ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 14, 2010

Ms. YuShan Chang
Assistant City Attorney
City of Houston
P.O. Box 368
Houston, Texas 77001

OR2010-15654

Dear Ms. Chang:

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# 397971.

The Houston Police Department (the "department") received a request for fifty-five specified incident reports. You claim the requested information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.[1]

As you acknowledge, the department failed to comply with section 552.301 of the Government Code in seeking an open records decision from this office. A governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling

[1]We assume the "representative sample" of information submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than those submitted to this office.

demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 630 (1994). This office has held a compelling reason exists to withhold information when the information is confidential by another source of law. *See* Open Records Decision No. 150 (1977) (presumption of openness overcome by a showing that the information is made confidential by another source of law or affects third party interests). The applicability of section 552.101 is a compelling reason.

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 information made confidential by other statutes, including section 58.007 of the Family Code. The relevant language of section 58.007(c) of the Family Code reads as follows:

> (c) Except as provided by Subsection (d), law enforcement records and files concerning a child and information stored, by electronic means or otherwise, concerning the child from which a record or file could be generated may not be disclosed to the public and shall be:
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> > (1) if maintained on paper or microfilm, kept separate from adult files and records;
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> > (2) if maintained electronically in the same computer system as records or files relating to adults, be accessible under controls that are separate and distinct from controls to access electronic data concerning adults; and
> >
> > (3) maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subchapters B, D, and E.

Fam. Code § 58.007. Exhibit 2 involves juvenile conduct that occurred after September 1, 1997. It does not appear any of the exceptions in section 58.007 apply; therefore, exhibit 2 is confidential pursuant to section 58.007(c) of the Family Code. The department must withhold exhibit 2 from disclosure under section 552.101 of the Government Code.

We note section 552.101 of the Government Code also encompasses criminal history record information ("CHRI") made confidential by chapter 411 of the Government Code. CHRI is defined as "information collected about a person by a criminal justice agency that consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions." Gov't Code § 411.082(2). Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI 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.* at 10-12. 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. *See* Gov't Code § 411.089(b)(1). Upon review, we find the Federal Bureau of Investigation ("FBI") numbers we have marked in exhibits 3 and 5 constitute CHRI generated by the FBI. Because the requestor is not a criminal justice agency, the FBI numbers must be withheld pursuant to section 552.101 in conjunction with chapter 411 of the Government Code.

We note section 552.101 of the Government Code also encompasses section 411.192 of the Government Code. Section 411.192 governs the release of all information maintained by the Texas Department of Public Safety ("DPS") concerning the licensure of individuals to carry a concealed handgun, and provides as follows:

> (a) [DPS] shall disclose to a criminal justice agency information contained in its files and records regarding whether a named individual or any individual named in a specified list is licensed under this subchapter. Information on an individual subject to disclosure under this section includes the individual's name, date of birth, gender, race, zip code, telephone number, e-mail address, and Internet website address. Except as otherwise provided by this section and by Section 411.193, all other records maintained under this subchapter are confidential and are not subject to mandatory disclosure under the open records law, Chapter 552.
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> b) An applicant or license holder may be furnished a copy of disclosable records regarding the applicant or license holder on request and the payment of a reasonable fee.

Id. § 411.192(a), (b). It appears the department received the concealed handgun license information in exhibit 7 from DPS. In this instance, the requestor is not a criminal justice agency, nor is the requestor a license holder whose information is at issue. Further, we note section 411.193 is not applicable in this instance. *See id.* § 411.193 (making statistical report including number of licenses issued, denied, revoked, or suspended during the preceding month available to the public). Therefore, the department must withhold the information we have marked in exhibit 7 pursuant to section 552.101 of the Government Code in conjunction with section 411.192.

We note section 552.101 of the Government Code also encompasses information made confidential under the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. Section 159.002 of the Occupations Code 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.
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> (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). Further, information that is subject to the MPA includes both medical records and information obtained from those medical records. *See* Occ. Code § 159.002,.004; *see also* Open Records Decision No. 598 (1991). Upon review, exhibit 7 contains information subject to the MPA because it was obtained from a communication between a physician and a patient relative to or in connection with the professional services rendered by the physician to the patient. Accordingly, this information, which we have marked, may only be released in accordance with the MPA.

Section 552.101 of the Government Code also encompasses the common-law right of privacy. Common-law privacy 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 satisfied. *Id.* at 681-82. The types of information considered intimate and 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. *Id.* at 683.

In Open Records Decision No. 393 (1983), this office concluded information that either identifies or tends to identify a victim of sexual assault or other sex-related offense must be withheld under common-law privacy. Open Records Decision Nos. 393 at 2, 339 (1982); *see also Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied) (identities of witnesses to and victims of sexual harassment were highly intimate or embarrassing information and public did not have legitimate interest in such information). Accordingly, the department must withhold the sexual assault victims' identifying information we have marked in exhibits 3, 4, 5, and 6 under section 552.101 in conjunction with common-law privacy.

We also note 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) (finding significant privacy interest in compilation of individual's criminal history by recognizing distinction between public records found in courthouse files and local police stations and compiled summary of criminal history information). Furthermore, we find a compilation of a private citizen's criminal history is generally not of legitimate concern to the public. We note, however, records relating to routine traffic violations are not considered criminal history information. Gov't Code § 411.082(2)(B) (criminal history record information does not include driving record information). Portions of the submitted reports constitute compilations of individuals' criminal history. Accordingly, the department must withhold the information we have marked in exhibits 3, 5, 6, and 7 under section 552.101 of the Government Code in conjunction with common-law privacy.

We note section 552.1175 of the Government Code may apply to a portion of the remaining information in exhibit 7.[2] Section 552.1175 provides in part:

> (b) Information that relates to the home address, home telephone number, or social security number of [officers and employees of a community supervision and corrections department established under Chapter 76 of the Government Code who perform a duty described by Section 76.004(b)], 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:
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> > (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). To the extent the information we have marked in exhibit 7 relates to an officer or employee of a community supervision and corrections department, the department must withhold this information under section 552.1175 if the individual to whom it pertains elects to restrict access to the information in accordance with section 552.1175(b).

We also 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). Accordingly, the department must withhold the Texas

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[2]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).

driver's license numbers and class of license we have marked in exhibits 3, 4, 5, 6, and 7 and the license plate numbers we have marked in exhibit 3 pursuant to section 552.130 of the Government Code.[3]

In summary, the department must withhold exhibit 2 under section 552.101 of the Government Code in conjunction with section 58.007(c) of the Family Code. The department must withhold the FBI numbers we have marked in exhibits 3 and 5 under section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code. The department must withhold the concealed handgun license information we have marked in exhibit 7 under section 552.101 of the Government Code in conjunction with section 411.192 of the Government Code. The department may only release the medical record information we have marked in exhibit 7 in accordance with the MPA. The department must withhold the alleged sexual assault victims' identifying information we have marked in exhibits 3, 4, 5, and 6 under section 552.101 of the Government Code in conjunction with common-law privacy. The department must withhold the criminal history information we have marked in exhibits 3, 5, 6, and 7 under section 552.101 of the Government Code in conjunction with common-law privacy. The department must withhold the information we have marked under section 552.1175 of the Government Code, to the extent it relates to an officer or employee of a community supervision and corrections department who elects to restrict access to the information in accordance with section 552.1175(b) of the Government Code. The department must withhold the Texas driver's license numbers and class of license we have marked in exhibits 3, 4, 5, 6, and 7 and the license plate numbers we have marked in exhibit 3 pursuant to section 552.130 of the Government Code. The remaining information must be released to the requestor.[4]

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

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[3]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 Texas driver's license and license plate numbers of a member of the public under section 552.130 of the Government Code, without the necessity of requesting an attorney general decision.

[4]We note the remaining information contains social security numbers. 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.

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,

Sean Nottingham
Assistant Attorney General
Open Records Division

SN/eb

Ref: ID# 397971

Enc. Submitted documents

c: Requestor
(w/o enclosures)