



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

July 27, 2010

Ms. Rebecca Brewer  
Abernathy, Roeder, Boyd & Joplin, P.C.  
For Town of Prosper  
P.O. Box 1210  
McKinney, Texas 75070-1210

ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

OR2010-11225

Dear Ms. Brewer:

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# 388279.

The Prosper Police Department (the "department"), which you represent, received a request for (1) the name of the department's "IT person;" (2) the department's policies and procedures regarding uploading and preserving video recordings of driving while intoxicated ("DWT") arrests; (3) the personnel records of a named officer; (4) the total number of DWI arrests made by the named officer; and (5) all computer-aided dispatch ("CAD") and mobile data terminal ("MDT") records involving the named officer and a specified time period. You state some information has been released to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.108, 552.117, 552.130, and 552.136 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we address your argument under section 552.108, as this is potentially the most encompassing exception you claim. Section 552.108 provides in pertinent part:

- (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:

(1) release of the information would interfere with the detection, investigation or prosecution of crime[.]

...

(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:

(1) release of the internal record or notation would interfere with law enforcement or prosecution[.]

Gov't Code § 552.108(a), (b). Section 552.108(a)(1) applies when release of information relating to a pending criminal investigation will 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. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases). Section 552.108(b)(1) is applicable to internal records of a law enforcement agency, provided the law enforcement agency reasonably explains how and why release of the information at issue would interfere with law enforcement or prosecution. *See City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet.) (section 552.108(b)(1) exception intended to protect information which, if released, would permit private citizens to anticipate weaknesses in a police department, avoid detection, jeopardize officer safety, and generally undermine law enforcement efforts). Generally, a governmental body claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See Gov't Code* §§ 552.108(a)(1), (b)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state that release of the submitted information would interfere with the detection, investigation, and prosecution of a traffic stop. Based on your representations and our review, we conclude the release of the submitted call report pertaining to the traffic stop 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. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases).

Section 552.108, however, does not except from disclosure basic information about an arrested person, an arrest, or a crime. Gov't Code § 552.108(c). Such basic information refers to the information held to be public in *Houston Chronicle*, and includes the identity of the complainant and a detailed description of the offense. *See* 531 S.W.2d at 186-87; Open Records Decision No. 127 (summarizing types of information considered to be basic information). In Open Records Decision No. 649 (1996), this office concluded information contained in a CAD report is substantially the same as basic information and, thus, is not excepted from public disclosure under section 552.108. *See* ORD 649 at 3; *see also* Open

Records Decision No. 394 at 3 (1983) (no qualitative difference between information contained in radio cards or radio logs and front-page offense report information expressly held to be public in *Houston Chronicle*). We note that basic information described in *Houston Chronicle* does not include Texas motor vehicle record information subject to section 552.130 of the Government Code. Therefore, with the exception of the basic offense and arrest information, the department may withhold the CAD report, which we have marked, under section 552.108(a)(1) of the Government Code.

With respect to the remaining information, which consists of personnel records, we note that in *Fort Worth v. Cornyn*, the Third Court of Appeals stated, “when a police department acts as an employer, its concerns are similar to those of other governmental agencies—to hire the most qualified applicants—and, when acting in such a capacity, its activities do not ‘relate to law enforcement.’” See *City of Fort Worth v. Cornyn*, 86 S.W.3d 320. As a general rule, section 552.108 is not applicable to a law enforcement agency’s personnel records. See *id.* at 329 (section 552.108(b)(1) not applicable to documents obtained by police department for purpose of evaluating applicant’s fitness for employment); see also Open Records Decision Nos. 562 at 10 (1990) (predecessor to section 552.108(b) not applicable to employment information in police officer’s file), 361 at 2-3 (1983) (statutory predecessor to section 552.108(b) not applicable to background information collected on unsuccessful applicant for employment with sheriff’s department). Thus, we find that the department has not reasonably explained how release of this information would interfere with the investigation or prosecution of crime or would otherwise undermine the department’s law enforcement and crime prevention efforts. We therefore find that you have failed to establish that section 552.108 is applicable to the remaining information, and we determine that the department may not withhold any portion of this information pursuant to section 552.108. See Gov’t Code § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706; Open Records Decision No. 434 at 2-3 (1986).

You claim that portions of remaining information are protected under the federal Health Insurance Portability and Accountability Act of 1996 (“HIPAA”), 42 U.S.C. §§ 1320d-1320d-8. At the direction of Congress, the Secretary of Health and Human Services (“HHS”) promulgated regulations setting privacy standards for medical records, which HHS issued as the Federal Standards for Privacy of Individually Identifiable Health Information. See Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 1320d-2 (Supp. IV 1998) (historical & statutory note); Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. Pts. 160, 164 (“Privacy Rule”); see also Attorney General Opinion JC-0508 at 2 (2002). These standards govern the releasability of protected health information by a covered entity. See 45 C.F.R. pts. 160, 164. Under these standards, a covered entity may not use or disclose protected health information, except as provided by parts 160 and 164 of the Code of Federal Regulations. See *id.* § 164.502(a). This office has addressed the interplay of the Privacy Rule and the Act. In Open Records Decision No. 681 (2004), we noted section 164.512 of title 45 of the Code of Federal Regulations provides a covered entity may use or disclose protected health information to

the extent such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law. *See* 45 C.F.R. § 164.512(a)(1). We further noted the Act “is a mandate in Texas law that compels Texas governmental bodies to disclose information to the public.” *See* ORD 681 at 8; *see also* Gov’t Code §§ 552.002, .003, .021. We, therefore, held the disclosures under the Act come within section 164.512(a). Consequently, the Privacy Rule does not make information confidential for the purpose of section 552.101 of the Government Code. *See Abbott v. Tex. Dep’t of Mental Health & Mental Retardation*, 212 S.W.3d 648 (Tex. App.—Austin 2006, no pet.); ORD 681 at 9; *see also* Open Records Decision No. 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). Thus, because the Privacy Rule does not make information that is subject to disclosure under the Act confidential, the department may withhold protected health information from the public only if the information is confidential under other law or an exception in subchapter C of the Act applies.

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 section encompasses information protected by other statutes, such as section 1324a of title 8 of the United States Code, which provides that an Employment Eligibility Verification Form I-9 “and any information contained in or appended to such form . . . may not be used for purposes other than for enforcement of this chapter” and for enforcement of other federal statutes governing crime and criminal investigations. *See* 8 U.S.C. § 1324a(b)(5); *see also* 8 C.F.R. § 274a.2(b)(4). The submitted information includes an I-9 form, which is governed by federal law. Release of the submitted I-9 form under the Act would be “for purposes other than for enforcement” of the referenced federal statutes. Accordingly, we find the submitted I-9 form, which we have marked, is confidential under section 552.101 of the Government Code, and may only be released in compliance with the federal laws and regulations governing the employment verification system.

Section 552.101 of the Government Code also encompasses the Medical Practice Act (the “MPA”), subtitle B of title 3 of the Occupations Code. *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). The submitted information contains medical records subject to the MPA. Accordingly, unless the department receives written consent for release of those records that complies with sections 159.004 and 159.005 of the MPA, the department must withhold the medical records we have marked pursuant to section 552.101 of the Government Code in conjunction with the MPA.

The submitted information contains an L-2 Declaration of Medical Condition form required by the Texas Commission on Law Enforcement Officer Standards and Education ("TCLEOSE"). This form is 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 department must, therefore, withhold the submitted L-2 declaration form we have marked pursuant to section 552.101 of the Government Code in conjunction with section 1701.306 of the Occupations Code.

Section 552.101 also encompasses criminal history records information (“CHRI”) generated by the National Crime Information Center or by the Texas Crime Information Center. 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 no portion of the remaining information consists of confidential CHRI. Accordingly, the department may not withhold any portion of the remaining information under section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code.

Section 552.101 of the Government Code also encompasses section 1703.306(a) of the Occupations Code, which provides “[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[.]” *Id.* § 1703.306(a). Upon review, we find that no portion of the remaining information relates to a polygraph examination. Consequently, the department may not withhold any of the remaining information under section 552.101 in conjunction with section 1703.306 of the Occupations Code.

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). Upon review, we find that no portion of the remaining information consists of mental health records. Thus, no portion of the remaining information may be withheld pursuant to section 552.101 of the Government Code in conjunction with section 611.002(a) of the Health and Safety 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 your claims under common-law privacy together under both sections 552.101 and 552.102.

This office has found that personal financial information not relating to the financial transaction between an individual and a governmental body is excepted from required public disclosure under common-law privacy. 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 of no legitimate public interest. The department 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 the job performance of a current employee of the department. 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 department 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)(2) of the Government Code 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.<sup>1</sup> 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 individual whose information is at issue is a licensed peace officer. Therefore, the department must withhold the information we have marked under section 552.117(a)(2) of the Government Code.

Section 552.1175 of the Government Code provides in part:

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<sup>1</sup>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)).

(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.

*Id.* § 552.1175(b). We note a portion of the remaining information includes the personal information of individuals who may be licensed peace officers who are not employees of the department.<sup>2</sup> To the extent these individuals are currently licensed peace officers who elect to restrict public access to their personal information, the department 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 department may not withhold the information we have marked pertaining to this individual under section 552.1175.

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." *Id.* § 552.130(a). Thus, the department 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." *Id.* § 552.136(b). Upon review, the department must withhold the bank account number we have marked under section 552.136 of the Government Code.

We note the remaining information contains a personal e-mail address subject to section 552.137 of the Government Code.<sup>3</sup> Section 552.137 of the Government Code

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<sup>2</sup>The 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).

<sup>3</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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 id.* § 552.137(a)-(c). The e-mail address in the remaining information is not of a type specifically excluded by section 552.137(c). As such, the e-mail address we have marked must be withheld under section 552.137, unless the owner of the address affirmatively consents to its disclosure.

In summary, the department may withhold the information we have marked under section 552.108(a)(1) of the Government Code. The department must withhold (1) the marked I-9 form in conjunction with section 1324a of title 8 of the United States Code; (2) the information we have marked under section 552.101 of the Government Code in conjunction with the MPA, unless the department receives written consent for release of those records that complies with the MPA; (3) the L-2 declaration form we have marked pursuant to section 552.101 of the Government Code in conjunction with section 1701.306 of the Occupations Code; (4) the information we have marked pursuant to section 552.101 of the Government Code in conjunction with common-law privacy; (5) the information we have marked under section 552.117(a)(2) of the Government Code; (6) the information we have marked under section 552.1175, to the extent the individuals whose information is at issue are currently licensed peace officers who elect to restrict public access to their personal information; (7) the Texas motor vehicle record information we have marked pursuant to section 552.130 of the Government Code; (8) the bank account number we have marked under section 552.136 of the Government Code; and (9) the e-mail address we have marked under section 552.137, unless the owner of the address has affirmatively consented to its disclosure.<sup>4</sup> 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](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

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<sup>4</sup>Open Records Decision No. 684 (2009) serves as a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including I-9 forms under section 552.101 of the Government Code, L-2 declarations under section 552.101 of the Government Code in conjunction with section 1701.306 of the Occupations Code, Texas driver’s license numbers under section 552.130 of the Government Code, bank account numbers under section 552.136 of the Government Code, and e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

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 "Jennifer Burnett", written in a cursive style.

Jennifer Burnett  
Assistant Attorney General  
Open Records Division

JB/dls

Ref: ID# 388279

Enc. Submitted documents

c: Requestor  
(w/o enclosures)