ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 24, 2010

Ms. Jennifer C. Cohen
Assistant General Counsel
Texas Department of Public Safety
P.O. Box 4087
Austin, Texas 78773-0001

OR2010-14548

Dear Ms. Cohen:

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# 394682 (ORA# 10-1552).

The Texas Department of Public Safety (the "department") received a request for any and all court documents and investigative reports related to a specified shooting involving two named individuals. You claim that a portion of the submitted information is excepted from disclosure under sections 552.101, 552.130, 552.136, and 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

You seek to withhold a portion of the submitted information under section 552.101 of the Government Code in conjunction with section 411.00755 of the Government Code. We note this office recently issued Open Records Letter No. 2010-12863 (2010), a previous determination authorizing the department to withhold personnel records of commissioned officers of the department under section 552.101 of the Government Code in conjunction with section 411.00755 of the Government Code, unless the exceptions to confidentiality listed in subsections 411.00755(b)(1)-(12) or the release provisions listed in subsection 411.00755(c) are applicable. *See* Gov't Code § 411.00755(b)(1)-(12), (c). The information at issue does not contain any of the types of information listed in subsections 411.00755(b)(1)-(12), and the release provisions in subsection 411.00755(c) do not apply. Therefore, pursuant to Open Records Letter No. 2010-12863, the department must withhold the information you have marked under section 552.101 in conjunction with section 411.00755. *See* Open Records Letter No. 673 (2001) (governmental body may rely on previous determination when elements of law, fact, and circumstances have not changed, decision concludes specific, clearly delineated category of information is excepted, and governmental body is explicitly informed it need not seek a decision from this office to withhold information in response to future requests).

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 section 58.005 of the Family Code, which provides:

> (a) Records and files concerning a child, including personally identifiable information, and information obtained for the purpose of diagnosis, examination, evaluation, or treatment or for making a referral for treatment of a child by a public or private agency or institution providing supervision of a child by arrangement of the juvenile court or having custody of the child under order of the juvenile court may be disclosed only to:
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> > (1) the professional staff or consultants of the agency or institution;
> >
> > (2) the judge, probation officers, and professional staff or consultants of the juvenile court;
> >
> > (3) an attorney for the child;
> >
> > (4) a governmental agency if the disclosure is required or authorized by law;
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> > (5) a person or entity to whom the child is referred for treatment or services if the agency or institution disclosing the information has entered into a written confidentiality agreement with the person or entity regarding the protection of the disclosed information;
> >
> > (6) the Texas Department of Criminal Justice and the Texas Juvenile Probation Commission for the purpose of maintaining statistical records of recidivism and for diagnosis and classification; or
> >
> > (7) with leave of the juvenile court, any other person, agency, or institution having a legitimate interest in the proceeding or in the work of the court.

Fam. Code § 58.005. In this instance, the information you have marked under this section consists of the names of juveniles listed in a police report. We find that this information was not obtained for the purpose of diagnosis, examination, evaluation, or treatment, or for making a referral for treatment of a child by a public or private agency or institution providing supervision of a child by arrangement of the juvenile court or having custody of the child under order of the juvenile court. Accordingly, we conclude that the information you have marked is not the type of information contemplated by section 58.005 of the Family Code, and none of it may be withheld on that basis.

Section 552.101 of the Government Code also encompasses section 773.091 of the Health and Safety Code, which is applicable to information relating to the provision of emergency medical services ("EMS") and provides in part:

> (b) Records of the identity, evaluation or treatment of a patient by emergency medical services personnel or by a physician providing medical supervision that are created by the emergency medical services personnel or physician or maintained by an emergency medical services provider are confidential and privileged and may not be disclosed except as provided by this chapter.
>
> (c) Any person who receives information from confidential communications or records as described by this chapter, other than a person listed in Section 773.092 who is acting on the survivor's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was obtained.

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

> [t]he privilege of confidentiality under this section does not extend to information regarding the presence, nature of injury or illness, age, sex, occupation, and city of residence of a patient who is receiving emergency medical services.

Id. § 773.091(g). Upon review, we find that the information you have marked constitutes an EMS record that is generally confidential under section 773.091. We note that records that are confidential under section 773.091 may be disclosed to "any person who bears a written consent of the patient or other persons authorized to act on the patient's behalf for the release of confidential information." *Id.* §§ 773.092(e)(4), .093. When the patient is deceased, as is the case here, the patient's personal representative may consent to the release of the patient's records. *Id.* § 773.093(a); *see* Open Records Decision No. 632 (1995) (defining "personal representative" for purposes of Health & Safety Code § 773.093). The consent must be in writing, signed by the patient, authorized representative, or personal representative, and specify (1) the information to be covered by the release, (2) the reasons or purposes for the release, and (3) the person to whom the information is to be released. Health & Safety Code § 773.093(a). Therefore, the marked EMS record is confidential under section 773.091 of the Health and Safety Code, except as specified by section 773.091(g). However, the marked record must be released if the deceased patient's personal representative provides the department with written consent for release that meets the requirements of section 773.093(a). *See id.* §§ 773.092, .093; ORD 632.

Section 552.101 of the Government Code also encompasses the Medical Practice Act (the "MPA"), chapter 159 of the Occupations Code, which governs access to medical records. Section 159.002 of the Occupations Code provides in pertinent part:

> (b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.
>
> (c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002(b), (c). This office has 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). We have also found that when a file is created as the result of a hospital stay, all the documents in the file relating to diagnosis and treatment constitute physician-patient communications or "[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician." Open Records Decision No. 546 (1990). Medical records must be released upon the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) the reasons or purposes for the release, and (3) the person to whom the information is to be released. Occ. Code §§ 159.004,.005. We note the medical records we have marked relate to a deceased patient. The medical records of a deceased patient may only be released on the signed written consent of the decedent's personal representative. *See id.* §§ 159.005(a)(5). Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Upon review, we find the information we have marked constitutes confidential medical records that may only be released in accordance with the MPA.

We note the remaining information you seek to withhold under the MPA includes the record of death/postmortem disposition. Section 159.001 of the MPA defines "patient" as a person who consults with or is seen by a physician to receive medical care. *See id.* § 159.001(3). Under this definition, a deceased individual cannot be a "patient" under section 159.002 of the MPA. Thus, section 159.002 is applicable only to the medical records of a person who was alive at the time of the diagnosis, evaluation, or treatment to which the record pertains. Accordingly, the submitted record of death/postmortem disposition is not confidential under the MPA, and you have not demonstrated how this or the remaining documents you have indicated are medical records for purposes of the MPA. Therefore, the department may not withhold this remaining information on the basis of the MPA.

Section 552.101 of the Government Code also encompasses laws that make criminal history record information ("CHRI") confidential. CHRI generated by the National Crime Information Center (the "NCIC") or by the Texas Crime Information Center (the "TCIC") is confidential under federal and state law. Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or

other states. Open Records Decision No. 565 at 7 (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 the Texas Department of Public Safety ("DPS") maintains, except DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *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 not release CHRI except to another criminal justice agency for a criminal justice purpose. *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. Similarly, 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. *See id.* § 411.082(2)(B) (term CHRI does not include driving record information). However, section 411.083 does not apply to active warrant information or other information relating to one's current involvement with the criminal justice system. *See id.* § 411.081(b) (police department allowed to disclose information pertaining to person's current involvement in the criminal justice system). We note because the laws governing the dissemination of information obtained from NCIC and TCIC are based on both law enforcement and privacy interests, the CHRI of a deceased individual that is obtained from a criminal justice agency may be disseminated only as permitted by subchapter F of chapter 411 of the Government Code. *See* ORD 565 at 10-12. Accordingly, the department must withhold the CHRI we have marked under section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code. However, none of the remaining information at issue constitutes CHRI that may be withheld on that basis under section 552.101.

Section 552.101 also encompasses the doctrine of common-law privacy, which protects information if it (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.[1] *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. This office has found that personal financial information not related to a financial transaction between an individual and a governmental body is intimate and embarrassing and of no legitimate public interest. *See* Open Records Decision Nos. 545 (1990) (deferred compensation information, mortgage payments, assets, bills, and credit history protected under common-law privacy), 373 (1983) (sources of income not related to financial transaction between individual and governmental body protected under common-law privacy). In this instance, the submitted information contains personal financial information, which we have marked, that is intimate or embarrassing and of no legitimate public concern. Therefore, the department must withhold the information we have

[1]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).

marked under section 552.101 of the Government Code in conjunction with common-law privacy.

You also assert some of the submitted information is subject to sections 552.130 and 552.136 of the Government Code. Section 552.130 excepts from disclosure information that relates to a motor vehicle operator's license, driver's license, motor vehicle title, or registration issued by a Texas agency. *Id.* § 552.130(a)(1), (2). However, we note that section 552.130 protects the privacy interest of the individual, and because the right of privacy is purely personal, it lapses upon death. *Moore v. Charles B. Pierce Film Enters., Inc.*, 589 S.W.2d 489, 491 (Tex. Civ. App.—Texarkana 1979, writ ref'd n.r.e.); *see also* Attorney General Opinions JM-229 (1984), H-917 (1976); Open Records Decision No. 272 (1981). Therefore, the department may not withhold the deceased individual's Texas motor vehicle record information under section 552.130. However, upon review, the department must only withhold the Texas motor vehicle record information we have marked that belongs to living individuals under section 552.130.[2]

Section 552.136 of the Government Code 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; *see id.* § 552.136(a) (defining "access device"). Upon review, we find the information you have marked under section 552.136 does not constitute an access device number and may not be withheld under section 552.136.

Section 552.147 of the Government Code states "[t]he social security number of a living person is excepted from" required public disclosure under the Act. *Id.* § 552.147. We note section 552.147 does not apply to the social security number of a deceased individual. *Id.* Accordingly, the department may withhold the social security numbers that do not pertain to the deceased individual under section 552.147 of the Government Code.[3]

In summary, pursuant to Open Records Letter No. 2010-12863, the department must withhold the information you have marked under section 552.101 of the Government Code in conjunction with section 411.00755 of the Government Code. The department must withhold the marked EMS records under section 552.101 of the Government Code in conjunction with section 773.091 of the Health and Safety Code, except as specified by section 773.091(g) of the Health and Safety Code, unless the department receives the

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[2]We 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 a Texas driver's license number, a copy of a Texas driver's license, a Texas license plate number, and the portion of a photograph that reveals a Texas license plate number under section 552.130 of the Government Code, without the necessity of requesting an attorney general decision.

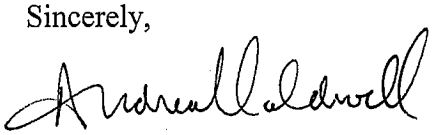
[3]We note that section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

required consent for release of that information. The marked medical records may only be released in accordance with the MPA. The department must withhold the CHRI we have marked under section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code. The department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The department must withhold the Texas motor vehicle record information we have marked under section 552.130 of the Government Code. The department may withhold the social security numbers that do not pertain to the deceased individual under section 552.147 of the Government Code. 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,



Andrea L. Caldwell
Assistant Attorney General
Open Records Division

ALC/eeg

Ref: ID# 394682

Enc. Submitted documents

c: Requestor
(w/o enclosures)