



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 29, 2010

Mr. B. Chase Griffith
Brown & Hofmeister, L.L.P.
740 East Campbell Road, Suite 800
Richardson, Texas 75081

OR2010-11424

Dear Mr. Griffith:

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# 388475 (McKinney ORR #10-2528).

The McKinney Police Department (the "department"), which you represent, received a request for the personnel file of a named department police officer. You state the department released some information to the requestor. You also state the department will redact social security numbers pursuant to section 552.147(b) of the Government Code.¹ You claim portions of the submitted information are excepted from disclosure under sections 552.101, 552.117, 552.130, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note in his request for information, the requestor agrees to the redaction of all information identifying family members, social security numbers, and other personal information such as home addresses. Thus, we understand the requestor to agree to the redaction of information protected by section 552.117 of the Government Code.²

¹Section 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. *See* Gov't Code § 552.147.

²Section 552.117 of the Government Code applies to a peace officer as defined by Article 2.12 of the Code of Criminal Procedure or a public official or employee who elects for confidentiality pursuant to section 552.024 of the Government Code, and excepts the home address, home telephone number, social security number, or information that reveals whether the person has family members. Gov't Code § 552.117(a)(1), (2).

Accordingly, any such information within the submitted documents is not responsive to the present request for information. This ruling does not address the public availability of any information that is not responsive to the request, and the department need not release non-responsive information in response to this request.

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 411.083 of the Government Code. Section 411.083 pertains to criminal history record information ("CHRI") generated by the National Crime Information Center or by the Texas Crime Information Center. Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that state agencies 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. *See id.* Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety ("DPS") maintains, except DPS may disseminate this information in accordance with chapter 411, subchapter F of the Government Code.³ *See* Gov't Code § 411.083. Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may only release CHRI to another criminal justice agency for a criminal justice purpose. *See id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090-127. Furthermore, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F. Upon review, we conclude the department must withhold the CHRI we have marked under section 552.101 in conjunction with section 411.083 and federal law. However, we find no portion of the remaining responsive information constitutes CHRI and none of it may be withheld under section 552.101 in conjunction with chapter 411.

Section 552.101 of the Government Code also encompasses section 611.002(a) of the Health and Safety Code. Section 611.002(a) 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

³Although you assert release of a portion of the submitted information is prohibited by section 411.085 of the Government Code, that provision merely provides the penalties for the "Unauthorized Obtaining, Use, or Disclosure of Criminal History Record Information." Gov't Code § 411.085. Section 411.083 is applicable to the dissemination of CHRI.

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 remaining responsive information consist of mental health records. Accordingly, the department must withhold the mental health records, which we have marked, pursuant to section 552.101 in conjunction with section 611.002(a).⁴

We note the remaining responsive information contains an L-3 Declaration of Psychological and Emotional Health 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. 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). Upon review, we find the department must withhold the L-3 declaration form we marked under section 552.101 in conjunction with section 1701.306.

The Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code, is also encompassed by section 552.101 of the Government Code. Section 159.002 of the MPA provides in part the following:

⁴As our ruling is dispositive for this information, we do not address your arguments against its release.

(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.

Occ. Code § 159.002(a)-(c). This office has concluded the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). You contend the submitted documents contain medical records subject to the MPA. However, upon review, we find the none of the remaining responsive information constitutes medical records for purposes of the MPA. Therefore, the department may not withhold any of the remaining responsive information under section 552.101 on that ground.

Section 552.101 of the Government Code also encompasses section 1703.306 of the Occupations Code. Section 1703.306 provides as follows:

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

- (1) the examinee or any other person specifically designated in writing by the examinee;
- (2) the person that requested the examination;
- (3) a member, or the member's agent, of a governmental agency that licenses a polygraph examiner or supervises or controls a polygraph examiner's activities;
- (4) another polygraph examiner in private consultation; or
- (5) any other person required by due process of law.

(b) The [Polygraph Examiners B]oard or any other governmental agency that acquires information from a polygraph examination under this section shall maintain the confidentiality of the information.

(c) A polygraph examiner to whom information acquired from a polygraph examination is disclosed under Subsection (a)(4) may not disclose the information except as provided by this section.

Occ. Code § 1703.306. A portion of the remaining responsive information, which we have marked, consists of information acquired from polygraph examinations subject to section 1703.306. The requestor does not appear to fall into any of the categories of individuals who are authorized to receive the polygraph information under section 1703.306(a). Accordingly, the department must withhold the marked polygraph information under section 552.101 in conjunction with section 1703.306.

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

Section 552.101 of the Government Code also encompasses sections 772.118, 772.218 and 772.318 of the Health and Safety Code. Chapter 772 of the Health and Safety Code authorizes the development of local emergency communication districts. Sections 772.118, 772.218, and 772.318 are applicable to emergency 9-1-1 districts established in accordance with chapter 772. *See* Open Records Decision No. 649 (1996). These sections make the originating telephone numbers and addresses of 9-1-1 callers that are furnished by a service supplier confidential. *Id.* at 2. Section 772.118 applies to an emergency communication district for a county with a population of more than two million. Section 772.218 applies to an emergency communication district for a county with a population of more than 860,000. Section 772.318 applies to an emergency communication district for a county with a population of more than 20,000.

When asserting section 772.118, 772.218, or 772.318 of the Health and Safety Code, a governmental body must indicate whether it is part of a 9-1-1 district subject to that section and whether the originating addresses and telephone numbers of the 9-1-1 callers were supplied by a 9-1-1 service supplier to that 9-1-1 district. *See* Gov't Code § 552.301(e). Furthermore, the 9-1-1 callers should be identified in the submitted information. In this

instance, you do not indicate whether the City of McKinney is part of an emergency communication district established under section 772.118, section 772.218, or section 772.318 of the Health and Safety Code. Further, you do not identify any telephone numbers or addresses within the submitted information as telephone numbers or addresses of 9-1-1 callers supplied by a 9-1-1 service provider. As you have failed to identify which information constitutes a telephone number or address of a 9-1-1 caller that was provided by a 9-1-1 service provider, we find the department may not withhold any portion of the remaining responsive information under section 552.101 in conjunction with chapter 772 of the Health and Safety Code.

Section 552.101 of the Government Code also encompasses the common-law right of privacy, which protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *See id.* at 681-82. This office has found personal financial information not relating to the financial transaction between an individual and a governmental body is excepted from public disclosure under common-law privacy. *See Open Records Decision Nos. 600, 545 (1990)*. Furthermore, this office has also found some 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 emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps)*. Upon review, we find the information we have marked is highly intimate or embarrassing and of no legitimate concern to the public. Accordingly, the department must withhold the information we have marked under section 552.101 in conjunction with common-law privacy.

Next, you assert the submitted documents contain Texas motor vehicle record information. Section 552.130 of the Government Code excepts from disclosure information relating to a motor vehicle operator's license, driver's license, motor vehicle title, or registration issued by a Texas agency. Gov't Code § 552.130(a)(1), (2). We note section 552.130 does not apply to out-of-state motor vehicle record information. In this instance, none of the remaining responsive documents contain motor vehicle record information issued by an agency of this state. Accordingly, the department may not withhold any of the remaining responsive information under section 552.130.

Next, we note the remaining responsive information contains bank account and insurance policy numbers. Section 552.136(b) of the Government Code provides "[n]otwithstanding any other provision of [the Act], 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.”⁵ *Id.* § 552.136(b); *see id.* § 552.136(a) (defining “access device”). Thus, the department must withhold the bank account and insurance policy numbers we have marked pursuant to section 552.136.

Lastly, you seek to withhold personal e-mail addresses from the remaining responsive information. 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 we marked are not specifically excluded by section 552.137(c). Accordingly, the department must withhold the marked e-mail addresses 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 pursuant to section 552.101 of the Government Code: (1) the marked CHRI in conjunction with section 411.083 of the Government Code; (2) the marked mental health records in conjunction with section 611.002 of the Health and Safety Code; (3) the L-3 declaration form we marked in conjunction with section 1701.306 of the Occupations Code; (4) the marked polygraph information in conjunction with section 1703.306 of the Occupations Code; (5) the fingerprints we marked in conjunction with section 560.003 of the Government Code; and (6) the information we marked in conjunction with common-law privacy. The department must also withhold the bank account and insurance policy numbers we marked under section 552.136 of the Government Code. Unless the owners of the e-mail addresses we marked have affirmatively consented to their release, the department must withhold them under section 552.137 of the Government Code.⁶ The department must release the remaining responsive information to the requestor.

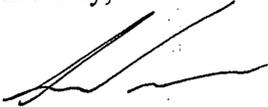
This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

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).

⁶We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including: L-3 declarations under section 552.101 in conjunction with section 1701.306 of the Occupations Code; fingerprints under section 552.101 in conjunction with section 560.003 of the Government Code; bank account and insurance policy numbers under section 552.136 of the Government Code; and personal 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.

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,



Ana Carolina Vieira
Assistant Attorney General
Open Records Division

ACV/eeg

Ref: ID# 388475

Enc. Submitted documents

c: Requestor
(w/o enclosures)