ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 24, 2011

Mr. Slater C. Elza
Underwood
For the Friona Police Department
P.O. Box 9158
Amarillo, Texas 79105-9158

OR2011-01172

Dear Mr. Elza:

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# 406831.

The Friona Police Department (the "department"), which you represent, received a request for all records pertaining to the requestor's client. You state you have redacted social security numbers from the requested information under section 552.147 of the Government Code.[1] You state you have provided the requestor with some of the requested information. You claim the remaining information is excepted from disclosure under sections 552.101, 552.108, and 552.130 of the Government Code.[2] We have considered the exceptions you claim and reviewed the submitted information.

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[1]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. *See* Gov't Code § 552.147.

[2]We note that although you also raise section 552.305 of the Government Code, this section is not an exception to disclosure under the Act; rather, it is a procedural provision permitting a governmental body to decline to release information that may implicate a person's privacy or property interests for the purpose of requesting a decision from this office as provided under the Act. *See* Gov't Code § 552.305; Open Records Decision No. 542 (1990).

Initially, we note the department did not fully comply with section 552.301 of the Government Code. Subsection (b) of section 552.301 requires a governmental body requesting an open records ruling from this office to "ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the tenth business-day after the date of receiving the written request." Gov't Code § 552.301(b). While you raised sections 552.101 and 552.130 within the ten-business-day time period required by subsection 552.301(b), you did not raise section 552.108 until after the ten-business-day deadline had passed. Generally, if a governmental body fails to timely raise an exception, that exception is waived. *See generally id.* § 552.302; Open Records Decision No. 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions). Section 552.108 is a discretionary exception to disclosure which protects a governmental body's interests and may be waived. *See* Gov't Code § 552.007; Open Records Decision No. 177 (1977) (statutory predecessor to section 552.108 subject to waiver); 665 at 2 n.5 (2000) (discretionary exceptions generally). Consequently, by failing to comply with section 552.301(b) with respect to its claim under section 552.108, the department has waived its claim under this section. Accordingly, the department may not withhold any of the submitted information under section 552.108 of the Government Code. However, we will address your timely raised exceptions.

We note the submitted information contains the requestor's client's medical records that are subject to the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. *See* Occ. Code § 151.001. 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 other statutes make confidential, such as the MPA. 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.
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> (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). This office has also determined when a file is created as the result of a hospital stay, all of the documents in the file that relate to diagnosis and treatment constitute either physician-patient communications or records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician. *See* Open Records Decision No. 546 (1990). Medical records must be released upon the patient's signed, written consent, provided 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. 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). The requestor's client's hospital treatment records, which we have marked, constitute medical records that are subject to the MPA. Thus, these medical records may only be released in accordance with the MPA.

Section 552.101 of the Government Code also encompasses information protected by chapter 411 of the Government Code, which deems confidential criminal history record information ("CHRI"). 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 that states obtain from the federal government or other states. *See* ORD 565. 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") number we marked constitutes CHRI, which must be withheld pursuant to section 552.101 in conjunction with section 411.083 of the Government Code.

Section 552.101 of the Government Code also encompasses the common-law right of 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). The types of information considered intimate or 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. Generally, only the information that either identifies or tends to identify a victim of sexual assault or other sex-related offense may be withheld under common-law privacy. However, a governmental body is required to withhold an entire report when identifying information is inextricably intertwined with other releasable information or when the requestor knows the identity of the alleged victim. Open Records Decision No. 393 at 2

(1983); *see* Open Records Decision No. 339 (1982); *see also Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied) (identity of witnesses to and victims of sexual harassment was highly intimate or embarrassing information and public did not have legitimate interest in such information); Open Records Decision No. 440 (1986) (detailed descriptions of serious sexual offenses must be withheld). A portion of the information at issue pertains to an investigation of sexual assault. The submitted information reveals the requestor's client in this instance knows the identity of the alleged victim. Thus, withholding only the victim's identifying information from the requestor would not preserve the victim's common-law right to privacy. Accordingly, to protect the victim's privacy, the department must withhold report 071730800 in its entirety, as well as the information we marked in report 071730799, under section 552.101 of the Government Code in conjunction with common-law privacy.[3] You also seek to withhold the submitted photograph line-ups under common-law privacy. However, upon review, we find this information is not highly intimate or embarrassing. Accordingly, the department may not withhold any of the remaining information under section 552.101 in conjunction with common-law privacy.

Next, we note you have highlighted in orange Texas motor vehicle record information that you state you have redacted under section 552.130 of the Government Code pursuant to Open Records Decision No. 684 (2009).[4] Section 552.130 provides that information relating to a motor vehicle operator's license or driver's license issued by a Texas agency is excepted from public release. Gov't Code § 552.130(a)(1). We note, however, you have also highlighted the state of issuance of the driver's licenses. Generally, this office does not withhold the state of issuance because, in order for section 552.130 to be applicable, the motor vehicle information must be issued by an agency of the State of Texas. *See id.* Accordingly, except for the state of issuance, the department must withhold the Texas motor vehicle record information you have marked under section 552.130.

In summary, the department may only release the marked medical records in accordance with the MPA. The department must withhold the FBI number we have marked under section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code. The department must withhold report number 071730800 in its entirety and the information we have marked in report number 071730799 under section 552.101 of the Government Code in conjunction with common-law privacy. Except for the state of issuance, the department must withhold the Texas motor vehicle record information you have

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[3]As our ruling is dispositive, we need not address your remaining arguments against the disclosure of this information.

[4]Open Records Decision No. 684 is a previous determination issued by this office to all governmental bodies authorizing them to withhold ten categories of information, including Texas driver's license numbers under section 552.130 of the Government Code, without the necessity of requesting an attorney general decision.

marked under section 552.130 of the Government Code. The remaining information must be released.[5]

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,

Kate Hartfield
Assistant Attorney General
Open Records Division

KH/em

Ref: ID# 406831

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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[5]We note that the information being released in this instance contains confidential information pertaining to the requestor's client to which the requestor has a right of access. *See* Gov't Code § 552.023(a) (person or person's authorized representative has special right of access, beyond right of general public, to information held by governmental body that relates to person and is protected from public disclosure by laws intended to protect person's privacy interests). If the department receives another request for this same information from a different requestor, then the department should again seek a decision from this office.