



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 28, 2010

Mr. Cary L. Bovey
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For City of Brenham
2251 Double Creek Drive, Suite 204
Round Rock, Texas 78664

OR2010-11334

Dear Mr. Bovey:

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# 388326.

The Brenham Police Department (the "department"), which you represent, received a request for the personnel file of a named officer. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.108, 552.115, 552.117, 552.130, 552.136, 552.137, and 552.147 of the Government Code.¹ We have considered the exceptions 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 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:

¹Although you also raise section 552.026 of the Government Code as an exception to disclosure, section 552.026 is not an exception to disclosure. Rather, section 552.026 provides that the Act does not require the release of information contained in education records except in conformity with the Family Educational Rights and Privacy Act of 1974. Gov't Code § 552.026.

(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). 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) 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 agree the submitted information contains a medical record subject to the MPA. Accordingly, the department must withhold the medical record it has marked pursuant to section 552.101 of the Government Code in conjunction with the MPA unless the department receives written consent for release of this record that complies with sections 159.004 and 159.005 of the MPA.

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. Upon review, we find that a portion of the remaining information consists of confidential CHRI. Accordingly, the department 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. However, none of the remaining information

you have marked constitutes CHRI for purposes of chapter 411. Therefore, none of the remaining information may be withheld on that basis.

The remaining information 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 department must withhold the submitted L-2 and L-3 declaration forms and the attachment to the L-3 form you have marked pursuant to section 552.101 of the Government Code in conjunction with section 1701.306 of the Occupations Code.

The remaining information contains an F-5 form ("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 officer resigned due to a substantiated incident of excessive force or violations of the law other than traffic offenses. Thus, the department must withhold the submitted F-5 form you have marked under section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code.

You seek to withhold the fingerprints in the remaining information under section 560.003 of the Government Code.² Section 552.101 of the Government Code also encompasses section 560.003, which provides “[a] biometric identifier in the possession of a governmental body is exempt from disclosure under [the Act].” Gov’t Code § 560.003; *see id.* § 560.001(1) (“biometric identifier” means retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry). There is no indication the requestor has a right of access to the fingerprints under section 560.002. *See id.* § 560.002(1)(A) (governmental body may not sell, lease, or otherwise disclose individual’s biometric identifier to another person unless the individual consents to disclosure). Therefore, the department 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 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). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681-82. The types of information considered intimate or embarrassing by the Texas Supreme Court in *Industrial Foundation* include 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. *Id.* at 683. This office has found that personal financial information not relating to a financial transaction between an individual and a governmental body is generally protected by common-law privacy. *See* Open Records Decision No. 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history). In addition, this office has found certain kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe

²We note you raise sections 559.001, 559.002, and 559.003 of the Government Code for fingerprint information. These sections were renumbered as chapter 560 by the Seventy-eighth Legislature. *See* Act of May 20, 2003, 78th Leg., R.S., ch. 1275, § 2 (78), 2003 Tex. Gen. Laws 4140, 4144.

emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). This office has also found 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. *Cf. U.S. 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 history). Furthermore, we find that a compilation of a private citizen's criminal history is generally not of legitimate concern to the public. Upon review, we find that the information we have marked is highly intimate or embarrassing and not of legitimate public concern. Thus, the department must withhold this information under section 552.101 of the Government Code in conjunction with the common-law right of privacy. However, none of the remaining information is highly intimate or embarrassing information of no legitimate public concern. Accordingly, none of the remaining information may be withheld under section 552.101 on the basis of common-law privacy.

Section 552.108(a)(1) of the Government Code exempts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime." Gov't Code § 552.108(a)(1). A governmental body claiming section 552.108(a)(1) must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state that portions of the remaining information relate to three pending criminal investigations or prosecutions. Based on your representation and our review, we conclude that the release of the information you have marked 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). Accordingly, the department may withhold the information you have marked under section 552.108(a)(1) of the Government Code.

You raise section 552.115 of the Government Code for the submitted birth certificate. Section 552.115 exempts from disclosure "[a] birth or death record maintained by the bureau of vital statistics of the Texas Department of Health or a local registration official[.]" Gov't Code § 552.115(a). Section 552.115 is applicable only to information maintained by the bureau of vital statistics or local registration officials. *See Open Records Decision No. 338* (1982) (finding that statutory predecessor to section 552.115 excepted only those birth and death records which are maintained by the bureau of vital statistics and local registration officials). Because section 552.115 does not apply to information held by the department, the submitted birth certificate may not be withheld on this basis.

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 552.117.³ 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.⁴

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 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).⁵ We note portions of the information at issue include the personal information of individuals who may be licensed peace officers who are not employees of the department. 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 these individuals under section 552.1175.

³See 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)).

⁴As our ruling is dispositive for this information, we do not address your remaining argument against disclosure of portions of this information under section 552.147 of the Government Code.

⁵The 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).

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)(1), (2). Thus, the department must withhold the Texas motor vehicle record information you have marked, in addition to the 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). This office has determined that insurance policy numbers are access device numbers for purposes of section 552.136. *See id.* § 552.136(a) (defining “access device”). Accordingly, the department must withhold the insurance policy number you have marked under section 552.136 of the Government Code.

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 id.* § 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).

In summary, the department must withhold under section 552.101 of the Government Code (1) the medical record you have marked in conjunction with the MPA, unless the department receives the required written consent for release of the information under sections 159.004 and 159.005 of the MPA; (2) the information we have marked in conjunction with section 411.083 of the Government Code; (3) the L-2 and L-3 declaration forms you have marked in conjunction with section 1701.306 of the Occupations Code; (4) the fingerprints we have marked in conjunction with section 560.003 of the Government Code; (5) the F-5 form you have marked in conjunction with section 1701.454 of the Occupations Code; and (6) the information we have marked in conjunction with common-law privacy. The department may withhold the information you have marked under section 552.108(a)(1) of the Government Code. The department must withhold the information we have marked under section 552.117(a)(2) of the Government Code and the information we have marked under section 552.1175 of the Government Code if the individuals at issue are currently licensed peace officers who elect to restrict access to this information in accordance with section 552.1175(b). The department must also withhold the information you have marked, as well as the information we have marked, under section 552.130 of the Government Code, the insurance policy number you have marked under section 552.136 of the Government Code, and the e-mail addresses we have marked under section 552.137 of the Government

Code, unless the owners have affirmatively consented to their release.⁶ 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,



Jennifer Burnett
Assistant Attorney General
Open Records Division

JB/dls

Ref: ID# 388326

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁶Open 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, and e-mail addresses of members of the public under section 552.137, without the necessity of requesting an attorney general decision.