



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 8, 2009

Mr. William A. Mills
Aransas County Sheriff's Office
301 North Live Oak
Rockport, Texas 78382

OR2009-07812

Dear Mr. Mills:

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# 344081.

The Aransas County Sheriff's Office (the "sheriff") received a request for nineteen categories of information relating to a specified incident involving the requestor, including the personnel files of four named officers. You state you have released some of the information to the requestor. You state that you maintain no information responsive to categories 6 and 17 of the request.¹ You claim that portions of the submitted information are excepted from disclosure under sections 552.101, 552.102, 552.103,² 552.108, and 552.117 of the Government Code.³ You also state that the submitted information may implicate the interests of named individuals, and that you have notified these individuals of their rights to

¹We 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).

²Based on your argument that some of the information pertains to pending litigation, we understand you to raise section 552.103 of the Government Code.

³Although you raise section 552.024 of the Government Code, we note that this section is not an exception to public disclosure under the Act. Rather, this section permits a current or former official or employee of a governmental body to choose whether to allow public access to certain information relating to the current or former official or employee that is held by the employing governmental body. See Gov't Code § 552.024. Section 552.117 of the Government Code is instead the proper exception to assert. Further, although you raise section 552.1175 of the Government Code for some of the submitted information, we note that section 552.117(a)(2) of the Government Code is the applicable exception for that type of information.

submit arguments to this office as to why the requested information should not be released. *See* Gov't Code § 552.304 (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.

Initially, we address your assertion that a portion of the request seeking personnel records is ambiguous.⁴ You state that although it is probable you could identify which individuals the requestor was referring to in his request for personnel records, you seek our opinion due to the incomplete identification of the employees in the request. We note that a governmental body has a duty to make a good faith effort to relate a request for information to information that the governmental body holds. Open Records Decision No. 561 (1990). In this case, because you have submitted responsive information for our review and made arguments against the disclosure of these records, we consider the sheriff to have made a good faith effort to identify information that is responsive to the request, and we will address the applicability of your arguments to that information.

We note that the request seeks nineteen categories of information pertaining to the specified incident. However, you have not submitted any information responsive to categories 1, 2, 3, 7, 9, 10, 11, 12, 13, 14, 15, or 19. Thus, to the extent any information responsive to these categories of the request existed on the date the sheriff received this request, we assume you have released it. If you have not released any such information, you must do so at this time. *See* Gov't Code §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

Next, we must address the sheriff's obligations under section 552.301 of the Government Code, which prescribes the procedures that a governmental body must follow in asking this office to decide whether information is excepted from public disclosure. Pursuant to section 552.301(b) of the Government Code, a governmental body must ask for the attorney general's decision and state the exceptions that apply within ten business days after receiving the request. *See* Gov't Code § 552.301(a), (b). The sheriff received the instant request for information on March 4, 2009. Although you timely raised sections 552.101, 552.102, 552.108, and 552.117 of the Government Code in accordance with section 552.301(b), you did not raise section 552.103 until March 25, 2009. Thus, with respect to section 552.103, the sheriff failed to comply with the procedural requirements mandated by section 552.301(b). Furthermore, pursuant to section 552.301(e), a governmental body must submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received

⁴We note that in the future, if the sheriff receives a request that it considers overly broad or ambiguous, then the sheriff should ask the requestor to clarify or narrow the request. *See* Gov't Code § 552.222(b).

the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. Although you timely submitted some of the requested information to this office, we note you did not submit to this office the information responsive to categories 4 and 5 or portions of the information responsive to category 8 until May 27, 2009. Thus, with respect to the information not timely submitted to this office, the sheriff failed to comply with the requirements mandated by section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the requirements of section 552.301 results in the legal presumption that the information at issue is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See Gov't Code § 552.302; Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ); Open Records Decision No. 319 (1982). A compelling reason exists when third-party interests are at stake or when information is confidential under other law. Open Records Decision No. 150 (1977). Sections 552.103 and 552.108 are discretionary in nature and serve only to protect a governmental body's interests. By failing to timely raise section 552.103, the sheriff has waived its claim under this exception. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103). Further, the sheriff has also waived its claim under section 552.108 for the information responsive to categories 4 and 5 of the request that it failed to timely submit to this office. *See Open Records Decision No. 177 (1977)* (governmental body may waive statutory predecessor to section 552.108). We will, however, still address the sheriff's claim under section 552.108 for the timely submitted information in Exhibit B. Also, because section 552.101 of the Government Code can provide a compelling reason to overcome this presumption, we will consider whether any of the information at issue is excepted from disclosure under section 552.101.

We now address your arguments against disclosure of the submitted information. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. The submitted information contains an I-9 form (Employment Eligibility Verification), which is governed by section 1324a of title 8 of the United States Code. This section provides that an I-9 form and "any information contained in or appended to such form, may not be used for purposes other than for enforcement of this chapter" and for enforcement of other federal statutes governing crime and criminal investigations. *See 8 U.S.C. § 1324a(b)(5); see also 8 C.F.R. § 274a.2(b)(4)*. Release of the form in this instance would be "for purposes other than for enforcement" of the referenced federal statutes. Accordingly, we conclude that the I-9 form, which we have marked, is confidential and may only be released in compliance with the federal laws and regulations governing the employment verification system.

Section 552.101 of the Government Code also encompasses section 6103(a) of title 26 of the United States Code. Section 6103(a) renders tax return information confidential. Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision No. 600 (1992) (W-4 forms), 226 (1979) (W-2 forms). Section 6103(b) defines the term "return information" as a taxpayer's "identity, the nature, source, or amount of income." See 26 U.S.C. § 6103(b)(2)(A). Federal courts have construed the term "return information" expansively to include any information gathered by the Internal Revenue Service regarding a taxpayer's liability under title 26 of the United States Code. See *Mallas v. Kolak*, 721 F. Supp. 748, 754 (M.D.N.C. 1989), *aff'd in part*, 993 F.2d 1111 (4th Cir. 1993). Thus, the sheriff must withhold the submitted W-4 forms we have marked pursuant to section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code.

Section 552.101 also encompasses the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. Section 159.002 of the MPA provides in part the following:

(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). Information subject to the MPA includes both medical records and information obtained from those medical records. See Open Records Decision No. 598 (1991). This office has concluded that the protection afforded by section 159.002 extends 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 further found that when a file is created as a result of a hospital stay, all the documents in the file referring to diagnosis and treatment constitute physician-patient communications or "[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician." Open Records Decision No. 546 (1990). Medical records may be released only as provided under the MPA. *Id.* Upon review, we have marked the portion of the remaining information that constitutes medical records and that may only be released in accordance with the MPA.

The remaining information contains records that are subject to 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) states that "[c]ommunications 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." 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. Health & Safety Code § 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). We have marked the information that constitutes mental health records, and that may only be released in accordance with sections 611.004 and 611.0045 of the Health and Safety Code.

The remaining information also contains L-3 (Declaration of Psychological and Emotional Health) forms, which are required by the Texas Commission on Law Enforcement Officer Standards and Education (the "commission"). Section 1701.306 of the Occupations Code, which is also encompassed by section 552.101 of the Government Code, provides in relevant part as follows:

(a) The commission 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). The sheriff must withhold the L-3 forms we have marked under section 552.101 in conjunction with section 1701.306 of the Occupations Code.

The remaining information also contains F-5 forms (Report of Separation of License Holder), which are made confidential by section 1701.454 of the Occupations Code. Section 1701.454, which is encompassed by section 552.101 of the Government Code, provides in relevant part that "[a] report or statement submitted to the commission under this subchapter is confidential and is not subject to disclosure under Chapter 552 of the Government Code." Occ. Code § 1701.454(a). The sheriff must withhold the F-5 forms,

which we have marked, pursuant to section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code.

Section 552.101 also encompasses criminal history record information ("CHRI") generated by the National Crime Information Center or by the Texas Crime Information Center. 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 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, but 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.* §§ 411.090-411.127. Thus, any CHRI generated by the federal government or another state may not be made available to the requestor except in accordance with federal regulations. *See* ORD 565. Upon review, we find that the information we have marked constitutes CHRI and must be withheld under section 552.101 in conjunction with section 411.083 of the Government Code.

Section 552.101 also encompasses the Texas Homeland Security Act ("HSA"). As part of the HSA, the Seventy-eighth Legislature passed House Bill 9, which added sections 418.176 through 418.182 to chapter 418 of the Government Code. These provisions make certain information related to terrorism confidential. Specifically, section 418.181 of the Government Code provides in relevant part:

Those documents or portions of documents in the possession of a governmental entity are confidential if they identify the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism.

Gov't Code § 418.181; *see generally id.* § 421.001 (defining "critical infrastructure" to include all public or private assets, systems, and functions vital to security, governance, public health and safety, economy, or morale of state or nation). The fact information may be related to a governmental body's security concerns does not make such information *per se* confidential under the HSA. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection). Furthermore, the mere recitation by a governmental body of a statute's key terms is not sufficient to demonstrate the applicability of a claimed provision. As with any exception to disclosure, a governmental body asserting one of the confidentiality provisions of the HSA must adequately explain how the responsive records fall within the scope of the claimed provision. *See* Gov't Code

§ 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

The submitted floor plans depict the technical details of particular vulnerabilities of the Aransas County jail, including the specific locations of all security cameras in the jail. You state that release of the floor plans to the public would increase the opportunity for the public to smuggle contraband, contact an inmate, plan a jail escape, or participate in illegal activities within the jail. You also argue this would negatively impact jail security measures and pose safety risks for jail personnel. Based on your representations and our review, we conclude that the Aransas County jail is critical infrastructure for purposes of section 418.181 of the Government Code. Thus, the sheriff must withhold these floor plans, which we have marked, under section 552.101 in conjunction with section 418.181 of the Government Code.

You assert that some of the remaining information is excepted under section 552.102 of the Government Code. Section 552.102(a) of the Government Code excepts from required public disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." This exception applies when the release of information would result in a violation of the common-law right to privacy. *Hubert v. Harte-Hanks Tex. Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.). The common-law right to privacy protects information that (1) contains highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person and (2) is of no legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). The types 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 personal financial information not relating to a financial transaction between an individual and a governmental body is excepted from required public disclosure under common-law privacy. See Open Records Decision Nos. 600 (1992) (finding personal financial information to include designation of beneficiary of employee's retirement benefits and optional insurance coverage; choice of particular insurance carrier; direct deposit authorization; and forms allowing employee to allocate pretax compensation to group insurance, health care, or dependent care), 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history). Upon review, we agree that portions of the submitted personnel information are highly intimate and embarrassing and of no legitimate concern to the public. Thus, we have marked the information that the sheriff must withhold under section 552.102 of the Government Code.

You generally assert that Exhibit B is excepted from disclosure under section 552.108 of the Government Code. Section 552.108(a) excepts from public disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or

prosecution of crime[.]” Gov’t Code § 552.108(a). Section 552.108(b) excepts from public disclosure “[a]n 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[.]” *Id.* § 552.108(b). A governmental body that claims an exception to disclosure under section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* § 52.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). However, beyond a general statement that section 552.108 is applicable, you have provided no arguments explaining how the release of Exhibit B would interfere with the detection, investigation, or prosecution of crime. Further, you have provided no arguments explaining how Exhibit B is an internal record or notation of a law enforcement agency maintained for internal use in matters relating to law enforcement or prosecution. Therefore, you have failed to demonstrate how section 552.108 is applicable to the information at issue. *See* Open Records Decision No. 252 at 3 (1980). Accordingly, we conclude that the sheriff may not withhold Exhibit B under section 552.108 of the Government Code.

Next, you generally assert that some of the remaining information is excepted from disclosure under section 552.117 of the Government Code. Section 552.117(a)(2) excepts the home addresses, telephone numbers, social security numbers, and family member information of a peace officer as defined by Article 2.12 of the Code of Criminal Procedure, regardless of whether the officer made an election under section 552.024 of the Government Code. Gov’t Code § 552.117(a)(2); *see* Open Records Decision No. 622 (1994). The sheriff must withhold the information we have marked under section 552.117(a)(2).

We note that some of the remaining information is excepted under section 552.130 of the Government Code.⁵ Section 552.130 provides that information relating to a motor vehicle operator’s license, driver’s license, motor vehicle title, or registration issued by a Texas agency is excepted from public release. Gov’t Code § 552.130(a)(1), (2). The sheriff must withhold the Texas motor vehicle record information we have marked under section 552.130.

We also note that the remaining information contains e-mail addresses that are excepted from disclosure under section 552.137 of the Government Code. Section 552.137 requires a governmental body to withhold the e-mail addresses of members of the general public, unless the individuals to whom the e-mail addresses belong have affirmatively consented to its public disclosure. *See Id.* § 552.137 (b). You do not inform us that the owners of the e-mail addresses have affirmatively consented to release. Therefore, the sheriff must withhold the e-mail addresses we have marked under section 552.137.

⁵The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

In summary, the sheriff must withhold the I-9 form we have marked under section 552.101 in conjunction with section 1324a of title 8 of the United States Code as well as the W-4 forms we have marked in conjunction with section 6103(a) of title 26 of the United States Code. We have marked the portion of the remaining information that constitutes medical records that may only be released in accordance with the MPA as well as the mental health records that may only be released in accordance with sections 611.004 and 611.0045 of the Health and Safety Code. The sheriff must withhold the L-3 forms we have marked under section 552.101 in conjunction with section 1701.306 of the Occupations Code as well as the F-5 forms we have marked in conjunction with section 1701.454 of the Occupations Code. The sheriff must withhold the information we have marked as CHRI under section 552.101 in conjunction with section 411.083 of the Government Code. The sheriff must also withhold the submitted floor plans under section 552.101 in conjunction with section 418.181 of the Government Code. The sheriff must withhold the information we have marked under section 552.102. Lastly, the sheriff must withhold the information we have marked under section 552.117(a)(2), the Texas motor vehicle record information we have marked under section 552.130, and the e-mail addresses we have marked under section 552.137. The remaining information must be released to the requestor.⁶

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, 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,



Adam Leiber
Assistant Attorney General
Open Records Division

ACL/eeg

⁶We note that the remaining information contains 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.

Ref: ID# 344081

Enc. Submitted documents

c: Requestor
(w/o enclosures)