



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

March 4, 2008

Ms. Christine Womble  
Assistant District Attorney  
Dallas County District Attorney's Office  
133 North Industrial Boulevard LB-19  
Dallas, Texas 75207-4399

OR2008-02901

Dear Ms. Womble:

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# 303566.

The Dallas County District Attorney's Office (the "district attorney") received a request for trial transcripts and forensic laboratory reports relating to twelve named individuals. You state that the district attorney has no information that is related to one of the named individuals.<sup>1</sup> You have submitted information that the district attorney seeks to withhold under sections 552.101, 552.108, and 552.1325 of the Government Code.<sup>2</sup> We have considered the exceptions you claim and have reviewed the submitted information.<sup>3</sup>

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<sup>1</sup>We note that the Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App. – San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

<sup>2</sup>We note that you have redacted some of the submitted information. In this instance, we are able to discern the nature of the redacted information. In the future, however, you should refrain from redacting any information that you submit to this office in seeking an open records ruling. *See Gov't Code §§ 552.301(e)(1)(D), .302.*

<sup>3</sup>This letter ruling assumes that the submitted representative sample of information is truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the district attorney to withhold any information that is substantially different from the submitted information. *See Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).*

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. Medical records are confidential under the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. Section 159.002 of the MPA provides in part:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002(b)-(c). 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) the 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 and information obtained from medical records that must be withheld under the MPA, unless the district attorney receives written consent for the release of those records that complies with sections 159.004 and 159.005 of the MPA.

Section 552.101 also encompasses section 508.313 of the Government Code, which is applicable to records of the Texas Department of Criminal Justice ("TDCJ"). Section 508.313 provides in part:

(a) All information obtained and maintained, including a victim protest letter or other correspondence, a victim impact statement, a list of inmates eligible for release on parole, and an arrest record of an inmate, is confidential and privileged if the information relates to:

(1) an inmate of the institutional division [of TDCJ] subject to release on parole, release to mandatory supervision, or executive clemency;

(2) a releasee; or

(3) a person directly identified in any proposed plan of release for an inmate.

...

(c) [TDCJ] may provide information that is confidential and privileged under Subsection (a) to:

...

(4) an eligible entity requesting information for a law enforcement, prosecutorial, correctional, clemency, or treatment purpose.

(d) In this section, "eligible entity" means:

(1) a government agency, including the office of a prosecuting attorney[.]

Gov't Code § 508.313(a)-(d). Thus, TDCJ may provide information that is encompassed by section 508.313 to an eligible entity, and such information remains confidential in the possession of the entity to which it was provided. *See id.* § 508.313(c)-(d); *see also* Open Records Decision No. 655 at 8 (1997) (information excepted from public disclosure under Act may be transferred between governmental agencies without destroying its confidential character if agency to which information is transferred has authority to obtain it). You contend that some of the submitted information is confidential under section 508.313. We have marked information that TDCJ appears to have provided to the district attorney, whose office is an eligible entity authorized to obtain information from TDCJ under section 508.313. *See* Gov't Code § 508.313(d)(1). To the extent that the marked information was in fact provided to the district attorney by TDCJ, it must be withheld under section 552.101 of the Government Code in conjunction with section 508.313 of the Government Code.

You also raise section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code, which provides that "[a] biometric identifier in the possession of a governmental body is exempt from disclosure under [the Act]." *Id.* § 560.003; *see id.* § 560.001(1) ("biometric identifier" means retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry). We have marked fingerprints that are confidential under section 560.003. There is no indication that the requestor has a right of access to the fingerprints under section 560.002. *See id.* § 560.002(1)(A) (governmental body may not sell, lease, or otherwise disclose individual's biometric identifier to another person unless the individual consents to disclosure). Therefore, the district attorney must withhold the

marked fingerprints under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code.

Section 552.101 also encompasses section 411.153 of the Government Code, which provides as follows:

(a) A DNA record stored in the DNA database is confidential and is not subject to disclosure under the public information law, Chapter 552.

(b) A person commits an offense if the person knowingly discloses to an unauthorized recipient information in a DNA record or information related to a DNA analysis of a sample collected under this subchapter.

(c) An offense under this section is a state jail felony.

(d) A violation under this section constitutes official misconduct.

*Id.* § 411.153. A "DNA record" means the results of a forensic DNA analysis performed by a DNA laboratory. *See id.* §§ 411.141(6),(7). "Forensic analysis" is defined as "a medical, chemical, toxicologic, ballistic, or other expert examination or test performed on physical evidence, including DNA evidence, for the purpose of determining the connection of the evidence to a criminal action." *See* Crim. Proc. Code art. 38.35(4); *see also* Gov't Code § 411.141(10) (providing that "forensic analysis" has meaning assigned by Crim. Proc. Code art. 38.35). A "DNA database" means "one or more databases that contain forensic DNA records maintained by the director [of the Texas Department of Public Safety (the "DPS").]" Gov't Code § 411.141(5); *see id.* § 411.001(3).

The director of the DPS is required to establish certain procedures for DNA laboratories. *See id.* §§ 411.144(a), 411.142(h) (requiring director to establish standards for DNA analysis). Section 411.144 of the Government Code provides that a DNA laboratory conducting a forensic DNA analysis under subchapter G of chapter 411 shall comply with subchapter G and the rules adopted under subchapter G. *See id.* § 411.144(d); 37 T.A.C § 28.82(a). The director of the DPS has adopted rules that govern the regulation of forensic DNA laboratories in this state. *See* 37 T.A.C. §§ 28.81, 28.82 (describing minimum standards by which a forensic DNA laboratory must abide); *see also* Gov't Code § 411.147(b).

In this instance, some of the remaining documents appear to consist of DNA records and information relating to DNA analyses of samples collected under subchapter G of chapter 411 of the Government Code. You inform us that the information in question is contained in the district attorney's files in two criminal cases prosecuted by his office. We assume that the information in question is the result of forensic DNA analyses performed by DNA laboratories in accordance with DPS regulations. Based on your representations and our review of the information, we conclude that the district attorney must withhold the

information that we have marked under section 552.101 of the Government Code in conjunction with section 411.153 of the Government Code.<sup>4</sup>

Section 552.101 also encompasses constitutional and common-law privacy. Constitutional privacy protects two types of interests. *See Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); Open Records Decision Nos. 600 at 3-5 (1992), 478 at 4 (1987), 455 at 3-7 (1987). The first is the interest in independence in making certain decisions related to the "zones of privacy," pertaining to marriage, procreation, contraception, family relationships, and child rearing and education, recognized by the U.S. Supreme Court. *See Fado v. Coon*, 633 F.2d 1172 (5<sup>th</sup> Cir. 1981); ORD 455 at 3-7. The second type of privacy interest is in freedom from public disclosure of certain personal matters. *See Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5<sup>th</sup> Cir. 1985); ORD 455 at 6-7. This aspect of constitutional privacy balances the individual's privacy interest against the public's interest in disclosure of the information. *See* ORD 455 at 7. Constitutional privacy is reserved for "the most intimate aspects of human affairs." *Id.* at 8 (quoting *Ramie*, 765 F.2d at 492).

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). 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 determined 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).

You seek to withhold information that identifies victims of sexual offenses on privacy grounds. We note, however, that much of that information is contained in records that have been filed with a court. The district attorney may not withhold any of the information contained in the court records under section 552.101 in conjunction with constitutional or common-law privacy. *See* Gov't Code § 552.022(a)(17) (providing for required disclosure of information also contained in court record unless it is expressly confidential under other law); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 496 (1975) (action for invasion of privacy cannot be maintained where information is in public domain); *Star-Telegram v. Walker*, 834 S.W.2d 54 (Tex. 1992) (sexual assault victim's privacy right not violated by release of information in public court document). We have marked information contained in the remaining documents that the district attorney must withhold under section 552.101 in conjunction with common-law privacy.

You also raise section 552.1325 of the Government Code, which provides as follows:

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<sup>4</sup>We note that section 411.147 of the Government Code allows the director of the DPS to release DNA samples in certain instances. *See* Gov't Code § 411.147(c).

(a) In this section:

(1) "Crime victim" means a person who is a victim as defined by Article 56.32, Code of Criminal Procedure.

(2) "Victim impact statement" means a victim impact statement under Article 56.03, Code of Criminal Procedure.

(b) The following information that is held by a governmental body or filed with a court and that is contained in a victim impact statement or was submitted for purposes of preparing a victim impact statement is confidential:

(1) the name, social security number, address, and telephone number of a crime victim; and

(2) any other information the disclosure of which would identify or tend to identify the crime victim.

Gov't Code § 552.1325. In this instance, you have not demonstrated that any of the remaining information either is contained in a victim impact statement or was submitted for purposes of preparing a victim impact statement. We therefore conclude that the district attorney may not withhold any of the remaining information under section 552.1325.

We note that the district attorney may be required to withhold some of the remaining information under section 552.1175 of the Government Code.<sup>5</sup> This section is applicable to "peace officers as defined by Article 2.12, Code of Criminal Procedure." *Id.* § 552.1175(a)(1). Section 552.1175(b) provides as follows:

(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.

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<sup>5</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).

*Id.* § 552.1175(b). We have marked information that must be withheld under section 552.1175 to the extent that the information concerns peace officers who request confidentiality for the information in accordance with section 552.1175(b).

We also note that the remaining information includes a Texas driver's license number. Section 552.130 of the Government Code exempts from disclosure information relating to a motor vehicle operator's or driver's license or permit issued by an agency of this state.<sup>6</sup> *See id.* § 552.130(a)(1). We have marked information that must be withheld under section 552.130.

In summary: (1) the marked medical records and information obtained from medical records must be withheld under the MPA unless the district attorney receives consent for release that complies with sections 159.004 and 159.005 of the MPA; (2) the district attorney must withhold the information that we have marked under section 552.101 of the Government Code in conjunction with sections 508.313, 560.003, and 411.153 of the Government Code and common-law privacy; (3) the district attorney must withhold the information that we have marked under section 552.1175 of the Government Code to the extent that it concerns peace officers who request confidentiality for the information in accordance with section 552.1175(b); and (4) the marked Texas driver's license information must be withheld under section 552.130 of the Government Code. The rest of the submitted information must be released. As we are able to make these determinations, we need not address your other arguments against disclosure.

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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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>6</sup>Section 552.130 also is mandatory and may not be waived. Gov't Code §§ 552.007, .352; ORD 674 at 3 n.4.

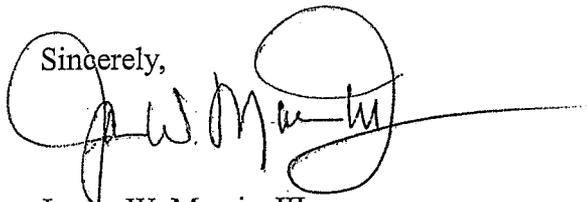
will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to 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 challenge 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 'J.W. Morris, III', with a long horizontal line extending to the right.

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

JWM/eb

Ref: ID# 303566

Enc: Submitted documents

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