



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 16, 2008

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

OR2008-09701

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# 316094.

The El Paso County Sheriff's Office (the "sheriff") received a request for all records related to a specific detective. You state that you have released a portion of the requested information to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.117, 552.119, and 552.130 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

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. Section 552.101 encompasses 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) provides as follows:

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.

¹ Although you raise section 552.101 in conjunction with section 552.117, 552.119, and 552.130, we note that section 552.101 does not encompass other exceptions found in the Act.

Health & Safety Code § 611.002(a). 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). These sections permit disclosure of mental health records to a patient, a person authorized to act on the patient's behalf, or a person who has the written consent of the patient. Health & Safety Code § 611.004, .0045. We have marked the submitted information that is subject to section 611.002 of the Health and Safety Code. These records may only be released in accordance with sections 611.004 and 611.0045 of the Health and Safety Code.

Section 552.101 encompasses CHRI generated by the National Crime Information Center ("NCIC") or by the Texas Crime Information Center ("TCIC"). Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that state agencies 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 maintains, except that the department 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 department 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. Furthermore, any CHRI obtained from 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. *See* Gov't Code § 411.082(2)(B) (term CHRI does not include driving record information). However, we find that no portion of the remaining information constitutes CHRI generated by either the TCIC or NCIC databases. Therefore, no portion of the remaining information is confidential under chapter 411 and none of the remaining information may be withheld under section 552.101 on that basis.

Next, you assert that portions of Exhibit C are protected by common-law privacy. Section 552.101 further encompasses common-law privacy, which protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). 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.

In this instance you seek to withhold information in the named officer's personnel file, that is solely related to his qualifications, job performance, and work conduct. This office has stated, in numerous decisions, that information pertaining to the work conduct and job performance of public employees is subject to a legitimate public interest and therefore generally not protected from disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (1987) (public employee's job performance does not generally constitute employee's private affairs), 455 (1987) (public employee's job performance or abilities generally not protected by privacy), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employee), 423 at 2 (1984) (scope of public employee privacy is narrow). Therefore, the sheriff may not withhold the submitted information in its entirety under section 552.101 and common-law privacy. We note, however, that the submitted information contains medical information.

This office has found some kinds of medical information or information indicating specific illnesses are confidential under common-law privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps) and identities of victims of sexual abuse, *see also* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). We have marked the information that is highly intimate or embarrassing and not of legitimate public interest. Accordingly, the sheriff must withhold the information we have marked under section 552.101 in conjunction with common-law privacy. However, we find that none of the remaining information constitutes highly intimate or embarrassing information in which there is no legitimate public interest. Therefore, none of the remaining information may be withheld under common-law privacy.

You assert that some of the remaining information is excepted from disclosure under section 552.117(a)(2) of the Government Code. Section 552.117(a)(2) excepts from required public disclosure the current and former home address, home telephone number, social security number, and the family member information of a peace officer as defined by article 2.12 of the Code of Criminal Procedure. *See* Open Records Decision No. 622 (1994). We note that section 552.117(a)(2) also encompasses personal cellular telephone and pager numbers, only if the cellular telephone or pager service is paid for by the officer with his or her own funds. *See* Open Records Decision No. 670 at 6 (2001). You do not indicate which of the individuals are currently licensed peace officers. Accordingly, if the individuals listed in the submitted information are currently licensed peace officers, the sheriff must withhold the information we have marked under section 552.117(a)(2).²

² We note that in Open Records Decision No. 670 (2001), the attorney general determined that all governmental bodies may withhold information that reveals a peace officer's home address, home telephone number, personal cellular phone number, personal pager number, social security number, and information that reveals whether the individual has family members without the necessity of requesting an attorney general decision as to whether the exception under section 552.117(a)(2) applies.

To the extent that these individuals are not a currently licensed peace officers, section 552.117(a)(1) may apply. Section 552.117(a)(1) excepts from disclosure the current and former home addresses and home telephone numbers, social security numbers, and family member information of a current or former official or employee of a governmental body who requests that this information be kept confidential under section 552.024. 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). Therefore, the sheriff may only withhold information under section 552.117(a)(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Accordingly, if these individuals timely elected to keep their personal information confidential, the sheriff must withhold the marked information under section 552.117(a)(1). The sheriff may not withhold the marked information under section 552.117(a)(1) if these individuals did not make a timely election to keep this information confidential.

Section 552.119 of the Government Code provides:

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

Gov't Code § 552.119. Under section 552.119, a governmental body must demonstrate 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 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 of the Government Code excepts from disclosure information that relates to "a motor vehicle operator's or driver's license [or] motor vehicle title or registration issued by an agency of this state." Gov't Code § 552.130(a)(1), (2). The sheriff must withhold the information we have marked under section 552.130.

In summary, the sheriff may only release the information we have marked in accordance with sections 611.004 and 611.0045 of the Health and Safety Code. The sheriff must withhold the information we have marked under section 552.101 in conjunction with common-law privacy. The sheriff must withhold the information we have marked under section 552.117(a)(2) if the individuals in the submitted information are currently licensed peace officers. If the individuals are not currently licensed police officers, the information we have marked under section 552.117(a)(2) must be withheld under section 552.117(a)(1) if the individuals made a timely election to withhold personal information under section 552.024 of the Government Code. The sheriff must withhold the information we have marked under section 552.130. The remaining information must be released.

You also request that this office issue a previous determination that would permit the sheriff to withhold information in a law enforcement personnel file under (1) section 552.101 in conjunction with section 611.002 of the Health and Safety Code, section 411.083 of the Government Code, and common-law privacy; (2) section 552.117; and (3) section 552.119 without the need of requesting a ruling from this office. We decline to issue such a previous determination at this time.

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). If the governmental body does not file suit over 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,



Chris Schulz
Assistant Attorney General
Open Records Division

CS/mcf

Ref: ID# 316094

Enc. Submitted documents

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(w/o enclosures)