



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 30, 2010

Ms. Kimberly L. Allen
County Attorney
Sherman County
P.O. Box 165
Stratford, Texas 79084

OR2010-06246

Dear Ms. Allen:

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# 377683.

The Sherman County Attorney's Office (the "county attorney") received two requests from the same requestor for information pertaining to a specified case. You claim the submitted information is excepted from disclosure under section 552.108 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, we must address the county attorney's obligations under section 552.301 of the Government Code, which prescribes the procedures a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply within ten business days from receiving the written request. Gov't Code § 552.301(b). In addition, pursuant to section 552.301(e) of the Government Code, a governmental body is required to 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 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. *Id.* § 552.301(e)(1)(A)-(D). In

order for us to determine the statutory deadlines, a governmental body is required to submit to this office within fifteen business days of receiving an open records request a signed statement or other evidence showing the date the governmental body received the request. *See id.* § 552.301(e)(1)(C). You state you do not know when the county attorney received the first request for information. Because you do not inform us when the request was received, we must assume that the county attorney received the request on the day it was dated, which is January 25, 2010. Accordingly, the deadline for the county attorney to request a ruling from this office was February 8, 2010. The county attorney's request for a ruling from this office was postmarked February 22, 2010. *See id.* § 552.308 (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Further, the county attorney mailed the information at issue and its comments on March 16, 2010. Consequently, we find the county attorney did not comply with section 552.301 in requesting this decision.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the legal presumption that the information is public and must be released. Information presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); *see also* Open Records Decision No. 630 (1994). Normally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third-party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977). You assert the submitted information is excepted under section 552.108. This section, however, is discretionary in nature. It serves only to protect a governmental body's interests, and may be waived; as such, it generally does not constitute a compelling reason to withhold information for purposes of section 552.302. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions in general), 663 at 5 (1999) (waiver of discretionary exceptions), 177 (1977) (statutory predecessor to section 552.108 subject to waiver). Thus, the submitted information may not be withheld under section 552.108 of the Government Code. We note the submitted information includes information subject to sections 552.101, 552.1175, and 552.130 of the Government Code.¹ Sections 552.101, 552.1175, and 552.130 of the Government Code can provide compelling reasons to overcome the presumption of openness. Therefore, we will address whether the submitted information must be withheld from public disclosure under these exceptions.

¹The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Section 552.101 excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. The Medical Practice Act ("MPA"), subtitle B of title 3 of the Occupations Code, governs release of medical records, and is encompassed by section 552.101 of the Government Code. *See* Occ. Code § 151.001. 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.

Id. § 159.002(b)-(c). Information subject to the MPA includes both medical records and information obtained from those medical records. *See id.* This office has concluded 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). We have also found when a file is created as the result of a hospital stay, all of the documents in the file relating to diagnosis and treatment constitute either 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 must be released upon the patient's signed, written consent, provided 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. 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). We have marked the medical records of the requestor which are subject to the MPA and may only be released to in accordance with its provisions. *See* Open Records Decision No. 598 (1991).

Section 552.101 also encompasses section 1703.306 of the Occupations Code which provides in part:

(a) A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person other than:

(1) the examinee or any other person specifically designated in writing by the examinee[.]

Occ. Code § 1703.306. We have marked the information acquired from polygraph examinations that is confidential under section 552.101 in conjunction with section 1703.306. We note that the county attorney has the discretion to release the marked information pertaining to the requestor pursuant to section 1703.306(a)(1). *See* Open Records Decision No. 481 at 9 (1987) (statutory predecessor to Occ. Code § 1703.306 permitted, but did not require, examination results to be disclosed to polygraph examinees). Otherwise, the county attorney must withhold the information we have marked under section 552.101 in conjunction with section 1703.306 of the Occupations Code.

Next, we note a portion of the remaining information may be subject to section 552.1175 of the Government Code. Section 552.1175 provides in part:

(b) Information that relates to the home address, home telephone number, or social security number of [a peace officer as defined by article 2.12 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). The remaining information may include the personal information of licensed peace officers who are not county attorney employees. To the extent these individuals are currently licensed peace officers who elect to restrict public access to their personal information, the county attorney must withhold the information we have marked under section 552.1175. To the extent any of these individuals are not currently licensed peace officers who elect to restrict public access to their personal information, the county attorney may not withhold the information we have marked under section 552.1175.

Lastly, some of the remaining information is confidential under section 552.130, which provides 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 county attorney must withhold the Texas driver's license number we have marked under section 552.130 of the Government Code.²

²We 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 under section 552.130 of the Government Code, without the necessity of requesting an attorney general decision.

In summary, the medical records we have marked are subject to the MPA and may only be released to in accordance with its provisions. The marked polygraph information is confidential under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code, but the county attorney has the discretion to release the polygraph information pertaining to the requestor pursuant to section 1703.306(a)(1) of the Occupations Code. The county attorney must withhold the information we have marked under section 552.1175 of the Government Code to the extent the individuals to which the information pertains are currently licensed peace officers who elect to restrict public access to their personal information. The county attorney must withhold the Texas driver's license number we have marked under section 552.130 of the Government Code. The remaining information must be released.³

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,



Paige Lay
Assistant Attorney General
Open Records Division

PL/eeg

³We note the remaining information contains a social security number. 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. See Gov't Code § 552.147. We also note that the information being released contains confidential information to which the requestor has a right of access. See Gov't Code § 552.023(a). Therefore, if the county attorney receives another request for this particular information from a different requestor, then the county attorney must again seek a decision from this office

Ref: ID# 377683

Enc. Submitted documents

cc: Requestor
(w/o enclosures)