



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 12, 2009

Ms. J. Middlebrooks
Assistant City Attorney
Criminal Law & Police Section
City of Dallas
1400 South Lamar
Dallas, Texas 75215

OR2009-08146

Dear Ms. Middlebrooks:

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# 346299. (DPD PIR: 09-2449, 09-2552, 09-2621, 09-2622)

The Dallas Police Department (the "department") received four requests for information pertaining to a named department officer. You claim that portions of the submitted information are excepted from disclosure under sections 552.101, 552.108, 552.117, 552.130, and 552.136 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

Initially, we note that you have redacted portions of the information you have submitted in report number 0227654-V. Pursuant to section 552.301 of the Government Code, a

¹Although you initially raised sections 552.103, 552.107, 552.111, 552.1175, 552.127, and 552.137 of the Government Code as exceptions to disclosure, you did not submit to this office written comments stating the reasons why these sections would allow the information to be withheld; we therefore assume you no longer assert these exceptions. *See* Gov't Code §§ 552.301, .302.

²We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

governmental body that seeks to withhold requested information must submit to this office a copy of the information, labeled to indicate which exceptions apply to which parts of the copy, unless the governmental body has received a previous determination for the information at issue. *Id.* §§ 552.301(a), .301(e)(1)(D). You do not assert, nor does our review of the records indicate, that you have been authorized to withhold any of the remaining redacted information without seeking a ruling from this office. *See id.* § 552.301(a); Open Records Decision 673 (2000). As such, these types of information must be submitted in a manner that enables this office to determine whether the information comes within the scope of an exception to disclosure. In this instance, we can discern the nature of the redacted information; thus, being deprived of that information does not inhibit our ability to make a ruling. In the future, however, the department should refrain from redacting any information it submits to this office in seeking an open records ruling. Redaction of such information may result in a determination that the information must be released. *See Gov't Code* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App. — Austin 1990, no writ).

Next, we note, and you acknowledge, that with respect to the request received on March 26, 2009 the department did not comply with section 552.301 of the Government Code in requesting a decision. *See Gov't Code* § 552.301(b) (prescribing deadlines for governmental body's request for attorney general's decision under Act). The information responsive to this request is therefore presumed to be public under section 552.302 of the Government Code and must be released, unless there is a compelling reason to withhold any of the information. 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). You assert that the information responsive to this request is excepted from disclosure under section 552.108 of the Government Code, which is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See Gov't Code* § 552.007; *Open Records Decision* Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 177 at 3 (1977) (statutory predecessor to *Gov't Code* § 552.108 subject to waiver). Nevertheless, the law enforcement interests under section 552.108 of a governmental body other than the one that failed to comply with section 552.301 can provide a compelling reason for non-disclosure. *See Open Records Decision* No. 586 at 2-3 (1991). You inform us that the Dallas County District Attorney's Office (the "district attorney") asserts an interest in the submitted information. Therefore, we will determine whether the department may withhold the information at issue on behalf of the district attorney under section 552.108. We will also address your arguments against disclosure of the remaining information.

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, including chapter 773 of the Health and Safety Code, which pertains to emergency medical service ("EMS") records. Access to EMS records is governed by the

provisions of section 773.091 of the Health and Safety Code. *See* Open Records Decision No. 598 (1991). Section 773.091 provides in part the following:

(b) Records of the identity, evaluation, or treatment of a patient by emergency medical services personnel or by a physician providing medical supervision that are created by the emergency medical services personnel or physician or maintained by an emergency medical services provider are confidential and privileged and may not be disclosed except as provided by this chapter.

(g) The privilege of confidentiality under this section does not extend to information regarding the presence, nature of injury or illness, age, sex, occupation, and city of residence of a patient who is receiving emergency medical services.

Health & Safety Code § 773.091(b), (g). You assert the submitted documents contain confidential EMS records. Upon review, we have marked an EMS record that is subject to section 773.091. You do not indicate, and the documents do not reflect, that the requestor has a special right of access to this record. Therefore, except for the information subject to section 773.091(g), which is not confidential, the department must withhold the EMS record we marked under section 552.101 of the Government Code in conjunction with section 773.091(b) of the Health and Safety Code.

You assert the remaining records also contain information subject to the Medical Practice Act (the "MPA"), which governs access to medical records and is encompassed by section 552.101 of the Government Code. *See* Occ. Code §§ 151.001-165.160. Section 159.002 of the MPA provides:

(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(b)-(c). Information subject to the MPA includes both medical records and information obtained from those medical records. *See* ORD 598. You have identified records within the remaining information at issue that you assert must be withheld under section 552.101 and the MPA. Upon review, we agree that the remaining information you

have identified constitutes medical records subject to the MPA. Accordingly, the medical records, which we have marked, may be released only in accordance with the MPA.

Section 552.101 also encompasses section 58.007 of the Family Code, which makes confidential the law enforcement records of a juvenile who, on or after September 1, 1997, engaged in delinquent conduct or conduct indicating a need for supervision. *See* Fam. Code: § 51.03 (defining "delinquent conduct" and "conduct indicating a need for supervision"). The relevant language of section 58.007(c) reads as follows:

Except as provided by Subsection (d), law enforcement records and files concerning a child and information stored, by electronic means or otherwise, concerning the child from which a record or file could be generated may not be disclosed to the public and shall be:

- (1) if maintained on paper or microfilm, kept separate from adult files and records;
- (2) if maintained electronically in the same computer system as records or files relating to adults, be accessible under controls that are separate and distinct from controls to access electronic data concerning adults; and
- (3) maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subchapter B.

Id. § 58.007(c). For purposes of section 58.007, "child" means a person who is ten years of age or older and under seventeen years of age. *See id.* § 51.02(2). You indicate that the information you have marked pertains to delinquent conduct or conduct indicating a need for supervision that occurred after September 1, 1997. Based on your representations and our review, we agree that the incident reports you have marked must be withheld under section 552.101 in conjunction with section 58.007 of the Family Code. However, although the remaining information you seek to withhold under section 58.007 indicates that it involves minors, you have not identified, nor does the submitted information reflect, that any of the remaining information at issue involves juvenile suspects or offenders for purposes of section 58.007. Accordingly, this information, which we have marked for release, may not be withheld under section 552.101 in conjunction with section 58.007 of the Family Code.

Section 552.101 also encompasses the doctrine of common-law privacy, which protects information if it (1) contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) 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

established. *Id.* at 681-82. 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. In addition, this office has found that some kinds of medical information or information indicating disabilities or specific illnesses is protected by 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). This office has also found that 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 summary of information and noted that individual has significant privacy interest in compilation of one's criminal history). Furthermore, we find a compilation of a private citizen's criminal history is generally not of legitimate concern to the public. Upon review, we find a portion of the submitted information is highly intimate or embarrassing information that is not of legitimate public interest. Accordingly, we agree the department must withhold the information you have marked, along with the additional information we have marked, under section 552.101 in conjunction with common-law privacy.

Section 552.108(a)(1) excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]" Gov't Code § 552.108(a)(1). Generally, a governmental body claiming section 552.108(a)(1) must reasonably explain how and why the release of the requested information would interfere with law enforcement. See *id.* §§ 552.108(a)(1), .301(e)(1)(A); see also *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You assert that the information you have marked pertains to pending criminal prosecutions by the district attorney. You also state that the district attorney objects to release of the information at issue, including the information responsive to the March 26 request. Based on your representations and our review, we conclude the release of the information you have marked would interfere with the detection, investigation, or prosecution of crime. See *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e.*, 536 S.W.2d 559 (Tex. 1976) (per curiam) (court delineates law enforcement interests that are present in active cases). Thus, we conclude that you may withhold the information that you have marked under section 552.108(a)(1) of the Government Code.

Section 552.117(a)(2) excepts from public disclosure a peace officer's home address and telephone number, social security number, and family member information regardless of whether the peace officer made an election under section 552.024 of the Government Code.

Gov't Code § 552.117(a)(2). Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. Accordingly, the department must withhold the information we have marked under section 552.117(a)(2) of the Government Code. However, no portion of the remaining information that you have marked under section 552.117 constitutes the home address, home telephone number, social security number, or family member information of a peace officer. Accordingly, you may not withhold the remaining information that you have marked under section 552.117 on this basis.

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. *Id.* § 552.130(a)(1), (2). Therefore, the department must withhold the Texas motor vehicle information you have marked under section 552.130.

Finally section 552.136(b) states "[n]otwithstanding any other provision of [the Act], 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." *Id.* § 552.136(b). We understand an employee's identification number is also used as an employee's city bank account number. Thus, the department must withhold the information you have marked under section 552.136 of the Government Code.

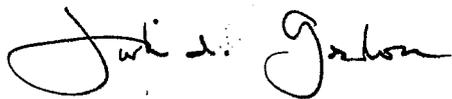
In summary, except for the information subject to section 773.091(g), which is not confidential, the department must withhold the EMS record we marked under section 552.101 of the Government Code in conjunction with section 773.091(b) of the Health and Safety Code. The medical records that we have marked may be released only in accordance with the MPA. With the exception of the information that we have marked for release, you must withhold the information marked under section 552.101 in conjunction with section 58.007 of the Family Code. You must withhold the information marked under section 552.101 in conjunction with common-law privacy. You may withhold the information that you have marked under section 552.108(a)(1) of the Government Code. The department must withhold the information we have marked under section 552.117(a)(2) of the Government Code. The department must also withhold the information we have marked under section 552.130 of the Government Code. Finally, the department must withhold the information 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 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,

A handwritten signature in black ink that reads "Justin D. Gordon". The signature is written in a cursive style with a large initial "J" and "G".

Justin D. Gordon
Assistant Attorney General
Open Records Division

JDG/eeg

Ref: ID# 346299

Enc. Submitted documents

c: Requestor (3)
(w/o enclosures)