



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 9, 2010

Mr. Shane Britton
Brown County Attorney
Brown County Courthouse
200 South Broadway
Brownwood, Texas 76801

OR2010-08448

Dear Mr. Britton:

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#381960.

The Brown County Sheriff's Office (the "sheriff") received a request for all personnel files, complaints, civil suits, internal investigations, and disciplinary actions pertaining to seven named employees. You claim that the submitted information is excepted from disclosure under section 552.102 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

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. Section 552.101 encompasses criminal history records information ("CHRI") generated by the National Crime Information Center or by the Texas Crime Information Center.¹ Title 28 of part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. *See* 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 DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See* Gov't Code § 411.083. We note that the term CHRI does not include driving record information. *See id.* § 411.082(2)(B). Upon review, we find that portions of the submitted information consist of confidential CHRI. Accordingly, the sheriff must withhold this information, which we have marked, pursuant to section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code.

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

Section 552.101 also encompasses chapter 560 of the Government Code, which provides that a governmental body may not release biometric identifier information except in certain limited circumstances. *See* Gov't Code §§ 560.001 (defining "biometric identifier" to include fingerprints and records of hand geometry), .002 (prescribing manner in which biometric identifiers must be maintained and circumstances in which they can be released), .003 (providing that biometric identifiers in possession of governmental body are exempt from disclosure under the Act). We note portions of the submitted information include peace officers' fingerprints. You do not inform us, and the submitted information does not indicate, that section 560.002 permits the disclosure of the submitted fingerprints in this instance. Therefore, the sheriff must withhold the fingerprints, which we have marked, under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code.

Section 552.101 also encompasses the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code, which makes medical records confidential. *See* Occ. Code § 159.001. Section 159.002 of the MPA provides in part:

- (a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.
- (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(a)-(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). In addition, because hospital treatment is routinely conducted under the supervision of physicians, documents relating to diagnosis and treatment during a hospital stay also constitute protected medical records. *See* Open Decision Nos. 598 (1991), 546 (1990). The submitted information contains medical records subject to the MPA. Accordingly, unless the sheriff receives written consent for release of those records that complies with sections 159.004 and 159.005 of the MPA, the sheriff must withhold the medical records we have marked pursuant to section 552.101 of the Government Code in conjunction with the MPA.

Section 552.101 also encompasses section 611.002(a) of the Health and Safety Code, which provides “[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.” Health & Safety Code § 611.002(a). 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. *See id.* § 611.001(2). Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals. *See Open Records Decision No. 565 (1990)*. These sections permit disclosure of mental health records to a patient, a person authorized to act on the patient’s behalf, or a person who has the written consent of the patient. *See Health & Safety Code §§ 611.004, .0045*. Upon review, we find portions of the information at issue consist of mental health records. Accordingly, the sheriff must withhold the mental health records, which we have marked, pursuant to section 552.101 of the Government Code in conjunction with section 611.002(a) of the Health and Safety Code.

The submitted information also contains L-2 Declaration of Medical Condition and L-3 Declaration of Psychological and Emotional Health forms required by the Texas Commission on Law Enforcement Officer Standards and Education (“TCLEOSE”). These forms are confidential under section 1701.306 of the Occupations Code, which is also encompassed by section 552.101 of the Government Code. Section 1701.306 provides the following:

(a) [TCLEOSE] 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 [TCLEOSE]. A declaration is not public information.

Occ. Code § 1701.306(a), (b). The sheriff must, therefore, withhold the submitted L-2 and L-3 declaration forms we have marked pursuant to section 552.101 of the Government Code in conjunction with section 1701.306 of the Occupations Code.

The submitted information also contains F-5 forms ("Report of Separation of Licensee") submitted to TCLEOSE under chapter J of chapter 1701 of the Occupations Code. This form is confidential under section 1701.454 of the Occupations Code, which is also encompassed by section 552.101, and provides as follows:

(a) A report or statement submitted to [TCLEOSE] under this subchapter is confidential and is not subject to disclosure under Chapter 552, Government Code, unless the person resigned or was terminated due to substantiated incidents of excessive force or violations of the law other than traffic offenses.

(b) Except as provided by this subchapter, a [TCLEOSE] member or other person may not release the contents of a report or statement submitted under this subchapter.

Id. § 1701.454. In this instance, it does not appear that the named officers resigned due to substantiated incidents of excessive force or violations of the law other than traffic offenses. We, therefore, conclude that the sheriff must withhold the submitted F-5 forms we have marked under section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code.

Section 552.101 also encompasses the doctrine of common-law privacy, which protects information that (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). Section 552.102(a) of the Government Code excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 550 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled the test to be applied to information protected under section 552.102 is the same test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101. Accordingly, we will consider privacy under both sections 552.101 and 552.102.

The types of information considered intimate or 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. *See id.* at 683. Additionally, this office has found that the following types of information are excepted from required public disclosure under common-law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps); personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records

Decision Nos. 600 (1992), 545 (1990). Upon review, we find that portions of the submitted information constitute highly intimate or embarrassing information. The sheriff must, therefore, withhold the information we have marked pursuant to section 552.101 of the Government Code in conjunction with common-law privacy. However, we note that the remaining information at issue pertains to current or former employees of the sheriff and their conduct in the workplace. As we have explained on many occasions, information concerning public employees and public employment is generally a matter of legitimate public interest. *See, e.g.*, Open Records Decision Nos. 562 at 10 (1990) (personnel file information does not involve most intimate aspects of human affairs but in fact touches on matters of legitimate public concern), 470 at 4 (1987) (job performance does not generally constitute public employee's private affairs), 444 at 3 (1986) (public has obvious interest in information concerning qualifications and performance of government employees), 405 at 2 (1983) (manner in which public employee's job was performed cannot be said to be of minimal public interest), 329 (1982) (reasons for employee's resignation ordinarily not private). The sheriff may not, therefore, withhold any portion of the remaining information under either section 552.101 or section 552.102 of the Government Code in conjunction with common-law privacy.

Section 552.117(a)(1) excepts from disclosure the current and former home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). Whether information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). The sheriff may only withhold information under section 552.117(a)(1) on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made.

We have marked the information that may be subject to section 552.117. If the employee whose information is at issue timely elected to withhold her personal family information, the sheriff must withhold the information we have marked pursuant to section 552.117(a)(1) of the Government Code. If the employee did not timely elect to withhold this information, then the sheriff may not withhold the marked information under section 552.117(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). We note that a post office box number is not a "home address" for purposes of section 552.117.² In addition, we note section 552.117 is also applicable to

²*See* Gov't Code § 552.117; Open Records Decision No. 622 at 4 (1994) (legislative history makes clear that purpose of section 552.117 is to protect public employees from being harassed at home) (citing House Committee on State Affairs, Bill Analysis, H.B. 1976, 69th Leg. (1985)).

personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. We understand that the remaining individuals whose information is at issue are licensed peace officers. Therefore, the sheriff must withhold the information we have marked under section 552.117(a)(2) of the Government Code. However, the sheriff may only withhold the marked personal cellular telephone numbers if the numbers are not paid for by the city.

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). We note portions of the information at issue include the personal information of licensed peace officers who are not employees of the sheriff. To the extent these individuals are currently licensed peace officers who elect to restrict public access to their personal information, the sheriff must withhold the information we have marked under section 552.1175. To the extent these individuals are not currently licensed peace officers who elect to restrict public access to their personal information, the sheriff may not withhold the information we have marked pertaining to these individuals under section 552.1175.

We note section 552.130 of the Government Code excepts from disclosure "information [that] relates to . . . a motor vehicle operator's or driver's license or permit issued by an agency of this state [or] a motor vehicle title or registration issued by an agency of this state." Gov't Code § 552.130(a). Thus, the sheriff must withhold the Texas motor vehicle record information we have marked pursuant to section 552.130 of the Government Code.

Section 552.136 states that "[n]otwithstanding any other provision of this chapter, 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." Gov't Code § 552.136(b). Section 552.136(a) defines "access device" as "a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to . . . obtain money,

goods, services, or another thing of value [or] initiate a transfer of funds other than a transfer originated solely by paper instrument.” *Id.* § 552.136(a). The sheriff must, therefore, withhold the credit card information we have marked, under section 552.136 of the Government Code.

We note the information at issue contains personal e-mail addresses. Section 552.137 of the Government Code excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body,” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov’t Code § 552.137(a)-(c). The e-mail addresses listed in the information at issue are not specifically excluded by section 552.137(c). As such, these e-mail addresses, which we have marked, must be withheld under section 552.137, unless the owners of the addresses have affirmatively consented to their release. *See id.* § 552.137(b).³

Finally, we note the information at issue includes two military discharge records that are subject to section 552.140 of the Government Code. Section 552.140 provides in part:

(a) This section applies only to a military veteran’s Department of Defense Form DD-214 or other military discharge record that is first recorded with or that otherwise first comes into the possession of a governmental body on or after September 1, 2003.

Id. § 552.140(a). Section 552.140 provides a military veteran’s DD-214 form or other military discharge record that is first recorded with or that otherwise first comes into the possession of a governmental body on or after September 1, 2003 is confidential for a period of seventy-five years and may only be disclosed in accordance with section 552.140 or in accordance with a court order. *See id.* § 552.140(a)-(b). From the submitted information, we are able to determine that the sheriff was first in possession of one of the military discharge forms after September 1, 2003. Accordingly, the sheriff must withhold this form pursuant to section 552.140. We are unable to determine, however, whether the sheriff came into possession of the second military discharge form on or after September 1, 2003. Therefore, we find to the extent the sheriff came into possession of the second form on or after September 1, 2003, the sheriff must withhold this form under section 552.140 of the Government Code. To the extent the sheriff possessed this form prior to September 1, 2003, the sheriff may not withhold the form under section 552.140. However, the sheriff must

³Open Records Decision No. 684 (2009) serves as a previous determination to all governmental bodies authorizing them to withhold ten categories of information; including fingerprints under section 552.101 in conjunction with section 560.003 of the Government Code, L-2 and L-3 declarations under section 552.101 in conjunction with section 1701.306 of the Occupations Code, Texas driver’s license numbers, copies of Texas driver’s licenses, and Texas license plate numbers under section 552.130, credit card numbers under section 552.136, e-mail addresses of members of the public under section 552.137, and a Form DD-214 or other military discharge record that is first recorded or first comes into the possession of a governmental body on or after September 1, 2003, without the necessity of requesting an attorney general decision.

withhold the personal information we have marked on this form pursuant to section 552.117 of the Government Code.

We note that portions of the submitted information are protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990). Thus, any copyrighted information may only be released in accordance with copyright law.

In summary; 1) the sheriff must withhold the CHRI we have marked pursuant to section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code; 2) the sheriff must withhold the fingerprints we have marked pursuant to section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code; 3) unless the sheriff receives written consent for release of the submitted medical records that complies with sections 159.004 and 159.005 of the MPA, the sheriff must withhold the medical records we have marked pursuant to section 552.101 of the Government Code in conjunction with the MPA; 4) the sheriff must withhold the documents we have marked pursuant to section 552.101 of the Government Code in conjunction with section 611.002(a) of the Health and Safety Code; 5) the sheriff must withhold the submitted L-2 and L-3 declaration forms under section 552.101 of the Government Code in conjunction with section 1701.306 of the Occupations Code; 6) the sheriff must withhold the submitted F-5 forms under section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code; 7) the sheriff must withhold the information we have marked pursuant to section 552.101 in conjunction with common-law privacy; 8) the sheriff must withhold the information we have marked pursuant to section 552.117(a)(1) of the Government Code, to the extent the individual whose information is at issue elected to withhold her personal information; 9) the sheriff must withhold the information we have marked pursuant to section 552.117(a)(2) of the Government Code, however, the sheriff may only withhold the marked personal cellular telephone numbers if the numbers are not paid for by the sheriff; 10) the sheriff must withhold the information we have marked pertaining to the individuals who are not employed by the sheriff pursuant to section 552.1175, to the extent the individuals are currently licensed peace officers who elect to restrict public access to their personal information; 11) the sheriff must withhold the Texas motor vehicle record information we have marked pursuant to section 552.130 of the Government Code; 12) the sheriff must withhold the credit card information we have marked pursuant to section 552.136 of the Government Code; 13) unless the owners of the addresses have affirmatively consented to their release, the sheriff must withhold the e-mail addresses we have marked under section 552.137 of the Government Code; 14) to the extent the sheriff possessed the submitted military discharge records under section 552.140 of the Government Code prior to September 1, 2003, the sheriff must withhold this information pursuant to section 552.140 of the Government Code. The remaining information must be released.

However, the copyrighted portion of the information at issue may only be released in accordance with copyright law.

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,

A handwritten signature in black ink, appearing to read 'V. Burgess', with a long horizontal line extending to the right.

Vanessa Burgess
Assistant Attorney General
Open Records Division

VB/jb

Ref: ID#381960

Enc. Submitted documents

c: Requestor
(w/o enclosures)