ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 11, 2010

Ms. Lillian Guillen Graham
Assistant City Attorney
City of Mesquite
P.O. Box 850137
Mesquite, Texas 75185-0137

OR2010-06749

Dear Ms. Graham:

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# 378875.

The City of Mesquite (the "city") received a request for information relating to a specified internal affairs investigation involving a named officer of the city's police department (the "department"). You claim that the requested information is excepted from disclosure under sections 552.101 and 552.130 of the Government Code.[1] We have considered the exceptions you claim and reviewed the information you submitted.

We first note that the city did not comply with its ten-business-day deadline under section 552.301(b) of the Government Code in requesting this decision. Section 552.301 prescribes procedures that must be followed in asking this office to decide whether requested information is excepted from public disclosure. *See* Gov't Code § 552.301(a). Section 552.301(b) requires the governmental body to ask for the attorney general's decision and claim its exceptions to disclosure not later than the tenth business day after the date of its receipt of the written request for information. *See id.* § 552.301(b). Section 552.302 of the Government Code provides that if a governmental body fails to comply with

[1]Although you do not expressly claim section 552.130, you have marked information that the city seeks to withhold under this exception, which is mandatory and may not be waived. *See* Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

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; *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 (Tex. App.—Austin 1990, no writ).

You inform us that the city received the instant request for information on February 17, 2010; therefore, its ten-business-day deadline under subsection 552.301(b) was March 3. The city requested this decision by United States mail meter-marked March 5. Thus, the city did not comply with section 552.301(b), 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). The applicability of sections 552.101 and 552.130 of the Government Code, which the city claims, can provide compelling reasons for non-disclosure. Accordingly, we will address those exceptions.

Section 552.101 of the Government Code 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. You claim section 552.101 in conjunction with section 143.089 of the Local Government Code.[2] Section 143.089 provides for the existence of two different types of personnel files relating to a police officer, including one that must be maintained as part of the officer's civil service file and another that the police department may maintain for its own internal use. *See* Local Gov't Code § 143.089(a), (g). The officer's civil service file must contain certain specified items, including commendations, periodic evaluations by the police officer's supervisor, and documents relating to misconduct in any instance in which the police department took disciplinary action against the officer under chapter 143 of the Local Government Code. *Id.* § 143.089(a)(1)-(2). Chapter 143 prescribes the following types of disciplinary actions: removal, suspension, demotion, and uncompensated duty. *See id.* § 143.051 *et seq.*

In cases in which a police department investigates a police officer's misconduct and takes disciplinary action against an officer, it is required by section 143.089(a)(2) to place all investigatory records relating to the investigation and disciplinary action, including background documents such as complaints, witness statements, and documents of like nature from individuals who were not in a supervisory capacity, in the police officer's civil service file maintained under section 143.089(a). *See Abbott v. Corpus Christi*, 109 S.W.3d 113, 122 (Tex. App.—Austin 2003, no pet.). All investigatory materials in a case resulting in disciplinary action are "from the employing department" when they are held by or are in the possession of the police department because of its investigation into a police

[2]You inform us that the department is subject to chapter 143 of the Local Government Code.

officer's misconduct, and the department must forward them to the civil service commission for placement in the civil service personnel file. *Id.* Such records may not be withheld under section 552.101 of the Government Code in conjunction with section 143.089 of the Local Government Code. *See* Local Gov't Code § 143.089(f); Open Records Decision No. 562 at 6 (1990). Information relating to alleged misconduct or disciplinary action taken must be removed from the police officer's civil service file if the police department determines that there is insufficient evidence to sustain the charge of misconduct or that the disciplinary action was taken without just cause. *See* Local Gov't Code § 143.089(b)-(c).

Subsection (g) of section 143.089 authorizes the police department to maintain, for its own use, a separate and independent internal personnel file relating to a police officer. Section 143.089(g) provides as follows:

> A fire or police department may maintain a personnel file on a fire fighter or police officer employed by the department for the department's use, but the department may not release any information contained in the department file to any agency or person requesting information relating to a fire fighter or police officer. The department shall refer to the director or the director's designee a person or agency that requests information that is maintained in the fire fighter's or police officer's personnel file.

Id. § 143.089(g). In *City of San Antonio v. Texas Attorney General*, 851 S.W.2d 946 (Tex. App.—Austin 1993, writ denied), the court addressed a request for information contained in a police officer's personnel file maintained by the police department for its use and the applicability of section 143.089(g) to that file. The records included in the departmental personnel file related to complaints against the police officer for which no disciplinary action was taken. The court determined that section 143.089(g) made the records confidential. *See id.* at 949; *see also City of San Antonio v. San Antonio Express-News*, 47 S.W.3d 556 (Tex. App.—San Antonio 2000, pet. denied) (restricting confidentiality under Local Gov't Code § 143.089(g) to "information reasonably related to a police officer's or fire fighter's employment relationship"); Attorney General Opinion JC-0257 at 6-7 (2000) (addressing functions of Local Gov't Code § 143.089(a) and (g) files).

You contend that the city must withhold the submitted information because the information is held in an internal file maintained by the department. In this instance, however, the information at issue is related to an internal affairs investigation that resulted in disciplinary action against the named officer under chapter 143 of the Local Government Code. Therefore, the submitted information must also be placed in the officer's civil service personnel file pursuant to section 143.089(a)(2) of the Local Government Code. *See Abbott v. Corpus Christi*, 109 S.W.3d at 122. Because the information at issue must be placed in the officer's civil service file, the city may not withhold any of this information under section 552.101 of the Government Code on the basis of section 143.089. *See* Local Gov't Code § 143.089(f); ORD 562 at 6. We will determine, however, whether any of the

submitted information is otherwise subject to section 552.101 or 552.130 of the Government Code.

Section 552.101 of the Government Code also encompasses the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. Medical records are confidential under section 159.002 of the MPA, which 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 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). When a file is created as the result of a hospital stay, we have concluded that all of the documents in the file that relate to diagnosis and treatment constitute either physician-patient communications or records of the identity, diagnosis, evaluation, or treatment of a patient by a physician, created or maintained by a physician, for purposes of the MPA. *See* Open Records Decision No. 546 (1990). 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). We have marked medical records and information obtained from medical records that must be withheld under section 159.002 of the MPA, unless the city receives consent for release of those records that complies with sections 159.004 and 159.005 of the MPA.

Information relating to the provision of emergency medical services ("EMS") is confidential under section 773.091 of the Health and Safety Code, which provides in part:

> (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.

> (c) Any person who receives information from confidential communications or records as described by this chapter, other than a person listed in Section 773.092 who is acting on the survivor's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was obtained.

Health & Safety Code § 773.091(b)-(c). Section 773.091 further provides, however, that

> [t]he 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.

Id. § 773.091(g). Information made confidential by section 773.091 may be released to "any person who bears a written consent of the patient or other persons authorized to act on the patient's behalf." *Id.* § 773.092(e)(4). The EMS information we have marked must be withheld under section 552.101 of the Government Code in conjunction with section 773.091(b) of the Health and Safety Code, except as specified by section 773.091(g), unless the city receives consent for release of that information that complies with sections 773.092 and 773.093 of the Health and Safety Code.

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." Gov't Code § 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). The CHRI we have marked must be withheld under section 552.101 of the Government Code in conjunction with federal law and subchapter F of chapter 411 of the Government Code.

Section 552.101 of the Government Code also encompasses constitutional and common-law rights to privacy. Constitutional privacy encompasses two types of interests. *See Whalen*

v. Roe, 429 U.S. 589, 599-600 (1977); Open Records Decision Nos. 600 at 3-5 (1992), 478 at 4 (1987), 455 at 3-7 (1987). The first is the interest in independence in making certain important decisions related to the "zones of privacy," pertaining to marriage, procreation, contraception, family relationships, and child rearing and education, that have been recognized by the United States Supreme Court. *See Fadjo v. Coon*, 633 F.2d 1172 (5th Cir. 1981); ORD 455 at 3-7. The second constitutionally protected privacy interest is in freedom from public disclosure of certain personal matters. *See Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5th Cir. 1985); ORD 455 at 6-7. This aspect of constitutional privacy balances the individual's privacy interest against the public's interest in the information. *See* ORD 455 at 7. Constitutional privacy under section 552.101 is reserved for "the most intimate aspects of human affairs." *Id.* at 8 (quoting *Ramie,* 765 F.2d at 492).

Federal courts have recognized that individuals have a constitutional right to privacy in their unclothed bodies. Quoting the United States Court of Appeals for the Ninth Circuit, which concluded that "[w]e cannot conceive of a more basic subject of privacy than the naked body[,]" the United States Court of Appeals for the Second Circuit has found that "there is a right to privacy in one's unclothed or partially unclothed body, regardless [of] whether that right is established through the auspices of the Fourth Amendment or the Fourteenth Amendment." *Poe v. Leonard*, 282 F.3d 123, 138-39 (2d Cir. 2002) (quoting *York v. Story*, 324 F.2d 450, 455 (9th Cir. 1963). Portions of the submitted video titled "C104 (1029 Medical Holding)" depict the genitalia of an identifiable male prisoner of the city jail.[3] We find that the prisoner has a constitutional right to the privacy of this information that outweighs any public interest in its release. We therefore conclude that the city must withhold the portions of the video that depict the prisoner's genitals under section 552.101 in conjunction with constitutional privacy. In the event that the city lacks the technical capability to redact those portions of the video, the entire video must be withheld.

Common-law privacy 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). To demonstrate the applicability of common-law privacy, both elements of the test must be established. *Id.* at 681-82. This office has concluded 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, 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

[3]The portions of the video in question begin at 8:46:00 and end at 8:47:30.

history). The criminal history information we have marked must be withheld under section 552.101 in conjunction with common-law privacy.

The city claims section 552.101 of the Government Code in conjunction with the decision in *Garrity v. New Jersey*, 385 U.S. 493 (1967). In *Garrity*, certain officers made incriminating statements during an investigation by the Attorney General of the State of New Jersey under the threat of a forfeiture-of-office statute. *See id.* at 494-95. In subsequent criminal proceedings, the lower court admitted some of the statements into evidence, holding that the officers gave the statements voluntarily. *Id.* at 495 n.2. Ultimately, the United States Supreme Court held that self-incriminating statements obtained under a threat of job forfeiture and subsequently used in criminal proceedings violated the officers' Fifth Amendment privilege against self-incrimination. *Id.* at 500. You seek to withhold statements provided by employees and supervisors of the department in connection with the internal investigation to which the submitted records pertain. We find that *Garrity* is not applicable in this instance. In *Garrity*, the issue was whether the officers' statements could be used as evidence in a criminal prosecution. *See id.* at 495. Here, the question is whether the information at issue must be released in response to a request for information under the Act. Information is not confidential under the Act simply because the party that provided the information anticipated or requested that it be kept confidential. *See Indus. Found.*, 540 S.W.2d at 677; *see also* Attorney General Opinion JM-672 (1987) (governmental body cannot overrule or repeal provisions of Act by agreement or contract). We therefore conclude that the city may not withhold any of the submitted information under section 552.101 on the basis of the decision in *Garrity*.

Lastly, section 552.130 of the Government Code excepts from disclosure information relating to a motor vehicle operator's or driver's license or permit issued by an agency of this state or to a personal identification document issued by an agency of this state or a local agency authorized to issue an identification document. *See* Gov't Code § 552.130(a)(1), (3). The Texas driver's license numbers you have marked, along with the Texas personal identification number we have marked, must be withheld under section 552.130.[4]

In summary: (1) the marked medical records must be withheld under section 159.002 of the MPA, unless the city receives the required consent for release under sections 159.004 and 159.005; (2) the marked EMS information must be withheld under section 552.101 of the Government Code in conjunction with section 773.091 of the Health and Safety Code, except as specified by section 773.091(g), unless the city receives the required consent for release under sections 773.092 and 773.093; (3) the marked CHRI must be withheld under section 552.101 in conjunction with federal law and subchapter F of chapter 411 of the

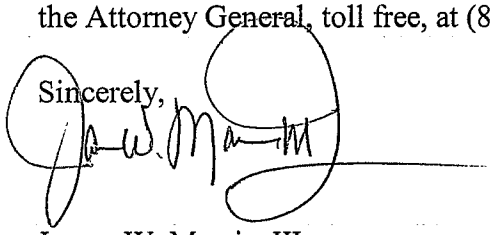
[4]We note that this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including a Texas driver's license number under section 552.130, without the necessity of requesting an attorney general decision.

Government Code; (4) the portions of the video that depict the prisoner's genitals must be withheld under section 552.101 in conjunction with constitutional privacy, unless the city lacks the technical capability to redact those portions of the video, in which event the entire video must be withheld; (5) the marked criminal history information must be withheld under section 552.101 in conjunction with common-law privacy; and (6) the marked Texas driver's license and personal identification numbers must be withheld under section 552.130 of the Government Code.[5] 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, 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,



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

JWM/rl

Ref: ID# 378875

Enc: Submitted information

c: Requestor
(w/o enclosures)

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[5]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.