. 562 at 10 (1990) (stating that law enforcement exception does not protect general personnel information about a peace officer or information concerning complaints filed against the officer), 361 at 3 (1983) (information relating to complaints against peace officers and disciplinary actions resulting therefrom not excepted under statutory predecessor).

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. You claim that some of the submitted information is excepted from disclosure under section 552.101 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 as follows:

(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 marked the medical records subject to the MPA. Absent the applicability of an MPA access provision, the sheriff's office must withhold these medical records pursuant to the MPA.

We note that the remaining information includes a dental record that is subject to chapter 258 of the Occupations Code, which is also encompassed by section 552.101 of the Government Code. Section 258.102 of the Occupations Code provides as follows:

(a) The following information is privileged and may not be disclosed except as provided by this article:

(1) a communication between a dentist and a patient that relates to a professional service provided by the dentist; and

(2) a dental record.

(b) The privilege described by this section applies regardless of when the patient received the professional service from the dentist.

Occ. Code § 258.102. A "dental record" means dental information about a patient that is created or maintained by a dentist and relates to the history or treatment of the patient. *See id.* §258.101(1). Information that is privileged under chapter 258 of the Occupations Code may be disclosed only under certain specified circumstances. *See id.* § 258.104 (consent to disclosure); *see also id.* §§ 258.105, .106, .107 (exceptions to privilege). We have marked the dental record that is subject to section 258.102 of the Occupations Code. Absent the applicability of an access provision, the sheriff's office must withhold this dental record pursuant to section 258.102.

Next, we note that some of the remaining information is confidential under section 1701.306 of the Occupations Code, which is also encompassed by section 552.101 of the Government Code. Section 1701.306 provides as follows:

(a) The commission may not issue a license to a person as an officer or county jailer unless the person is examined by:

(1) a licensed psychologist or by a psychiatrist who declares in writing that the person is in satisfactory psychological and emotional health to serve as the type of officer for which a license is sought; and

(2) a licensed physician who declares in writing that the person does not show any trace of drug dependency or illegal drug use after a physical examination, blood test, or other medical test.

(b) An agency hiring a person for whom a license as an officer or county jailer is sought shall select the examining physician and the examining psychologist or psychiatrist. The agency shall prepare a report of each declaration required by Subsection (a) and shall maintain a copy of the report on file in a format readily accessible to the commission. A declaration is not public information.

Id. § 1701.306(a), (b). The remaining information includes L-2 Declarations of Medical Condition and an L-3 Declaration of Psychological and Emotional Health. These declarations are confidential under section 1701.306 of the Occupations Code and must be withheld under section 552.101 of the Government Code.

We also note that the remaining information contains a F-5 form (Report of Separation of License Holder), which is made confidential by section 1701.454 of the Occupations Code. Section 1701.454 provides in relevant part that “[a] report or statement submitted to [the Texas Commission on Law Enforcement Officer Standards and Education] under this subchapter is confidential and is not subject to disclosure under Chapter 552[.]” *Id.* § 1701.454(a). Accordingly, the sheriff’s office must withhold the F-5 form pursuant to section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code.

Section 552.101 of the Government Code also encompasses chapter 560 of the Government Code. Fingerprint information is governed by sections 560.001, 560.002, and 560.003 of the Government Code, which provide as follows:

Sec. 560.001. DEFINITIONS. In this chapter

(1) “Biometric identifier” means a retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry.

(2) “Governmental body” has the meaning assigned by Section 552.003 [of the Government Code], except that the term includes each entity within or created by the judicial branch of state government.

Sec. 560.002. DISCLOSURE OF BIOMETRIC IDENTIFIER. A governmental body that possesses a biometric identifier of an individual:

(1) may not sell, lease, or otherwise disclose the biometric identifier to another person unless:

(A) the individual consents to the disclosure;

(B) the disclosure is required or permitted by a federal statute or by a state statute other than Chapter 552 [of the Government Code]; or

(C) the disclosure is made by or to a law enforcement agency for a law enforcement purpose; and

(2) shall store, transmit, and protect from disclosure the biometric identifier using reasonable care and in a manner that is the same as or more protective than the manner in which the governmental body stores, transmits, and protects its other confidential information.

Sec. 560.003. APPLICATION OF CHAPTER 552. A biometric identifier in the possession of a governmental body is exempt from disclosure under Chapter 552.

Gov't Code §§ 560.001-.003. Thus, the fingerprint information we have marked is confidential under section 560.003 and must be withheld under section 552.101 of the Government Code unless section 560.002 permits its disclosure.

Next, we address your claims under section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code. 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 id.* § 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. We note, however, that the definition of CHRI does not include driving record information. *See id.* § 411.082(2)(B). Therefore, to the extent the submitted information contains CHRI obtained from DPS or any other criminal agency, that information must be withheld under section 552.101 in conjunction with Government Code chapter 411, subchapter F.

Section 552.101 of the Government Code also encompasses the doctrine of common law privacy. Section 552.102(a) of the Government Code excepts from public disclosure "information in a personnel file, the disclosure of which would constitute a clearly

unwarranted invasion of personal privacy[.]” Section 552.102 is applicable to information that relates to public officials and employees. *See* Open Records Decision No. 327 at 2 (1982) (anything relating to employee’s employment and its terms constitutes information relevant to person’s employment relationship and is part of employee’s personnel file). The privacy analysis under section 552.102(a) is the same as the common law privacy standard under section 552.101. *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). We will therefore consider the applicability of common law privacy under section 552.101 together with your claim regarding section 552.102.

In *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), the Texas Supreme Court held that information is protected by common law privacy 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 a legitimate concern to the public. To demonstrate the applicability of common law privacy, both prongs of this test must be satisfied. *Industrial Foundation*, 540 S.W.2d at 681-82. This office has found that the following types of information are excepted from required public disclosure under common law privacy: 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 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). We have reviewed the remaining documents and marked the information that is highly intimate or embarrassing and of no legitimate concern to the public. This marked information is confidential under the doctrine of common law privacy and must be withheld under section 552.101. We find, however, that the remaining information is either not intimate or embarrassing or is of a legitimate public interest. Therefore, none of the remaining information is confidential under the doctrine of common law privacy, and it may not be withheld under section 552.101.

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.² Gov’t Code § 552.117(a)(2). You state that the named individual is a licensed peace officer. Therefore, based on your representations and our review, we find that the sheriff’s office must withhold the personal information we have marked under section 552.117(a)(2) of the Government Code.

Next, we note that the remaining documents contain information that may be excepted from disclosure pursuant to section 552.1175 of the Government Code, which provides in part:

²“Peace Officer” is defined by article 2.12 of the Code of Criminal Procedure.

(a) This section applies only to:

(1) peace officers as defined by Article 2.12, Code of Criminal Procedure[.]

(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.

Id. § 552.1175(a)(1), (b). We have marked the personal information of an individual who may be a licensed peace officer. To the extent this individual is a licensed peace officer who elects to restrict access to the information in accordance with section 552.1175(b), the personal information we have marked must be withheld under section 552.1175.

Next, we address your arguments 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." *Id.* § 552.130. We note that this provision does not protect out-of-state motor vehicle record information. Therefore, in accordance with section 552.130 of the Government Code, the sheriff's office must withhold the Texas motor vehicle record information we have marked.

We note that the remaining documents contain information that is excepted from disclosure under section 552.136 of the Government Code. Section 552.136 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.

Id. § 552.136. We have reviewed the remaining information and marked an account number that must be withheld pursuant to section 552.136 of the Government Code.

In summary, the sheriff's office must withhold the medical records we have marked under the MPA. The dental record we have marked must be withheld under section 552.101 of the Government Code in conjunction with section 258.102 of the Occupations Code. The L-2 Declaration of Medical Condition and a L-3 Declaration of Psychological and Emotional Health we have marked are confidential under section 1701.306 of the Occupations Code and must be withheld under section 552.101. The F-5 form we have marked must be withheld pursuant to section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code. The fingerprint information we have marked is confidential under section 560.003 of the Government Code and must be withheld under section 552.101 of the Government Code unless section 560.002 permits its disclosure. The CHRI we have marked must be withheld under section 552.101 in conjunction with chapter 411 of the Government Code. We have marked information that is confidential under the doctrine of common law privacy and that must be withheld under section 552.101 of the Government Code. The personal information we have marked under section 552.117 of the Government Code must be withheld. The department must also withhold the personal information we have marked under section 552.1175 of the Government Code if the individual to whom it pertains is a licensed peace officer who elects to restrict access to the information in accordance with section 552.1175(b). The sheriff's office must also withhold the Texas motor vehicle record information we have marked under section 552.130 of the Government Code and the account number we have marked under section 552.136 of the Government Code. The remaining 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,



Jaime L. Flores
Assistant Attorney General
Open Records Division

JLF/eb

Ref: ID# 264726

Enc. Submitted documents

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