



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 5, 2008

Mr. Cary L. Bovey
Bovey & Bojorquez, LLP
12325 Hymeadow Drive, Suite 2-100
Austin, Texas 78750

OR2008-10552

Dear Mr. Bovey:

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# 317978.

The Brenham Police Department (the "department"), which you represent, received a request for information related to the investigation, trial, and post-trial investigations pertaining to a specified criminal case. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.117, 552.130, and 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

First, you contend that the submitted information may be withheld in its entirety pursuant to section 552.103 of the Government Code. Section 552.103 provides in relevant part 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.

Gov't Code § 552.103(a). The purpose of section 552.103 is to protect the litigation interests of governmental bodies that are parties to the litigation at issue. *See* Gov't Code

§ 552.103(a); Open Records Decision No. 638 at 2 (1996) (section 552.103 only protects the litigation interests of the governmental body claiming the exception). You inform us that the submitted information relates to a crime and that the defendant was convicted. You state that the requestor "is preparing to seek a post-conviction remedy" in the form of a habeas corpus or other proceeding to challenge the conviction. We note that the department is not a party to any potential appellate proceeding and therefore does not have a litigation interest in the matter for purposes of section 552.103. Further, you have not provided this office with an affirmative representation from any governmental body with a litigation interest that the governmental body wishes the submitted information to be withheld pursuant to section 552.103. Accordingly, the department may not withhold the submitted information under section 552.103 of the Government Code.

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 section encompasses information protected by other statutes such as the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. Section 159.002 provides in pertinent 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 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). Further, information that is subject to the MPA also includes information that was obtained from medical records. *See* Occ. Code. § 159.002(a), (b), (c); *see also* Open Records Decision No. 598 (1991). Medical records must be released upon the governmental body's receipt of 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. 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. *See* Open Records

Decision No. 565 at 7 (1990). We have marked the medical records that may only be released in accordance with the MPA.¹

We next note that the submitted information contains DNA records obtained by the department from the Texas Department of Public Safety's ("DPS") crime laboratory service. 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 [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), .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). The director of the DPS may release a DNA record in certain instances, including to a criminal justice agency for criminal justice or law enforcement purposes. *See id.* § 411.147(c).

¹As our ruling is dispositive for this information, we need not address your argument against the disclosure of the marked medical records.

In this instance, some of the remaining documents are DNA records relating to DNA analyses of samples collected under subchapter G of chapter 411 of the Government Code. The information in question is contained in the department's file related to a criminal case. The documents appear to be the result of forensic DNA analyses performed by a DPS DNA laboratory in accordance with DPS regulations. Thus, we conclude that the department must withhold the DNA records that we have marked under section 552.101 of the Government Code in conjunction with section 411.153 of the Government Code.²

Next, we note that the remaining information contains criminal history record information that is confidential by statute. Section 552.101 of the Government Code also encompasses information protected by other statutes. Criminal history record information ("CHRI") generated by the National Crime Information Center ("NCIC") or by the Texas Crime Information Center ("TCIC") is 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 Texas 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; 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 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. 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. The department must withhold the CHRI that we have marked under section 552.101 of the Government Code in conjunction with federal law and chapter 411 of the Government Code.

We note that a portion of the remaining information is confidential under common-law privacy. Section 552.101 also encompasses the doctrine of 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. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). A compilation of an individual's criminal history 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

²We note that section 411.147 of the Government Code allows the director of the DPS to release DNA records in several specified instances. *See* Gov't Code § 411.147(c).

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. Therefore, the department must withhold the criminal history information we have marked under section 552.101 in conjunction with common-law privacy.

Next, you contend that the home address and telephone numbers you have marked are excepted from disclosure under section 552.1175 of the Government Code.³ Section 552.1175 provides in part:

(a) This section applies only to:

(1) peace officers as defined by Article 2.12, Code of Criminal Procedure;

...

(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.

Gov't Code § 552.1175(a), (b). We note that the individual at issue appears to have been a police officer at Blinn College. The department must withhold the home address and home telephone number we have marked to the extent that the individual at issue is a currently licensed peace officer and elects to restrict access to this information in accordance with section 552.1175(b). If no election is made or if the individual is not a currently licensed peace officer, the department may not withhold the information we have marked under section 552.1175.

Next, we address your assertion that a portion of the remaining information is subject to section 552.130 of the Government Code. Section 552.130 provides in relevant part:

³Although you raise section 552.117 for the home address and telephone numbers of a Blinn College police officer, we note that section 552.1175 is the proper exception in this instance because the department does not hold this information in an employment capacity.

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

- (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state;
- (2) a motor vehicle title or registration issued by an agency of this state; [.]

Gov't Code § 552.130. We note that section 552.130 does not apply to out-of-state motor vehicle record information. Accordingly, the department must only withhold the Texas motor vehicle information we have marked under section 552.130 of the Government Code.

Next, you assert that the social security numbers in the submitted information are excepted under section 552.147 of the Government Code, which provides that "[t]he social security number of a living person is excepted from" required public disclosure under the Act. *Id.* § 552.147. In this instance, it appears the requestor may be the legal representative of a person whose social security number is contained in the submitted information. Thus, if the requestor is the authorized representative of this individual, she has a right of access to the individual's social security number and it must be released to her. *See generally id.* § 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 individuals request information concerning themselves). However, if the requestor is not the authorized representative of this individual, the department may withhold the individual's social security number pursuant to section 552.147 of the Government Code. In any event, the department may withhold the remaining social security numbers in the submitted information pursuant to section 552.147.⁴

In summary, the department may only release the marked medical records in accordance with the MPA. The department must withhold the DNA records we have marked under section 552.101 in conjunction with section 411.153 of the Government Code. The department must withhold the CHRI we have marked under section 552.101 of the Government Code in conjunction with federal law and chapter 411 of the Government Code. The department must withhold the compiled criminal history information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. If the individual at issue is a peace officer as defined by article 2.12, Code of Criminal Procedure, and elects to restrict access to his home address and home telephone number in

⁴We note that 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 officer under the Act.

accordance with section 552.1175(b), the department must withhold the information we have marked under section 552.1175. If no election is made or if the individual is not a currently licensed peace officer, the department may not withhold the information we have marked under section 552.1175. The department must withhold the Texas motor vehicle information we have marked under section 552.130 of the Government Code. If the requestor is the representative of the individual at issue, she has a right of access to his social security number. If the requestor is not the representative of the individual the department may withhold his social security number under section 552.147 of the Government Code. The department may withhold the remaining social security numbers under section 552.147 of the Government Code. The remaining information must be released to the requestor.

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,

A handwritten signature in cursive script that reads "Laura E. Ream".

Laura E. Ream
Assistant Attorney General
Open Records Division

LER/jb

Ref: ID# 317978

Enc. Submitted documents

c: Ms. Karen Cunningham
University of Houston Law Center
Texas Innocence Network
100 Law Center
Houston, Texas 77204-6060
(w/o enclosures)