



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 20, 2008

Ms. Josefina J. Brostrom
Assistant County Attorney
El Paso County
500 East San Antonio, Room 503
El Paso, Texas 79901

OR2008-06931

Dear Ms. Brostrom:

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# 310734.

The El Paso County Sheriff's Office (the "sheriff") received two requests from the same requestor for a named officer's personnel file. You state you have provided some of the requested information to the requestor. You claim that the submitted personnel documents are excepted from disclosure under sections 552.101, 552.108, 552.117, 552.119, and 552.130 of the Government Code. You also provide documentation showing that you notified the named officer whose privacy interests may be at issue of the request and of his right to submit arguments to this office as to why the information should not be released. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released). We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments submitted by the requestor. *See id.*

Initially, we note that a portion of the submitted information does not pertain to the sheriff's officer named in the request. Thus, this information, which we have marked, is not responsive to the request. This decision does not address the public availability of the non-responsive information, and that information need not be released.

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information that other statutes make confidential. Medical records are confidential under the Medical Practice Act (the "MPA"),

subtitle B of title 3 of the Occupations Code. *See* Occ. Code § 151.001. Section 159.002 of the MPA provides, in part:

(a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.

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

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

Id. § 159.002(a)-(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 marked the documents that constitute medical records, which may only be released in accordance with the MPA. *See* ORD 598.

We note that the remaining information contains L-2 (Declaration of Medical Condition) and L-3 (Declaration of Psychological and Emotional Health) forms, which are confidential under section 1701.306 of the Occupations Code. Section 552.101 also encompasses section 1701.306 of the Occupations Code, which provides:

(a) The [Texas Commission on Law Enforcement Officer Standards and Education] 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.

Occ. Code § 1701.306(a)-(b). Therefore, the L-2 (Declaration of Medical Condition) and L-3 (Declaration of Psychological and Emotional Health) forms 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.

You also raise section 552.101 in conjunction with section 611.002 of the Health and Safety Code, which is applicable to 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”). Upon review, none of the remaining information constitutes mental health records. Further, you do not inform us that any of the remaining information was taken from mental health records. Therefore, we find that none of the remaining information may be withheld under section 552.101 of the Government Code in conjunction with section 611.002 of the Health & Safety Code.

Section 552.101 also encompasses 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].” Gov’t Code § 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 in the remaining personnel documents 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 sheriff 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 411.034 of the Labor Code. Section 411.034(a) states, in part, “[t]he identity of an employee in a report filed under Section 411.032 is confidential.” Labor Code § 411.034(a). Section 411.032(a) provides:

(a) an employer shall file with the commission a report of each:

(1) on-the-job injury that results in the employee’s absence from work for more than one day; and

(2) occupational disease of which the employer has knowledge.

Id. § 411.032(a). You do not identify, nor do we find, in the remaining information a report of an on-the-job injury or occupational disease that was filed under section 411.032 with the Workers’ Compensation Division of the Texas Department of Insurance. Thus, you have failed to demonstrate that section 411.034 of the Labor Code applies to any of the remaining information.

Section 552.101 also encompasses laws that make criminal history record information (“CHRI”) confidential. CHRI generated by the National Crime Information Center or by the Texas Crime Information Center is confidential under federal and state law. 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 at 7 (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 DPS maintains, except that the DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See* Gov’t Code § 411.083. Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from the 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. Similarly, any CHRI obtained from the DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F. Accordingly, we have marked the CHRI in the remaining personnel records that must be withheld under section 552.101 of the Government Code.

Section 552.101 also chapter 55 of the Code of Criminal Procedure. Articles 55.01 through 55.05 of the Code of Criminal Procedure provide for the expunction of criminal records in certain limited circumstances. Article 55.03 prescribes the effect of an expunction order and provides:

When the order of expunction is final:

(1) the release, maintenance, dissemination, or use of the expunged records and files for any purpose is prohibited;

(2) except as provided in Subdivision (3) of this article, the person arrested may deny the occurrence of the arrest and the existence of the expunction order; and

(3) the person arrested or any other person, when questioned under oath in a criminal proceeding about an arrest for which the records have been expunged, may state only that the matter in question has been expunged.

Crim. Proc. Code art. 55.03. Article 55.04 imposes sanctions for violations of an expunction order and provides in relevant part:

Sec. 1. A person who acquires knowledge of an arrest while an officer or employee of the state or of any agency or other entity of the state . . . and who knows of an order expunging the records and files relating to that arrest commits an offense if he knowingly releases, disseminates, or otherwise uses the records or files.

Id. art. 55.04, § 1. This office has previously determined that the expunction statute prevails over the Act. *See* Open Records Decision No. 457 at 2 (1987) (governmental body prohibited from releasing or disseminating arrest records subject to expunction order, as “those records are not subject to public disclosure under the [Act]”). Upon review, we note that a portion of the remaining information, which we have marked, pertains to expunged records that are confidential under article 55.03 of the Code of Criminal Procedure. Accordingly, the information we have marked must be withheld under section 552.101 of the Government Code.

Section 552.101 also encompasses the doctrine of common-law privacy, which protects information if (1) the information contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex.1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be demonstrated. *Id.* at 681-82. The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. This office has also found that the following types of information are excepted from required public disclosure under common-law privacy: 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), and 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). Upon review of the remaining personnel records, we find that some of the information is highly intimate or embarrassing and is not of legitimate public concern. Thus, the sheriff must withhold the information we have marked in the personnel records under section 552.101 of the Government Code in conjunction with common-law privacy.

You contend that a portion of the submitted information is protected by section 552.108 of the Government Code, which provides in part:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:

...

(2) 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;

...

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from [required public disclosure] if:

...

(2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication[.]

Gov't Code § 552.108(a)(2), (b)(2). Sections 552.108(a)(2) and 552.108(b)(2) protect information that relates to a concluded criminal investigation or prosecution that did not result in conviction or deferred adjudication. *Id.* A governmental body claiming section 552.108(a)(2) or section 552.108(b)(2) must demonstrate that the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. *Id.* In this instance, you state that a portion of the submitted personnel records relates to a criminal case that did not result in a conviction or deferred adjudication. However, you have not marked, or otherwise indicated, which part of the submitted information is excepted under section 552.108. *See id.* 552.301(e)(2) (governmental body must label copy of requested information to indicate which exceptions

apply to which parts of the copy). Therefore, we determine that the sheriff has failed to demonstrate that any of the submitted information relates to a concluded investigation or prosecution that did not result in conviction or deferred adjudication. Accordingly, no part of the submitted personnel records may be withheld under section 552.108(a)(2) or section 552.108(b)(2) of the Government Code.

Next, you claim that the remaining information contains the personal information of a peace officer. Section 552.117(a)(2) of the Government Code excepts from public disclosure the home address, home telephone numbers, and social security number of a peace officer, as well as information that reveals whether the peace officer has family members, regardless of whether the peace officer complies with sections 552.024 and 552.1175 of the Government Code.¹ Gov't Code § 552.117(a)(2). Thus, the sheriff must withhold under section 552.117 of the Government Code the information we have marked pertaining to the peace officer at issue.

Section 552.119 of the Government Code provides:

(a) A photograph that depicts a peace officer as defined by Article 2.12, Code of Criminal Procedure, the release of which would endanger the life or physical safety of the officer, is excepted from [required public disclosure] unless:

- (1) the officer is under indictment or charged with an offense by information;
- (2) the officer is a party in a civil service hearing or a case in arbitration; or
- (3) the photograph is introduced as evidence in a judicial proceeding.

(b) A photograph excepted from disclosure under Subsection (a) may be made public only if the peace officer gives written consent to the disclosure.

Id. § 552.119. Under section 552.119, a governmental body must demonstrate, if the documents do not demonstrate on their face, that release of the photograph would endanger the life or physical safety of a peace officer. In this instance, you state that the officer whose photograph is in the remaining information “may become an undercover officer in the future, and it is critical that his photograph be protected in order to avail the [sheriff], or another law enforcement agency, of his services should they become necessary.” You have not explained, however, how release of the officer’s photograph would endanger the officer’s life

¹ “Peace officer” is defined by Article 2.12 of the Texas Code of Criminal Procedure.

or physical safety at this time. Accordingly, we determine that the sheriff has failed to demonstrate how the release of the officer's photograph would endanger the life or physical safety of this officer. Therefore, the photograph of the peace officer contained in the remaining information may not be withheld under section 552.119 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[.]" *Id.* § 552.130(a)(1). Therefore, the sheriff must withhold the Texas motor vehicle record information that we have marked in the remaining personnel records under section 552.130 of the Government Code.

We note that the remaining information contains a bank account number and an insurance policy number that are subject to section 552.136(b) of the Government Code.² This section states that "[n]otwithstanding 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." Gov't Code § 552.136(b). Thus, the sheriff must withhold the bank account number and insurance policy number that we have marked under section 552.136 of the Government Code.

In summary, the sheriff must withhold under section 552.101 of the Government Code: the medical records we have marked in conjunction with the MPA; the L-2 and L-3 forms we have marked in conjunction with section 1701.306 of the Occupations Code; the fingerprint information we have marked in conjunction with section 560.003 of the Government Code; the criminal history record information we have marked in conjunction with chapter 411 of the Government Code; the information we have marked in conjunction with article 55.03 of the Code of Criminal Procedure; and the information we have marked in conjunction with common-law privacy. The sheriff must also withhold: the peace officer's personal information we have marked under section 552.117(a)(2) of the Government Code; the Texas motor vehicle record information we have marked under section 552.130 of the Government Code; and the bank account and insurance policy numbers we have marked under section 552.136 of the Government Code. The remaining information must be released.

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

² The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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).

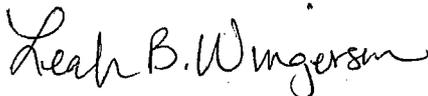
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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,



Leah B. Wingerson
Assistant Attorney General
Open Records Division

LBW/ma

Ref: ID# 309496

Enc. Submitted documents

c: Ms. Laura McIntyre
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(w/o enclosures)