



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

February 23, 2009

Ms. Jennifer Tharp  
Chief Civil Prosecutor  
Comal County Criminal District Attorney's Office  
150 North Seguin Avenue Suite 314  
New Braunfels, Texas 78130

OR2009-02358

Dear Ms. Tharp:

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# 335469.

The Comal County Criminal District Attorney's Office (the "district attorney") and the Comal County Sheriff's Department (the "sheriff") received separate requests from the same requestor for information relating to a specified incident and a named individual's arrest. On behalf of the district attorney and the sheriff, you claim that the requested information is excepted from disclosure under sections 552.103, 552.108, 552.130, and 552.147 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and reviewed the information you submitted.<sup>2</sup>

Initially, we note that you did not fully comply with section 552.301 of the Government Code in requesting this decision. Section 552.301 prescribes procedures that a governmental body

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<sup>1</sup>Although you also initially raised section 552.107 of the Government Code, you have submitted no arguments in support of the applicability of that exception. Accordingly, this decision does not address section 552.107. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must submit written comments stating reasons why claimed exceptions apply to information at issue).

<sup>2</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 you 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).

must follow in asking this office to decide whether requested information is excepted from public disclosure. *See* Gov't Code § 552.301(a). Section 552.301(e) provides that a governmental body must submit to this office, no later than the fifteenth business day after the date of its receipt of a request for the specific information that the governmental body seeks to withhold or representative samples if the information is voluminous. *See id.* § 552.301(e)(1)(D). If a governmental body fails to comply with section 552.301, the requested information is presumed to be subject to required public disclosure and must be released, unless there is a compelling reason to withhold any of the information. *See id.* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ). information)

You state that the district attorney and the sheriff received these requests for information on November 26 and November 28, 2008, respectively. Therefore, your fifteen-business-day deadline under section 552.301(e) was December 19. You submitted the information at issue to this office by U.S. Mail meter-marked December 22, 2008. Thus, you did not comply with your deadline under section 552.301(e) in requesting this decision, and the submitted information is therefore presumed to be public under section 552.302. This statutory presumption can generally be overcome when information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982). Although you claim exceptions to disclosure under sections 552.103 and 552.108 of the Government Code, those sections are discretionary exceptions that protect a governmental body's interests and may be waived. *See* Gov't Code § 552.007; *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (Gov't Code § 552.103 may be waived); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions), 663 at 5 (1999) (waiver of discretionary exceptions), 177 at 3 (1977) (statutory predecessor to Gov't Code § 552.108 subject to waiver). As such, your claims under sections 552.103 and 552.108 are not compelling reasons for non-disclosure under section 552.302. In failing to comply with section 552.301, the district attorney and the sheriff have waived sections 552.103 and 552.108 and may not withhold any of the submitted information on the basis of either of those exceptions. Because your claim under section 552.130 of the Government Code can provide a compelling reason for non-disclosure, we will address that exception.

We first note that section 552.101 of the Government Code is applicable in this instance.<sup>3</sup> Section 552.101 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:

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<sup>3</sup>Unlike other exceptions to disclosure, this office will raise section 552.101 on behalf of a governmental body, because the Act prescribes criminal penalties for the release of confidential information. *See* Gov't Code §§ 552.007, .352; Open Records Decision No. 325 at 2 (1982).

(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). 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). You must withhold the medical records that we have marked under section 159.002 of the MPA, unless you receive written consent for release of those records that complies with sections 159.004 and 159.005 of the MPA.

Criminal history record information ("CHRI") obtained from the National Crime Information Center or the Texas Crime Information Center is confidential under federal and state law. CHRI means "information collected about a person by a criminal justice agency that consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions."<sup>4</sup> *Id.* § 411.082(2). Federal law governs the dissemination of CHRI obtained from the National Crime Information Center network. Federal regulations prohibit the release to the general public of CHRI maintained in state and local CHRI systems. *See* 28 C.F.R. § 20.21(c)(1) ("Use of criminal history record information disseminated to noncriminal justice agencies shall be limited to the purpose for which it was given.") and (c)(2) ("No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself."). The federal regulations allow each state to follow its own individual law with respect to CHRI that it generates. *See* Open Records Decision No. 565 at 10-12 (1990); *see generally* Gov't Code ch. 411 subch. F. Although sections 411.083(b)(1) and 411.089(a) of the Government Code authorize a criminal justice agency to obtain CHRI, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *See id.* § 411.089(b). We have marked CHRI that you must withhold under section 552.101 of the Government

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<sup>4</sup>We note that the statutory definition of CHRI does not encompass driving record information maintained by the Texas Department of Public Safety under subchapter C of chapter 521 of the Transportation Code. *See* Gov't Code § 411.082(2).

Code in conjunction with the federal law and subchapter F of chapter 411 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”)].” *Id.* § 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 DPS has adopted rules that govern the regulation of forensic DNA laboratories in this state. *See id.* §§ 28.81, .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 are DNA records relating to DNA analyses of samples collected under subchapter G of chapter 411 of the Government Code. The documents in question are contained in records of a criminal investigation. The documents appear to be the result of forensic DNA analyses performed by a DPS DNA laboratory in accordance with DPS regulations. We therefore conclude that you 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.<sup>5</sup>

Section 552.101 also encompasses common-law privacy, which 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). We also have determined that a compilation of a private individual's criminal history is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person, and is generally not of legitimate concern to the public. *Cf. United States 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). We have marked information that identifies the victim of an alleged sexual assault and compilations of criminal history information that you must withhold under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.130 of the Government Code excepts from disclosure information relating 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; or
- (3) a personal identification document issued by an agency of this state or a local agency authorized to issue an identification document.

Gov't Code § 552.130(a)(1)-(3). We have marked Texas driver's license, motor vehicle, and personal identification information that you must withhold under section 552.130. We note that this exception is not applicable to out-of-state driver's license or motor vehicle information.

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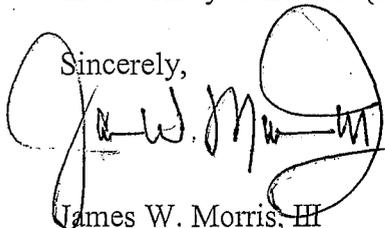
<sup>5</sup>We note that section 411.147 of the Government Code allows the director of the DPS to release DNA records in several specified instances. *See* Gov't Code § 411.147(c).

In summary: (1) you must withhold the marked medical records under section 159.002 of the MPA unless you receive written consent for release of those records that complies with sections 159.004 and 159.005 of the MPA; (2) you must withhold the marked CHRI under section 552.101 of the Government Code in conjunction with federal law and subchapter F of chapter 411 of the Government Code and the marked DNA records under section 552.101 in conjunction with section 411.153 of the Government Code; (3) you must withhold the marked information that identifies the alleged sexual assault victim and the compilations of criminal history information under section 552.101 in conjunction with common-law privacy; and (4) the marked Texas driver's license, motor vehicle, and personal identification information must be withheld under section 552.130 of the Government Code.<sup>6</sup> The rest of the submitted information must be released.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



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

JWM/cc

Ref: ID# 335469

Enc: Submitted documents

c: Requestor  
(w/o enclosures)

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<sup>6</sup>We note that the remaining information includes social security numbers. 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.