



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 13, 2011

Mr. David Daugherty
Assistant County Attorney
Harris County
1310 Prairie, Suite 940
Houston, Texas 77002

OR2011-05121

Dear Mr. Daugherty:

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# 414400 (C. A. File No. 11PIA0037).

The Harris County Sheriff's Office (the "sheriff") received a request for all information pertaining to a named sheriff employee. You state the sheriff has released some responsive records to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.117, 552.130, 552.136, and 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note the sheriff submitted time and attendance records unrelated to the named sheriff employee. We find these records are not responsive to the request. This ruling does not address the public availability of any information that is not responsive to the request, and the sheriff is not required to release such information in response to the 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 laws that make criminal history record information ("CHRI") confidential. CHRI generated by the National Crime Information Center or by the Texas Crime Information Center 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 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. We note that driving record information is not made confidential by the confidentiality provisions that govern CHRI. *See id.* § 411.082 (2)(B) (definition of CHRI does not include driving record information). Additionally, active warrant information or other information relating to an individual’s current involvement in the criminal justice system does not constitute criminal history information for the purposes of section 552.101. *See id.* § 411.081(b) (police department allowed to disclose information pertaining to person’s current involvement in the criminal justice system). Upon review, we have marked the portion of the submitted information that is confidential pursuant to chapter 411. The sheriff must withhold this marked information under section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code. You have not explained how the remaining information at issue constitutes confidential CHRI for purposes of chapter 411, and none of the remaining information may be withheld under section 552.101 on that basis.

Section 552.101 of the Government Code also encompasses section 560.003 of the Government Code, which provides that “[a] biometric identifier in the possession of a governmental body is exempt from disclosure under [the Act].” *Id.* §§ 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 (providing that biometric identifiers in possession of governmental body are exempt from disclosure under Act). Upon review, we have marked the fingerprints in the remaining information. You do not inform us, and the submitted information does not indicate, that section 560.002 permits the disclosure of the fingerprints in this case. Therefore, the sheriff must withhold the fingerprints we have marked under section 552.101 in conjunction with section 560.003 of the Government Code.

You assert the remaining information contains medical records subject to the Medical Practice Act (the “MPA”), subtitle B of title 3 of the Occupations Code, which is also encompassed by section 552.101 of the Government Code. *See Occ. Code §§ 151.001-165.160.* Section 159.002 of the MPA provides in relevant 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.

Id. § 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). Upon review, we have marked the medical records in the remaining information that are subject to the MPA, which the sheriff must withhold under section 552.101 of the Government Code on that basis.¹ However, you have not explained the applicability of the MPA to the remaining information, and no remaining information may be withheld on that basis.

You also raise section 1701.306 of the Occupations Code, which is also encompassed by section 552.101 of the Government Code. Section 1701.306 makes confidential 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"). Section 1701.306 provides:

(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.

¹As our ruling is dispositive for this information, we need not address your remaining raised exceptions to its disclosure.

Occ. Code § 1701.306(a), (b). Upon review, the remaining information does not contain L-2 or L-3 declaration forms. Accordingly, section 1701.306 is not applicable to the remaining information, and no information may be withheld under section 552.101 on that basis.

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 satisfied. *Id.* at 681-82. 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. Whether information is subject to a legitimate public interest and therefore not protected by common-law privacy must be determined on a case-by-case basis. *See* Open Records Decision No. 373 (1983).

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). However, upon review, the remaining criminal history information was provided by the named employee as part of her application for employment with the sheriff. Such information was not compiled by any governmental body. You do not provide arguments demonstrating how any remaining information consists of criminal history record information compiled by the sheriff. Thus, no remaining information at issue may be withheld as a criminal history compilation on the basis of common-law privacy.

This office has found that personal financial information not relating to a financial transaction between an individual and a governmental body is generally intimate or embarrassing. *See* Open Records Decision Nos. 600 at 9-10 (1992), 523 at 3-4 (1989). However, there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. *See* ORD 600 at 9 (information revealing that employee participates in group insurance plan funded partly or wholly by governmental body is not excepted from disclosure); *see also* Open Decision Nos. 545 (1990) (financial information pertaining to receipt of funds from governmental body or debts owed to governmental body not protected by common law privacy), 523 (1989). Upon review, we have marked the personal financial details in the remaining information that are not of legitimate public interest in this instance. The sheriff must withhold this marked information under section 552.101 in conjunction with common-law privacy.

This office has also found some kinds of medical information or information indicating disabilities or specific illnesses are generally highly intimate and embarrassing. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). You claim the submitted information contains medical details that are confidential under common-law privacy. Upon review, we have marked the portions of the remaining information that reveal private medical details of no legitimate public concern. The sheriff must withhold this marked information under section 552.101 of the Government Code in conjunction with common-law privacy. However, you have not provided arguments explaining how the remaining information at issue is highly intimate or embarrassing and of no legitimate public interest. Thus, none of the remaining information may be withheld under section 552.101 on the basis of common-law privacy.

Section 552.102(a) of the Government Code excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). The Texas Supreme Court recently held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, No. 08-0172, 2010 WL 4910163 (Tex. Dec. 3, 2010). Having carefully reviewed the information at issue, we have marked the named employee's birth date that must be withheld under section 552.102(a) of the Government Code. The remaining information, however, is not excepted under section 552.102(a) and may not be withheld on that basis.

Section 552.117(a)(1) of the Government Code excepts from public disclosure the present and former home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who timely request that such information be kept confidential under section 552.024. Gov't Code § 552.117(a)(1). Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Section 552.117 encompasses personal cellular telephone numbers, provided the cellular telephone service is paid for by the employee with his or her own funds. *See* Open Records Decision No. 506 at 5-6 (1988) (statutory predecessor to section 552.117 not applicable to cellular telephone numbers provided and paid for by governmental body and intended for official use). The sheriff may only withhold information under section 552.117(a)(1) on behalf of employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Thus, if the named employee timely elected to keep her personal information confidential, the sheriff must withhold the information we have marked under section 552.117(a)(1) of the Government Code, but may only withhold the cellular telephone numbers if service for those numbers is paid for with the employee's own funds. The sheriff may not withhold this

information under section 552.117(a)(1) if the employee did not make a timely election to keep the information confidential.²

The remaining records contain information that may be subject to section 552.1175 of the Government Code.³ Section 552.1175 provides in part:

(a) This section applies only to:

(1) peace officers as defined by Article 2.12, Code of Criminal Procedure;

...

(5) employees of a district attorney, criminal district attorney, or county or municipal attorney whose jurisdiction includes any criminal law or child protective services matters[.]

(b) Information that relates to the home address, home telephone number, or social security number of an individual to whom this section applies, 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.

Gov't Code § 552.1175(a)(1), (a)(5), (b). The sheriff must withhold the information we have marked under section 552.1175 of the Government Code if (1) this information relates to a peace officer or a district attorney employee whose jurisdiction includes any criminal law or child protective services matters and (2) that employee elects to restrict access to the information in accordance with section 552.1175(b).

Section 552.130 of the Government Code excepts from disclosure information relating to a motor vehicle operator's license or driver's license issued by a Texas agency. *Id.*

²Regardless of the applicability of section 552.117, 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(b).

³The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

§ 552.130(a)(1). The sheriff must withhold the Texas driver's license information we marked in the remaining information under section 552.130 of the Government Code.

Finally, 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." *Id.* § 552.136(b). Section 552.136(a) defines "access device" as "a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to . . . obtain money, goods, services, or another thing of value [or] initiate a transfer of funds other than a transfer originated solely by paper instrument." *Id.* § 552.136(a). You claim the submitted information contains financial documents "comprising means of account access" that are subject to section 552.136. However, you do not identify, and we are unable to locate, such financial documents in the submitted information. *See id.* § 552.301(e)(2) (governmental body must label copy of requested information to indicate which exceptions apply to which parts of the copy). You additionally indicate a highlighted account number should be protected by section 552.136. However, you do not explain, and the remaining information does not reflect, how this number can be used to obtain anything of value or initiate a transfer of funds. Accordingly, we conclude you failed to demonstrate the applicability of section 552.136 to any of the remaining information and no information may be withheld on that basis.

In summary, the sheriff must withhold: (1) the CHRI we marked under section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code; (2) the fingerprints we marked under section 552.101 in conjunction with section 560.003 of the Government Code; (3) the medical records we marked under section 552.101 of the Government Code in conjunction with the MPA; (4) the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy; (5) the information we marked under section 552.102(a) of the Government Code; and (6) the Texas driver's license information we marked under section 552.130 of the Government Code.⁴ The sheriff must also withhold the information we marked under section 552.117(a)(1) of the Government Code if the named sheriff employee properly elected to withhold this information, but may only withhold the cellular telephone numbers if service for those numbers is paid for with the employee's own funds. Finally, the sheriff must withhold the information we have marked under section 552.1175 of the Government Code if (1) this information relates to a peace officer or district attorney employee whose jurisdiction includes any criminal law or child protective services matters and (2) that employee elects

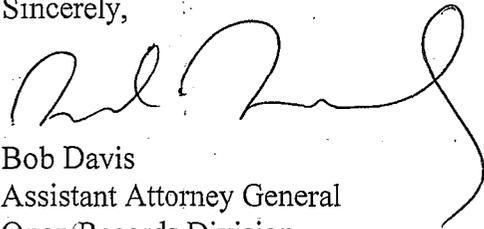
⁴Open Records Decision No. 684 (2009) authorizes a governmental body to withhold ten categories of information without the necessity of requesting an attorney general decision, including direct deposit authorization forms under section 552.101 of the Government Code in conjunction with common-law privacy; fingerprints under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code; as well as a Texas driver's license number and a copy of a Texas driver's license under section 552.130 of the Government Code.

to restrict access to the information in accordance with section 552.1175(b). The remaining submitted 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,



Bob Davis
Assistant Attorney General
Open Records Division

RSD/tf

Ref: ID# 414400

Enc. Submitted documents

c: Requestor
(w/o enclosures)