ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 16, 2007

Mr. David M. Swope
Assistant County Attorney
Harris County Attorney's Office
1019 Congress, 15th Floor
Houston, Texas 77002

OR2007-13541

Dear Mr. Swope:

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# 290674.

The Harris County Sheriff's Department (the "department") received a request for information relating to the requestor's client. You claim that the requested information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

You have submitted for our review, among other things, a high school transcript. The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office that the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code, does not permit state and local educational authorities to disclose to this office, without parental or an adult student's consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act.[1] Consequently, education records that are responsive to a request for information under the Act should not be submitted to this office in unredacted form, that is, in a form in which "personally identifiable information" is disclosed. *See* 34 C.F.R. § 99.3 (defining "personally identifiable

[1]A copy of this letter may be found on the Office of the Attorney General's website: http://www.oag.state.tx.us/opinopen/og_resources.shtml.

information"). Because our office is prohibited from reviewing education records to determine whether appropriate redactions have been made under FERPA, we will not address the applicability of FERPA to the transcript. Such determinations under FERPA must be made by the educational authority from which you obtained the transcript. Thus, the department should contact the educational authority from which the transcript was obtained and the DOE regarding the applicability of FERPA to the transcript.

We next note that some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a)(1) provides that a completed report, audit, evaluation, or investigation made of, for, or by a governmental body is expressly public unless it either is excepted under section 552.108 of the Government Code or is expressly confidential under other law. Under section 552.022(a)(3), information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body is expressly public unless it is expressly confidential under other law. Under section 552.022(a)(17), a document that has been filed with a court is expressly public and may not be withheld unless it is confidential under other law. Section 552.103 of the Government Code is a discretionary exception under the Act, and does not constitute "other law" for purposes of section 552.022. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived). Accordingly, the department may not withhold these documents under section 552.103.

You assert the remaining information is excepted under section 552.103 of the Government Code, which provides as follows:

> (a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.
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> . . .
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> (c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

The department has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the

governmental body received the request for information and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.–Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.–Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The department must meet both prongs of this test for information to be excepted under 552.103(a).

This office considers a contested case under the Texas Administrative Procedure Act (the "APA"), Government Code chapter 2001, to constitute "litigation" for purposes of section 552.103. *See* Open Records Decision Nos. 588 (1991), 301 (1982). You inform us that the information at issue relates to a pending administrative appeal before the department's Civil Service Commission. You have not indicated, however, whether the Civil Service Commission hearing is a contested case under the APA. Furthermore, you have not otherwise established that this hearing should be considered litigation for purposes of section 552.103(a). Therefore, we conclude you have failed to establish that the remaining information is excepted under section 552.103.

We note that some of the documents at issue are medical records, access to which 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 the following:

> (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.
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> (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). Medical 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. *Id.* §§ 159.004, 159.005. 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). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). We have marked the portion of the submitted information that constitutes medical records and that may only be released in accordance with the MPA.

The submitted information also contains records that are 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(a) states that "[c]ommunications 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." Section 611.001 defines a "professional" as (1) a person authorized to practice medicine, (2) a person licensed or certified by the state to diagnose, evaluate or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. *Id.* § 611.001(b). Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals. *See* Open Records Decision No. 565 (1990). We have marked the information that constitutes mental health records, and that may only be released in accordance with sections 611.004 and 611.0045 of the Health and Safety Code.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Section 1703.306 of the Occupations Code provides in relevant part the following:

> (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:
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> > (1) the examinee or any other person specifically designated in writing by the examinee[.]
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> > . . .
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> (b) The board or any other governmental agency that acquires information from a polygraph examination under this section shall maintain the confidentiality of the information.

Occ. Code § 1703.306(a)(1), (b). Section 1703.306(a) makes the polygraph results in the submitted information confidential. However, we note that a portion of the information at issue consists of the polygraph examination results of the requestor's client. Thus, the department has the discretion to release the client's information, which we have marked, pursuant to section 1703.306(a)(1). *See* Open Records Decision No. 481 at 9 (1987) (predecessor to section 1703.306 permits, but does not require, examination results to be disclosed to examinees). We have marked information pertaining to other examinees that the department must withhold under section 552.101 in conjunction with section 1703.306(a).

The information at issue also contains L-2 (Declaration of Medical Condition) and L-3 (Declaration of Psychological and Emotional Health) forms, which are required by the Texas Commission on Law Enforcement Officer Standards and Education (the "commission"). Section 1701.306 of the Occupations Code 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:
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> > (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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> > (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.
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> (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(a), (b). These declarations, which we have marked, are confidential under section 1701.306 of the Occupations Code, and must be withheld under section 552.101 of the Government Code.

Criminal history record information ("CHRI") generated by the National Crime Information Center or by the Texas Crime Information Center is also confidential. Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* Section 411.083 of the Government Code 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, but 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.* §§ 411.090-411.127. Thus, any CHRI generated by the federal government or another state may not be made available to the requestor except in accordance with federal regulations. *See* Open Records Decision No. 565 (1990). Therefore, the department must

withhold the CHRI we have marked under section 552.101 in conjunction with chapter 411 of the Government Code and federal law.[2]

The submitted information also contains an F-5 form (Report of Separation of License Holder) of the requestor's client. Section 552.101 encompasses section 1701.454 of the Occupations Code, which provides the following:

> (a) A report or statement submitted to the commission under this subchapter is confidential and is not subject to disclosure under Chapter 552, Government Code, unless the person resigned or was terminated due to substantiated incidents of excessive force or violations of the law other than traffic offenses.
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> (b) Except as provided by this subchapter, a commission member or other person may not release the contents of a report or statement submitted under this subchapter.

Occ. Code § 1701.454. Accordingly, if the requestor's client was terminated due to substantiated incidents of excessive force or violations of the law other than traffic offenses, then the submitted F-5 form is not confidential under section 1701.454, and it may not be withheld under section 552.101 of the Government Code on that ground. However, if the requestor's client was not terminated due to substantiated incidents of excessive force or violations of the law other than traffic offenses, then the department must withhold the F-5 form pursuant to section 552.101 in conjunction with section 1701.454.

The submitted information contains fingerprints of the requestor's client. Chapter 560 of the Government Code provides that a governmental body may not release fingerprint information except in certain limited circumstances. *See* Gov't Code §§ 560.001 (defining "biometric identifier" to include fingerprints), 560.002 (prescribing manner in which biometric identifiers must be maintained and circumstances in which they can be released), 560.003 (biometric identifiers in possession of governmental body exempt from disclosure under the Act). The submitted fingerprint information is confidential under section 560.003; however, the requestor has a special right of access to his client's fingerprint information. *See id.* § 560.002(1). Therefore, the department must release this information pursuant to section 560.002.

Section 552.101 also encompasses the doctrine of common-law privacy, which protects information that (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). To

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[2]We note that the requestor's client can obtain his own CHRI from DPS. Gov't Code § 411.083(b)(3).

demonstrate the applicability of common-law privacy, both prongs of this test must be demonstrated. *Id.* 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); personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990); and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). In addition, a compilation of an individual's criminal history record information is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person. *Cf. U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989) (when considering prong regarding individual's privacy interest, court recognized distinction between public records found in courthouse files and local police stations and compiled summary of information and noted that individual has significant privacy interest in compilation of one's criminal history). Furthermore, we find that a compilation of a private citizen's criminal history is generally not of legitimate concern to the public. However, information relating to routine traffic violations is not excepted from release under section 552.101 in conjunction with common-law privacy. *Cf.* Gov't Code § 411.082(2)(B). The common-law right to privacy is also a personal right that lapses at death, and therefore it does not encompass information that relates to a deceased individual. *See Moore v. Charles B. Pierce Film Enters., Inc.*, 589 S.W.2d 489, 491 (Tex. App.–Texarkana 1979, writ ref'd n.r.e.); Open Records Decision No. 272 at 1 (1981). The department must withhold the information we have marked under section 552.101 in conjunction with common-law privacy.

We note that some of the remaining information is excepted under section 552.117 of the Government Code. Section 552.117(a)(1) excepts from disclosure the current and former home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Section 552.117(a)(2) excepts from disclosure this same information regarding a peace officer, as defined by article 2.12 of the Texas Code of Criminal Procedure, regardless of whether the officer elected under section 552.024 or 552.1175 of the Government Code to keep such information confidential. The department must withhold the information pertaining to peace officers we have marked under section 552.117(a)(2). The department must also withhold the information pertaining to department employees we have marked under section 552.117(a)(1) if these employees elected to keep such information confidential prior to the department's receipt of the request for information.

We note that some of the remaining information is excepted under section 552.130 of the Government Code, which provides that information relating to a motor vehicle operator's license, driver's license, motor vehicle title, or registration issued by a Texas agency is excepted from public release. Gov't Code § 552.130(a)(1), (2). But section 552.130 is designed to protect the privacy of individuals, and the right to privacy expires at death. *See Moore*, 589 S.W.2d at 491; *see also* Open Records Decision No. 272 at 1 (1981) (privacy rights lapse upon death). The department must withhold the Texas motor vehicle record information we have marked under section 552.130.

Some of the materials at issue may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

Finally, we note that the requestor is the representative of the individual at issue; thus, he has a right of access to information in the submitted documents that otherwise would be excepted from release under the Act to protect his client's privacy interests. *See* Gov't Code § 552.023(a) ("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."); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning herself). The requestor also has a right of access to his client's fingerprint information pursuant to section 560.002 of the Government Code. *See* Gov't Code § 560.002(1). Accordingly, the department must again seek a decision from this office if it receives a request for this information from a different requestor.

To conclude, the department should contact the educational authority from which the transcript was obtained and the DOE regarding the applicability of FERPA to the transcript, the marked medical records may only be released in accordance with the MPA, and the marked mental health records may only be released in accordance with Chapter 611 of the Health and Safety Code. The department must withhold the polygraph information we have marked under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code; however, the department has the discretion to release the polygraph information pertaining to the requestor's client pursuant to section 1703.306(a)(1). The department must withhold the information marked under section 552.101 of the Government Code in conjunction with sections 1701.306 of the Occupations Code, chapter 411 of the Government Code and federal law, and common-law privacy. The department must also withhold the submitted F-5 report section 552.101 in conjunction with section 1701.454 of

the Occupations Code, unless the requestor's client was terminated due to substantiated incidents of excessive force or violations of the law other than traffic offenses. The department must withhold the information marked under section 552.117(a)(1) of the Government Code if the employees at issue timely elected to withhold that information, section 552.117(a)(2) of the Government Code, and section 552.130 of the Government Code. The department must release the remaining information, but any copyrighted information may only be released in accordance with copyright law.[3]

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).

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[3]We note that the submitted information contains the social security numbers of living persons other than the requestor's client 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.

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,

James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/jh

Ref: ID# 290674

Enc. Submitted documents

c: Mr. Eric Baumgart
226 Sheldon Road
Channelview, Texas 77530
(w/o enclosures)