



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

August 9, 2007

Ms. Pamela Smith  
Assistant General Counsel  
Texas Department of Public Safety  
P.O. Box 4087  
Austin, Texas 78773-0001

OR2007-10202

Dear Ms. Smith:

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# 286435.

The Texas Department of Public Safety (the "department") received four requests for information relating to an investigation. You claim that the requested information is excepted from disclosure under section 552.101 of the Government Code. We also received comments from attorneys for one of the individuals involved in the investigation and one of the requestors.<sup>1</sup> We have considered all of the submitted arguments and have reviewed the information you submitted.<sup>2</sup>

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. This exception encompasses information that other statutes make confidential. The public availability of medical records is governed by the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. Section 159.002 of the MPA provides in part:

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<sup>1</sup>See Gov't Code § 552.304 (any person may submit written comments stating why information at issue in request for attorney general decision should or should not be released).

<sup>2</sup>We note that the attorney for the individual involved in the investigation has submitted information that he seeks to have withheld from disclosure. This decision is applicable only to the information that the department submitted to this office. See Gov't Code § 552.301(e)(1)(D).

(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). This office has determined that in governing access to a specific subset of information, the MPA prevails over the more general provisions of the Act. *See* Open Records Decision No. 598 (1991). We also have concluded that when a file is created as the result of a hospital stay, all of the documents in the file that relate to diagnosis and treatment constitute either physician-patient communications or records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician. *See* Open Records Decision No. 546 (1990). Medical records must be released on 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. *See* Occ. Code §§ 159.004, .005. Any subsequent release of medical records must be consistent with the purposes for which the governmental body obtained the records. *See id.* § 159.002(c); Open Records Decision No. 565 at 7 (1990). We have marked medical records that are confidential under the MPA. As an attorney for the patient, the fourth requestor may have a right of access to those records. In any event, the marked medical records may only be released in accordance with the MPA.

Section 552.101 also encompasses section 611.002 of the Health and Safety Code, which governs the public availability of mental health records and provides in part:

(a) 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.

(b) Confidential communications or records may not be disclosed except as provided by Section 611.004 or 611.0045.

Health & Safety Code § 611.002(a)-(b); *see id.* § 611.001 (defining "patient" and "professional"). Sections 611.004 and 611.0045 provide for access to information that is made confidential by section 611.002 only by certain individuals. *See id.* §§ 611.004, 611.0045; Open Records Decision No. 565 (1990). We have marked the submitted information that is confidential under section 611.002. As the patient's attorney, the fourth requestor may have a right of access to his client's mental health information

under sections 611.004 and 611.0045. If not, then the department must withhold the marked information under section 552.101 in conjunction with section 611.002 of the Health and Safety Code.

Section 552.101 also encompasses common-law privacy, which 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). Common-law privacy encompasses the specific types of information that are held to be intimate or embarrassing in *Industrial Foundation*. *See id.* at 683 (information relating to sexual assault, pregnancy, mental or physical abuse in workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). This office has concluded that other types of information also are private under section 552.101. *See generally* Open Records Decision No. 659 at 4-5 (1999) (summarizing information attorney general has held to be private).

The rest of the submitted information is related to an investigation of an alleged sexual offense. Generally, only the information that either identifies or tends to identify a victim of a sexual assault or other sexual offense is protected by common-law privacy. However, a governmental body is required to withhold the entire report of such an investigation when identifying information is inextricably intertwined with other releasable information or when the requestor knows the identity of the alleged victim. *See* Open Records Decision Nos. 393 (1983), 339 (1982); *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 that was not a matter of legitimate public interest); Open Records Decision No. 440 (1986) (detailed descriptions of serious sexual offenses must be withheld).

In this instance, it is our understanding that the first three requestors know the identity of the alleged crime victim. Under these circumstances, withholding only the victim's identifying information from those requestors would not preserve the victim's common-law right to privacy. We therefore conclude that the rest of the submitted information must be withheld from the first three requestors under section 552.101 in conjunction with common-law privacy.

We next note that the fourth requestor is the alleged victim's attorney. As such, the fourth requestor has a special right of access under section 552.023 of the Government Code to information that the department would be required to withhold from the public to protect the victim's privacy. *See* Gov't Code § 552.023(a).<sup>3</sup> Therefore, the department may not

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<sup>3</sup>Section 552.023(a) provides that "[a] person or a person's authorized representative has a special right of access, beyond the right of the general public, to information held by a governmental body that relates to the person and that is protected from public disclosure by laws intended to protect that person's privacy interests." Gov't Code § 552.023(a).

withhold any of the remaining information from the fourth requestor on the basis of the victim's privacy interest. *See* Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning herself).

Nevertheless, we must also determine whether any of the remaining information must be withheld from the fourth requestor on other grounds. Through his attorney, the individual accused of the alleged offense argues that the remaining information should be withheld to protect his privacy.<sup>4</sup> He contends that the rest of the submitted information is highly intimate or embarrassing and is not a matter of legitimate public interest. Having considered his arguments, we note that the remaining information concerns an alleged crime and as such is generally a matter of legitimate public concern. *See Indus. Found.*, 540 S.W.2d at 685 (whether matter is of legitimate interest to public can be considered only in context of each particular case); *cf.* Open Records Decision Nos. 611 at 1 (1992) (family violence is a crime, not a private matter), 409 at 2 (1984) (identity of burglary victim not protected by common-law privacy). Furthermore, the individual accused of the offense is the police chief of the City of Corpus Christi. This office has long held that the public has a legitimate interest in information relating to matters involving law enforcement officers. *See* Open Records Decision Nos. 484 at 5-6 (1987) (information relating to off-duty incidents involving police officers not protected by common-law privacy), 444 at 6 (1986) (public has genuine interest in information concerning law enforcement employee's qualifications and performance and circumstances of his termination or resignation), 350 at 3 (1982) (release of final determination of complaint would not constitute clearly unwarranted invasion of personal privacy under statutory predecessor to Gov't Code § 552.102).<sup>5</sup> We therefore conclude that the department may not withhold any of the remaining information from the fourth requestor under section 552.101 in conjunction with common-law privacy.

The police chief also raises section 552.101 in conjunction with article 20.02 of the Code of Criminal Procedure, which provides in part that "[t]he proceedings of the grand jury shall be secret." Crim. Proc. Code art. 20.02(a). He asserts, and has submitted an affidavit from the District Attorney for Nueces County stating, that the remaining information was presented to a grand jury. He argues that release of the remaining information would disclose evidence that was presented to and relied on by the grand jury. We note that the remaining information was compiled by the Texas Rangers during the course of a criminal investigation. Neither the police chief nor the district attorney states, and it does not otherwise appear to this office, that any of the remaining information was obtained either at

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<sup>4</sup>We note that the department does not contend that the remaining information is protected by common-law privacy.

<sup>5</sup>Section 552.102(a) of the Government Code 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). The privacy analysis under section 552.102(a) is the same as the test under section 552.101 and common-law privacy under *Industrial Foundation*. *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.).

the direction of the grand jury or pursuant to a grand jury subpoena. *But see* Open Records Decision No. 513 (1988) (information held by law enforcement agency as agent of grand jury not subject to Act). We find that the remaining information does not reveal the deliberations of the grand jury merely because it was presented to the grand jury by the district attorney. We therefore conclude that the department may not withhold any of the remaining information from the fourth requestor under section 552.101 in conjunction with section 20.02(a) of the Code of Criminal Procedure. *Cf.* ORD 513 at 4 (fact that information collected or prepared by another person or entity is submitted to grand jury does not necessarily mean that such information is in grand jury's constructive possession when the same information is also held in other person's or entity's own capacity).

The police chief also raises section 552.108(a)(2) of the Government Code, which excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication[.]” Gov’t Code § 552.108(a)(2).

The police chief argues that the remaining information should be withheld under section 552.108(a)(2) because the alleged sexual offense was presented to and “no-billed” by the grand jury. We note, however, that section 552.108 is a discretionary exception that protects a governmental body's interests and may be waived. *See id.* § 552.007; Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 177 at 3 (1977) (statutory predecessor to Gov’t Code § 552.108 subject to waiver). In this instance, the department has specifically declined to claim an exception to disclosure under section 552.108(a)(2). Furthermore, no other law enforcement agency involved in the investigation has informed this office that it wishes to have any of the remaining information withheld under section 552.108. We therefore conclude that the department may not withhold any of the remaining information from the fourth requestor under section 552.108 of the Government Code.

We note that the department may be required to withhold some of the remaining information from the fourth requestor under section 552.1175 of the Government Code.<sup>6</sup> Section 552.1175 is applicable in part to peace officers, as defined by article 2.12 of the Code of Criminal Procedure. *See* Gov’t Code § 552.1175(a)(1). Section 552.1175(b) provides that

[i]nformation 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

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<sup>6</sup>Unlike other exceptions to disclosure under the Act, this office will raise section 552.1175 on behalf of a governmental body, as this exception is mandatory and may not be waived. *See* Gov’t Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

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(b). We have marked information relating to peace officers that the department must withhold under section 552.1175 to the extent that the peace officers involved elect to restrict access to the marked information in accordance with section 552.1175(b).

We also note that section 552.130 of the Government Code is applicable to some of the remaining information.<sup>7</sup> This section excepts from disclosure information that relates to a motor vehicle operator's or driver's license or permit or a motor vehicle title or registration issued by an agency of this state. *See id.* § 552.130(a)(1)-(2). We have marked Texas driver's license and motor vehicle information that must be withheld from the fourth requestor under section 552.130.

Lastly, we note that the remaining information includes e-mail addresses.<sup>8</sup> Section 552.137 of the Government Code states in part that "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act]," unless the owner of the e-mail address has affirmatively consented to its public disclosure. *Id.* § 552.137(a)-(b). The types of e-mail address listed in section 552.137(c) may not be withheld under this exception. *See id.* § 552.137(c). Likewise, section 552.137 is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees. We have marked e-mail addresses that must be withheld from the fourth requestor under section 552.137 unless the owner of an e-mail addresses affirmatively consents to its disclosure. Because this exception protects personal privacy, the fourth requestor has a right of access to his client's e-mail address under section 552.023. Gov't Code § 552.023; ORD 481 at 4.

In summary: (1) the marked medical records must be withheld under the MPA unless the department receives consent for release that complies with sections 159.004 and 159.005 of

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<sup>7</sup>Section 552.130 also is mandatory and may not be waived. Gov't Code §§ 552.007, .352; ORD 674 at 3 n.4.

<sup>8</sup>Section 552.137 also is mandatory and may not be waived. Gov't Code §§ 552.007, .352; ORD 674 at 3 n.4.

the MPA; (2) the marked mental health records must be withheld under section 552.101 of the Government Code in conjunction with section 611.002 of the Health and Safety Code unless the requestor has a right of access under sections 611.004 and 611.0045 of the Health and Safety Code; (3) the rest of the submitted information must be withheld from the first three requestors under section 552.101 in conjunction with common-law privacy; (4) the information that we have marked under section 552.1175 of the Government Code must be withheld from the fourth requestor to the extent that the peace officers involved elect to restrict access to the marked information in accordance with section 552.1175(b); (5) the marked Texas driver's license and motor vehicle information must be withheld from the fourth requestor under section 552.130 of the Government Code; and (6) the marked e-mail addresses must be withheld from the fourth requestor under section 552.137 of the Government Code unless the owner of an e-mail address affirmatively consents to its disclosure.<sup>9</sup> Except for information that the department must withhold under the MPA, section 611.002 of the Health and Safety Code, and sections 552.1175, 552.130, and 552.137 of the Government Code, the submitted information must be released to the fourth requestor.<sup>10</sup>

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

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<sup>9</sup>We note that the submitted information includes a social security number. Section 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.

<sup>10</sup>Should the department receive another request for these same records from a person who would not have a right of access to the private information, the department should resubmit these records and request another ruling. See Gov't Code §§ 552.301(a), .302.

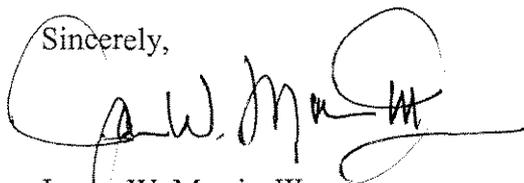
will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to 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,

A handwritten signature in black ink, appearing to read 'James W. Morris, III', with a large, stylized flourish at the end.

James W. Morris, III  
Assistant Attorney General  
Open Records Division

JWM/ma

Ref: ID# 286435

Enc: Submitted information

c: Ms. Barbara Ramirez  
Corpus Christi Caller-Times  
820 North Lower Broadway Street  
Corpus Christi, Texas 78401  
(w/o enclosures)

Mr. Robert Gonzales  
KRIS-TV/KDF-TV/KAJA-TV  
P.O. Box 840  
Corpus Christi, Texas 78403  
(w/o enclosures)

Mr. Richard Longoria  
KIII-TV  
P.O. Box 6669  
Corpus Christi, Texas 78466-6669  
(w/o enclosures)

Mr. Abraham Moss  
Moss Law Office  
5350 South Staples, Suite 209  
Corpus Christi, Texas 78411  
(w/o enclosures)

Mr. J. A. Canales  
Canales & Simonson, P.C.  
P.O. Box 5624  
Corpus Christi, Texas 78465-5624  
(w/o enclosures)

Mr. Jorge C. Rangel  
The Rangel Law Firm, P.C.  
P.O. Box 2683  
Corpus Christi, Texas 78403-2683  
(w/o enclosures)