



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 29, 2011

Mr. Rodolfo Ramirez
Assistant District Attorney
Fort Bend County
301 Jackson, Room 101
Richmond, Texas 77469

OR2011-14166

Dear Mr. Ramirez:

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# 431416.

The Fort Bend County District Attorney's Office (the "district attorney") received a request for all information pertaining to a specified automobile accident. You state the district attorney has released some of the information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.108, 552.114, 552.130, 552.137, and 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments submitted by the attorney for an individual to whom some of the information pertains. *See* Gov't Code § 552.304 (interested party may submit comments to this office stating why the information at issue should or should not be released).

Initially, we note the judiciary is expressly excluded from the requirements of the Act. *See id.* § 552.003(1)(B); *see also id.* § 552.0035 (access to judicial records is governed by rules adopted by Supreme Court of Texas or other applicable laws or rules). This office has determined a grand jury, for purposes of the Act, is a part of the judiciary and therefore is not subject to the Act. *See* Open Records Decision No. 411 (1984). Further, records kept by another person or entity acting as an agent for a grand jury are considered to be records in the constructive possession of the grand jury and therefore are not subject to the Act. *See* Open Records Decisions Nos. 513 (1988), 398 (1983). *But see* ORD 513 at 4 (defining limits of

judiciary exclusion). The fact that information collected or prepared by another person or entity is submitted to the grand jury does not necessarily mean that such information is in the grand jury's constructive possession when the same information is also held in the other person's or entity's own capacity. Information held by another person or entity but not produced at the direction of the grand jury may well be protected under one of the Act's specific exceptions to disclosure, but such information is not excluded from the reach of the Act by the judiciary exclusion. *See* ORD 513. We understand the information we have marked was provided to the district attorney for presentation to the grand jury. Accordingly, we find the information we have marked is held by the district attorney as an agent for the grand jury, and it is not subject to the Act. Our ruling does not address the public availability of this information, and the district attorney need not release it in response to this request.¹

Next, we note the submitted information contains CR-3 crash report forms completed pursuant to chapter 550 of the Transportation Code. *See* Transp. Code § 550.064 (officer's accident report). Section 550.065(b) states that, except as provided by subsection (c) or (e), accident reports are privileged and confidential. Section 550.065(c)(4) provides for the release of accident reports to a person who provides at least two of the following three pieces of information: (1) the date of the accident; (2) the name of any person involved in the accident; and (3) the specific location of the accident. *Id.* § 550.065(c)(4). In this instance, the requestor has provided the district attorney with two of the three required pieces of information specified by the statute. Although you seek to withhold portions of the CR-3 accident report forms under section 552.130 of the Government Code, we note a statutory right of access generally prevails over the Act's exceptions to public disclosure. *See* Open Records Decision Nos. 623 at 3 (1994) (exceptions in Act inapplicable to information statutes expressly make public), 613 at 4 (1993) (exceptions in Act cannot impinge on statutory right of access to information), 451 (1986) (specific statutory right of access provisions overcome general exception to disclosure under the Act). Accordingly, the district attorney must release the submitted CR-3 accident report forms to this requestor in their entirety pursuant to section 550.065(c)(4) of the Transportation Code.

Next, we note some of the submitted information consists of medical records pertaining to the requestor's clients. 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 exception encompasses the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. Section 159.002 of the MPA provides in 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.

¹As our ruling is dispositive, we do not address the remaining arguments for this information.

(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). This office also has concluded that 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 on receipt of the patient's signed, written consent, provided 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. *See* 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). As an attorney for the individuals whose medical records are at issue, the requestor might have a right of access to this information. However, we are unable to determine whether the requestor has acquired the proper consent to obtain these medical records. We have marked the information that is subject to the MPA. The district attorney must release this information upon receipt of a proper authorization under the MPA. In the absence of a proper authorization, the district attorney must withhold the marked medical records under section 552.101 of the Government Code in conjunction with the MPA. *See* Open Records Decision No. 598 (1991). We note that not all of the information for which the district attorney raises the MPA consists of medical records. Accordingly, the MPA is not applicable to any of the remaining information.

Section 552.101 of the Government Code also encompasses section 773.091 of the Health and Safety Code, which 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.

...

(g) The 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.

Health & Safety Code § 773.091(b)–(c), (g). Upon review, we find the information we have marked consists of emergency medical service (“EMS”) records created by EMS personnel documenting emergency medical services provided to two patients by EMS and is therefore confidential under section 773.091(b). However, we note records made confidential by 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. Section 773.093 provides a consent for release of EMS records must specify (1) the information or records to be covered by the release; (2) the reasons or purpose for the release; and (3) the person to whom the information is to be released. *Id.* § 773.093. The requestor may have a right of access to his clients’ EMS information. However, we are unable to determine whether the requestor has acquired the proper consent to obtain these EMS records. The district attorney must release this information upon receipt of a proper authorization under sections 773.092 and 773.093. In the absence of a proper authorization, the district attorney 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 for the information specified by section 773.091(g).

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 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. ORD 565 at 7. The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* at 10–12. 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. Section 411.083(b)(1) and 411.089(a) of the Government Code authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for criminal justice purposes. *See id.* § 411.089(b)(1). We note section 411.083 does not apply to active warrant information or other information relating to an individual’s current involvement with the criminal justice system. *See id.* § 411.081(b) (law enforcement agency allowed to disclose information pertaining to person’s current involvement in the criminal justice system). Further, CHRI

does not include driving record information. *Id.* § 411.082(2)(B). Upon review, we find the information we have marked consists of confidential CHRI. The district attorney must withhold this information under section 552.101 of the Government Code in conjunction with federal law and section 411.083 of the Government Code.² However, none of the remaining information constitutes CHRI. Accordingly, the district attorney may not withhold any of the remaining information under section 552.101 of the Government Code on that basis.

Section 552.101 of the Government Code 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. *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. 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 courthouses 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). Furthermore, we find a compilation of a private citizen's criminal history is generally not of legitimate concern to the public. The requestor seeks information pertaining to a specified automobile accident. Therefore, this request does not require the district attorney to compile unspecified law enforcement records and thus does not implicate any individual's right to privacy. Therefore, the district attorney may not withhold any of the submitted information as a compilation of criminal history under section 552.101 of the Government Code in conjunction with common-law privacy.

However, this office has found common-law privacy generally protects from disclosure personal financial information not relating to a financial transaction between an individual and a governmental body. *See Open Records Decision Nos. 600* (1992) (finding personal financial information to include designation of beneficiary of employee's retirement benefits and optional insurance coverage; choice of particular insurance carrier; direct deposit authorization; and forms allowing employee to allocate pretax compensation to group insurance, health care, or dependent care), 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history). Upon review, we find the information we have marked is highly intimate or embarrassing and of no legitimate concern to the public. The district attorney must withhold the personal financial information we have

²We note an individual can obtain his own CHRI from DPS. *See Gov't Code* § 411.083(b)(3).

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

Section 552.102(b) excepts from disclosure higher education transcripts of professional public school employees, but does not except the employee's name, the courses taken, and the degree obtained from disclosure. Gov't Code § 552.102(b); Open Records Decision No. 526 (1989). Upon review, we find none of the submitted information consists of higher education transcripts of a professional public school employee. Therefore, the district attorney may not withhold any of the submitted information under section 552.102(b) of the Government Code.

Section 552.108 of the Government Code provides, in part:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:

...

(4) it is information that:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from [required public disclosure] if:

...

(3) the internal record or notation:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

Gov't Code § 552.108(a)(4), (b)(3). A governmental body must reasonably explain how and why section 552.108 is applicable to the information at issue. *See id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). The requestor seeks, in part, "any other relevant documents/information taken by . . . [the] Fort Bend County District Attorney's Office pertaining to this accident." You state the information submitted as Exhibit E was prepared by an attorney representing the state in pending criminal litigation. Thus, we understand you to argue the information reveals the mental impressions or legal reasoning of prosecutors in the district attorney's office. Based on your representations and our review, we conclude the district attorney may withhold the information submitted as Exhibit E under section 552.108(a)(4) and (b)(3) of the Government Code.

Section 552.114(a) of the Government Code excepts from disclosure student records "at an educational institution funded wholly or partly by state revenue." Gov't Code § 552.114(a). This office has determined the same analysis applies under section 552.114 and the Family Educational Rights and Privacy Act of 1974 ("FERPA"), section 1232g of title 20 of the United States Code.³ These provisions are applicable only to student records in the custody of an educational institution and records directly transferred from an educational institution to a third party. *See* 34 C.F.R. § 99.33(a)(2). The district attorney is not an educational institution. *See* Open Records Decision No. 309 at 3 (1983) (City of Fort Worth not an "educational agency" for purposes of FERPA). You do not inform us the district attorney received the submitted transcripts directly from an educational institution. We therefore conclude the district attorney may not withhold the transcripts on the basis of section 552.114 of the Government Code.

Section 552.130 of the Government Code excepts from disclosure: (1) information related to a motor vehicle operator's or driver's license or permit issued by an agency of this state or another state or country, (2) information related to a motor vehicle title or registration issued by an agency of this state or another state or country, and (3) information related to a personal identification document issued by an agency of this state or another state or country or a local agency authorized to issue an identification document. Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 4 (to be codified as an amendment to Gov't Code § 552.130). We note section 552.130 is designed to protect personal privacy. As an authorized representative of two individuals whose information is at issue, the requestor has a right of access to some of the information you have marked under section 552.130. *See*

³We note section 552.026, which you also raise, is not an exception to disclosure. Rather, section 552.026 provides the Act does not require the release of information contained in education records except in conformity with FERPA. *See* Gov't Code § 552.026. The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office that FERPA does not permit state and local educational authorities to disclose to this office, without parental consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act. The DOE has determined that FERPA determinations must be made by the educational authority in possession of the education records. We have posted a copy of the letter from the DOE to this office on the Attorney General's website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

Gov't Code § 552.023 (governmental body may not deny access to person to whom information relates or person's agent on ground that information is considered confidential by privacy principles). Accordingly, the district attorney must withhold only the information we have marked under section 552.130 of the Government Code.

Section 552.137 of the Government Code provides "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act]," unless the owner of the e-mail address has affirmatively consented to its release. *Id.* § 552.137(a)–(b). Section 552.137(a) does not apply to an e-mail address "provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public." *Id.* § 552.137(c)(4). Upon review, we find section 552.137(a) does not apply to the e-mail addresses you have marked. Accordingly, the district attorney may not withhold these e-mail addresses under section 552.137 of the Government Code.

Section 552.147 of the Government Code provides "[t]he social security number of a living person is excepted from" required public disclosure under the Act. *Id.* § 552.147. Section 552.147 also is intended to protect personal privacy. *See id.* § 552.023. Therefore, the district attorney may withhold only the social security numbers we have marked under section 552.147.⁴

In summary, the district attorney need not release the information we have marked that is not subject to the Act. The district attorney must release the submitted CR-3 forms we have marked pursuant to section 550.065(c)(4) of the Transportation Code. Unless the district attorney receives proper authorization for release, he must withhold the information we have marked under section 552.101 in conjunction with the MPA and section 773.091 of the Health and Safety Code, except for the information specified by section 773.091(g). The district attorney must withhold the information we have marked under section 552.101 in conjunction with federal law and section 411.083 of the Government Code. The district attorney must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The district attorney may withhold the information submitted as Exhibit E under section 552.108(a)(4) and (b)(3) of the Government Code. The district attorney must withhold the information we have marked under section 552.130 of the Government Code. The district attorney may withhold the

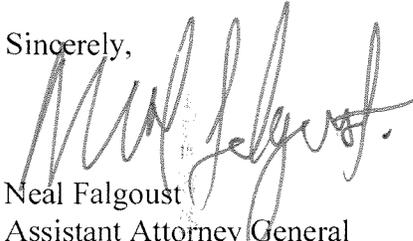
⁴We note section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

social security numbers we have marked under section 552.147. 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,



Neal Falgoust
Assistant Attorney General
Open Records Division

NF/agn

Ref: ID# 431416

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. Andrew A. Wright
Attorney at Law
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⁵We note the requestor has a right of access to some of the information being released. Therefore, if the district attorney receives another request for this same information, he must again seek a ruling from our office.