



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 5, 2010

Ms. Courtney Alvarez
City Attorney
City of Kingsville
P.O. Box 1458
Kingsville, Texas 78364

OR2010-01843

Dear Ms. Alvarez:

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# 367821 (No. 2009-245).

The City of Kingsville (the "city") received a request for five categories of information regarding a specified shooting and the policy or procedure manual pertaining to the use of deadly force in effect on July 1, 2009. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.108, 552.1175, 552.130, and 552.136 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered comments from the United States Customs and Border Protection (the "agency"). *See* Gov't Code § 552.304 (providing that an interested party may submit comments stating why information should or should not be released).

Initially, we note the city did not submit information responsive to the portion of the request seeking the specified manual. To the extent any information responsive to this portion of the request existed on the date the city received the request, we assume the city has released it. If the city has not released any such information, it 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).

¹Although you claim section 552.117 for portions of the submitted information, because the individuals at issue are employed by the United States Border Patrol, section 552.1175 is the proper exception to raise for the information at issue.

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 office has repeatedly held that the transfer of confidential information between governmental agencies does not destroy the confidentiality of that information. Attorney General Opinions H-917 (1976), H-836 (1974), Open Records Decision Nos. 561 (1990), 414 (1984), 388 (1983), 272 (1981), 183 (1978). These opinions recognize the need to maintain an unrestricted flow of information between state agencies. In Open Records Decision No. 561, we considered whether the same rule applied regarding information deemed confidential by a federal agency. In that decision, we noted the general rule that chapter 552 of the United States Code, the federal Freedom of Information Act ("FOIA"), applies only to federal agencies and does not apply to records held by state agencies. ORD 561 at 6. Further, we stated that information is not confidential when in the hands of a Texas agency simply because the same information is confidential in the hands of a federal agency. *Id.* However, in the interests of comity between state and federal authorities and to ensure the flow of information from federal agencies to Texas governmental bodies, we concluded that: "when information in the possession of a federal agency is 'deemed confidential' by federal law, such confidentiality is not destroyed by the sharing of the information with a governmental body in Texas. In such an instance, [section 552.101] requires a local government to respect the confidentiality imposed on the information by federal law." *Id.* at 7.

In this instance, portions of the submitted information were provided to the city by the agency. The agency has submitted documentation showing that it considers portions of this information confidential under the provisions found in section 552(b) of the United States Code. *See* 5 U.S.C. § 552(b). Therefore, to the extent the information provided to the city by the agency is confidential under federal law, it must be withheld under section 552.101 of the Government Code.²

The city raises sections 552.108(a)(2) and 552.108(b)(2) of the Government Code for the information you have marked, which provide as follows:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:

(2) it is information that the deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication;

²As our ruling is dispositive, we need not address the city's claims under section 552.103 of the Government Code on behalf of the agency for this information.

(b) An 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 is excepted from [required public disclosure] if:

(2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication[.]

Gov't Code § 552.108(a)(2), (b)(2). Sections 552.108(a)(2) and 552.108(b)(2) protect information that relates to a concluded criminal investigation or prosecution that did not result in conviction or deferred adjudication. *Id.*

A governmental body claiming section 552.108(a)(2) or section 552.108(b)(2) must demonstrate that the requested information relates to a criminal investigation that concluded in a final result other than a conviction or deferred adjudication. *Id.* You state that the information you have marked relates to a case that "has not yet resulted in a conviction or deferred adjudication." Having considered your representations, we find that you have not sufficiently shown that the submitted information relates to a concluded investigation that did not result in conviction or deferred adjudication. We therefore conclude that the city may not withhold any of the marked information under section 552.108(a)(2) or section 552.108(b)(2) of the Government Code.

Section 552.101 of the Government Code also 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 of the MPA provides in 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). Medical records may only be released in accordance with the MPA. *See* Open Records Decision No. 598 (1991). Upon review, we find that the information we have marked constitutes medical records that may only be released in accordance with the MPA.

Section 552.101 also encompasses section 773.091 of the Health and Safety Code, which is applicable to certain information related to the provision of emergency medical services ("EMS"). Section 773.091 provides in part the following:

(b) Records of the identity, evaluation, or treatment of a patient by [EMS] 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). We have marked documents that constitute EMS records pursuant to section 773.091. Thus, except for the information subject to section 773.091(g), which must be released, the city must withhold these EMS records under section 552.101 of the Government Code in conjunction with section 773.091 of the Occupations Code.³

Section 552.1175 of the Government Code provides in part:

(b) Information that relates to the home address, home telephone number, or social security number of [a criminal investigator of the United States as described by article 2.122(a) of the Code of Criminal Procedure], 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(b). Section 552.1175 also encompasses personal cellular telephone numbers if the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988). The submitted information includes home

³As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

addresses, cellular telephone numbers, and social security numbers of United States Border Patrol agents, which are not held by the city in an employment capacity. The city must withhold the information we have marked under section 552.1175 to the extent the agents at issue are criminal investigators of the United States as described by article 2.122(a) of the Code of Criminal Procedure and elected to restrict access to the information in accordance with section 552.1175(b); however, the city may only withhold the marked cellular telephone numbers if the agents at issue paid for the cellular telephone service with personal funds.

Section 552.130 of the Government Code 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). We note, however, that section 552.130 does not apply to out-of-state motor vehicle record information. Accordingly, the city must withhold only the Texas motor vehicle record information we have marked under section 552.130.

Section 552.136 of the Government Code provides that "[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). An access device number is one that may be used to (1) obtain money, goods, services, or another thing of value, or (2) initiate a transfer of funds other than a transfer originated solely by paper instrument, and includes an account number. *Id.* § 552.136(a). Upon review, we conclude the city must withhold the credit card account numbers, bank account numbers, and routing numbers you have marked, in addition to the partial checking account number we have marked, under section 552.136 of the Government Code. However, you have failed to demonstrate how the remaining information you have marked is an access device number for purposes of section 552.136. Thus, this remaining information, which we have marked for release, may not be withheld under section 552.136 of the Government Code.

In summary, to the extent the information provided to the city by the agency is confidential under federal law, it must be withheld under section 552.101 of the Government Code. The city may release the marked medical records only in accordance with the MPA. The city must withhold the marked EMS records under section 552.101 of the Government Code in conjunction with section 773.091 of the Occupations Code, except for the information subject to section 773.091(g). The city must withhold the information we have marked under section 552.1175 of the Government Code to the extent the agents at issue are criminal investigators of the United States as described by article 2.122(a) of the Code of Criminal Procedure and elected to restrict access to the information in accordance with section 552.1175(b); however, the city may only withhold the marked cellular telephone numbers if the agents at issue paid for the cellular telephone service with personal funds. The city must withhold the Texas motor vehicle record information we have marked under section 552.130. The city must also withhold the information you have marked and the

information we have marked under section 552.136, except where we have marked for release.⁴ 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, toll free, at (888) 672-6787.

Sincerely,



Sarah Casterline
Assistant Attorney General
Open Records Division

SEC/eeg

Ref: ID# 367821

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁴We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including a Texas driver's license number, a copy of a Texas driver's license, a Texas license plate number, and the portion of a photograph that reveals a Texas license plate number under section 552.130 of the Government Code and a credit card number, bank account number, and bank routing number under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.