



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 6, 2011

Ms. Myrna Reingold
Galveston County Legal Department
County Courthouse
722 Moody, 5th Floor
Galveston, TX 77550-2317

OR2011-17975

Dear Ms. Reingold:

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# 438049.

The Galveston County Sheriff's Office (the "sheriff") received a request for a complete copy of the requestor's client's personnel file, all documents reviewed by the AARC in regard to the requestor's client, a complete copy of the Internal Affairs Department file regarding the requestor's client, a copy of the sheriff's policies and procedures regarding termination appeals, and a complete copy of the sheriff's rules of conduct. You advise that you have released some of the requested information to the requestor. You claim that marked portions of the submitted information are excepted from disclosure under sections 552.101, 552.108, 552.117, 552.1175, 552.122, and 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

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 protected by other statutes, including 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. 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 (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 that the Department of Public Safety ("DPS") maintains, except that 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. Thus, any CHRI generated by the federal government or another state may not be made available to the requestor except in accordance with federal regulations. *See* Open Records Decision No. 565 (1990). Furthermore, 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 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. Gov't Code § 411.081(b) (police department allowed to disclose information pertaining to person's current involvement with 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 constitutes confidential CHRI. Accordingly, the sheriff must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code.¹ The remaining information that you have marked under section 411.083 does not constitute confidential CHRI for the purposes of chapter 411 and may not be withheld on that basis.

The submitted information contains L-2 Declaration of Medical Condition and L-3 Declaration of Psychological and Emotional Health forms required by the Texas Commission on Law Enforcement Officers Standards and Education ("TCLEOSE"). These forms are subject to section 1701.306 of the Occupations Code, which is also encompassed by section 552.101 of the Government Code. 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.

¹We note that DPS has the authority to release an individual's own CHRI to that individual. *See* Gov't Code § 411.083(b)(3).

(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.

Act of May 17, 1999, 76th Leg., R.S., ch. 388 § 1, 1999 Tex. Gen. Laws 1431, 2219 *amended by* Act of May 30, 2011 82nd Leg., R.S., ch. 1224 (S.B. 542), § 2 (to be codified as an amendment to Occ. Code § 1701.306). Thus, the sheriff must withhold the submitted L-2 and L-3 declarations, which we have marked, under section 552.101 of the Government Code in conjunction with section 1701.306 of the Occupations Code.

Section 552.101 of the Government Code also encompasses section 1701.454 of the Occupations Code, which governs the public availability of information submitted to TCLEOSE under subchapter J of chapter 1701 of the Occupations Code. Section 1701.454 provides as follows:

(a) All information submitted to [TCLEOSE] under this subchapter is confidential and is not subject to disclosure under [the Act], unless the person resigned or was terminated due to substantiated incidents of excessive force or violations of the law other than traffic offenses.

(b) Except as provided by this subchapter, a [TCLEOSE] member or other person may not release information submitted under this subchapter.

Act of May 23, 2011, 82nd Leg., R.S., S.B. 545, § 4 (to be codified as an amendment to Occ. Code § 1701.454). The submitted information contains four F-5 (“Report of Separation of Licensee”) reports. You state one of the reports is a draft which has not been signed off on by the sheriff, and therefore has not been submitted to TCLEOSE. Accordingly, as this report has not been submitted to TCLEOSE, it is not confidential under section 1701.454 of the Occupations Code, and may not be withheld on that basis. The remaining reports state the officer at issue resigned for reasons other than substantiated incidents of excessive force or violations of the law other than traffic offenses. Therefore, we find section 1701.454 of the Occupations Code is applicable to the remaining three reports.

You ask whether the requestor has a right of access to the F-5 reports under section 1701.452 of the Occupations Code. All three reports relate to resignations occurring before September 1, 2005. Employment termination reports regarding resignations or terminations that occurred before September 1, 2005 are governed by former section 1701.452, which was continued in effect for that purpose.² Former section 1701.452 provided:

²Act of May 30, 2005, 79th Leg., R.S., ch. 1298, § 6, 2005 Tex. Gen. Laws 4092, 4092.

(a) The head of a law enforcement agency shall submit a report to [TCLEOSE] on a form prescribed by [TCLEOSE] regarding a person licensed under this chapter who resigns from the employment of the law enforcement agency or whose appointment with the law enforcement agency is terminated. The agency head shall include in the report an explanation of the circumstances under which the person resigned or was terminated.

(b) The head of the law enforcement agency from which a person resigns or is terminated shall provide to the person a copy of the report. The person may submit a written statement to [TCLEOSE] to contest or explain any matter contained in the report.

Act of May 17, 1999, 76th Leg., R.S., ch. 388, § 1, 1999 Tex. Gen. Laws 1431, 2226 amended by Act of May 30, 2005, 79th Leg., R.S., ch. 1298, § 2, 2005 Tex. Gen. Laws 4092, 4092. One of the reports at issue pertains to the resignation of the requestor's client from the sheriff on January 23, 2001. Accordingly, we find that the requestor has a right of access to the January 23, 2001 F-5 report pursuant to former section 1701.452(b) of the Occupations Code. However, the remaining two F-5 reports pertain to the requestor's client's resignation from other law enforcement agencies. As the sheriff is not the law enforcement agency from which the requestor's client resigned in those instances, former section 1701.452(b) does not provide a right of access to that information and it must be withheld under section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code.

Section 552.101 also encompasses section 611.002 of the Health and Safety Code. Section 611.002 of the Health and Safety Code applies to “[c]ommunications between a patient and a professional, [and] records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional.” Health & Safety Code § 611.002; *see also* Health & Safety Code § 611.001 (defining “patient” and “professional”). Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals. *See id.* §§ 611.004, .0045; Open Records Decision No. 565 (1990). We have marked a mental health record belonging to the requestor's client that is subject to section 611.002 of the Health and Safety Code that must be released if the requestor is authorized to obtain the record under sections 611.004 and 611.0045 of the Health and Safety Code. *See* Health & Safety Code § 611.004(a)(4) (professional may disclose confidential information to person who has patient's written consent).

Section 552.101 also encompasses the Medical Practice Act (the “MPA”), subtitle B of title 3 of the Occupations Code, which pertains to medical records. *See* Occ. Code §§ 151.001-165.160. 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.

(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). Information subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004; Open Records Decision No. 598 (1991). 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 that 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. 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). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). We have marked a medical record belonging to the requestor's client in the remaining information that is subject to the MPA. The sheriff must withhold this information under section 552.101 of the Government Code in conjunction with section 159.002 of the Occupations Code unless it receives written consent for the release of the record that complies with sections 159.004 and 159.005 of the MPA.

Section 552.101 also encompasses the doctrine of common-law privacy. Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus Found. v. Tex Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The type 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. 540 S.W.2d at 683. This office has found some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 343 (1982) (references in emergency medical records to drug overdoses, acute alcohol intoxication, obstetrical or gynecological operations illnesses, convulsions or seizures, and emotional or mental distress), 455 (1987) (information pertaining to prescription drugs, specific illnesses, operations and procedures, and physical disabilities protected from disclosure). The submitted information contains information that is highly intimate or embarrassing and of no legitimate concern to the public. Therefore, the sheriff must

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

Section 552.108(a)(1) excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime.” Gov’t Code § 552.108(a)(1). Generally, a governmental body claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See* Gov’t Code §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state that portions of the submitted information, which you have marked, pertain to a criminal investigation conducted by the Austin Police Department. You also state that the Travis County Attorney’s Office has advised you that the criminal investigation remains pending and the Travis County Attorney’s Office objects to the disclosure of information related to the case. Based upon this representation, we agree that section 552.108 is applicable in this instance and that the release of the portions of the information you have marked would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ’g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975) (court delineates law enforcement interests that are present in active cases), *writ ref’d n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Accordingly, the sheriff may withhold the information you have marked pertaining to the pending case under section 552.108(a)(1) of the Government Code.

You have also marked Austin Police Department officers’ cellular telephone numbers in the remaining information under section 552.108(a)(1) of the Government Code, and state the telephone numbers at issue were exchanged between officers during the investigation or in the process of relaying information to the sheriff to enable it to satisfy its TCLEOSE obligations. However, you also state you are uncertain if the cellular telephone numbers are for government issued cellular telephones or personal cellular telephones. Further, you have provided no representation from the Austin Police Department or Travis County Attorney’s Office that the release of these cellular telephone numbers would interfere with the detection, investigation, or prosecution of crime. Therefore, the sheriff may not withhold these cellular telephone numbers under section 552.108(a)(1) of the Government Code.

Section 552.108(b)(1) of the Government Code excepts from disclosure the internal records and notations of law enforcement agencies and prosecutors when their release would interfere with law enforcement and crime prevention. Gov’t Code § 552.108(b)(1); *see also* Open Records Decision No. 531 at 2 (1989) (quoting *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977)). Section 552.108(b)(1) is intended to protect “information which, if released, would permit private citizens to anticipate weaknesses in a police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate the laws of this State.” *See City of Fort Worth v. Cornyn*, 86 S.W.3d 320 at 327 (Tex. App.—Austin 2002, no writ). To demonstrate the applicability of this exception, a governmental body must meet its burden of explaining how and why release of the requested information would interfere with law enforcement and crime prevention. Open Records

Decision No. 562 at 10 (1990). In Open Records Decision No. 506 (1988), this office determined that the statutory predecessor to section 552.108(b) excepted from disclosure “cellular mobile phone numbers assigned to county officials and employees with specific law enforcement responsibilities.” ORD 506 at 2. We noted that the purpose of the cellular telephones was to ensure immediate access to individuals with specific law enforcement responsibilities and that public access to these numbers could interfere with that purpose. *Id.*

You state the remaining information contains the cellular telephone numbers of various peace officers, both within the sheriff’s office and within the Austin Police Department. You represent that the disclosure of the work cellular telephone numbers of the sheriff’s deputies would impair law enforcement efforts. Therefore, to the extent the numbers you have marked constitute the work cellular telephone numbers of sheriff’s deputies, they may be withheld under section 552.108(b)(1). However, as previously stated, you have provided no representation from the Austin Police Department that the release of the work cellular telephone numbers of the Austin officers would interfere with law enforcement and crime prevention. As such, these cellular telephone numbers may not be withheld under section 552.108(b)(1) of the Government Code.

Section 552.117(a)(2) of the Government Code excepts from public disclosure a peace officer’s home address and telephone number, emergency contact information, social security number, and family member information regardless of whether the peace officer made an election under section 552.024 of the Government Code. Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 2 (to be codified as an amendment to Gov’t Code § 552.117(a)(2)). Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. We note section 552.117 is also applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). The submitted information includes the home addresses, telephone numbers, and family member information of peace officers employed by the sheriff. The sheriff must withhold this information, which we have marked, under section 552.117(a)(2). The submitted information also contains the cellular telephone numbers of peace officers employed by the sheriff. To the extent that these are personal cellular telephone numbers, which service is paid for with personal funds, the sheriff must withhold these numbers under section 552.117(a)(2). However, the sheriff may not withhold these numbers under section 552.117(a)(2) if the service is not paid for with personal funds. We note some of the information you have marked under section 552.117 belongs to the requestor’s client. Under section 552.023 of the Government Code, a person or person’s authorized representative has a special right of access, beyond the right of the general public, to information held by a governmental body that relates to the person and that is protected from public disclosure by laws intended to protect the person’s privacy interests. *See* Gov’t Code § 552.023(a). Therefore, because section 552.117 protects personal privacy, the requestor has a right of access under section 552.023 to information concerning his client.

Section 552.1175 of the Government Code applies to information that the sheriff does not hold in an employment context that concerns the following individuals:

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

(2) county jailers as defined by Section 1701.001, Occupations Code;

...

(4) commissioned security officers as defined by Section 1702.002, Occupations Code;

...

(9) current and former employees of the office of the attorney general who are or were assigned to a division of that office the duties of which involve law enforcement.

Gov't Code § 552.1175(a)(1),(2),(4); Act of May 29, 2011, 82nd Leg., R.S., H.B. 1046, § 2 (to be codified at Gov't Code § 552.1175(a)(9)). If the requested information concerns an individual listed in section 552.1175(a), then section 552.1175(b) provides:

(b) Information that relates to the home address, home telephone number, emergency contact information, 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.

Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 3 (to be codified as an amendment to Gov't Code § 552.1175(b)). Section 552.1175 also excepts from disclosure the personal cellular telephone number of peace officers if the service is not paid for by a governmental body. *See* ORD 506. Upon review, we determine the sheriff must withhold the information we have marked under section 552.1175 if the individuals to whom the information pertains are individuals described by section 552.1175(a), and the individuals elect to restrict access to the information in accordance with section 552.1175(b). If the individuals are not individuals described by section 552.1175(a) or no election is made, the sheriff may not withhold the information under section 552.1175 of the Government Code. To the extent that the cellular telephone numbers we have marked are personal cellular telephone numbers, service of which is paid for with personal funds, the sheriff must withhold these numbers

under section 552.1175. However, the sheriff may not withhold these numbers under section 552.1175 if the service is not paid for with personal funds.

Section 552.122 of the Government Code excepts from disclosure “a test item developed by a . . . governmental body[.]” Gov’t Code § 552.122(b). In Open Records Decision No. 626 (1994), this office determined that the term “test item” in section 552.122 includes “any standard means by which an individual’s or group’s knowledge or ability in a particular area is evaluated,” but does not encompass evaluations of an employee’s overall job performance or suitability. *Id.* at 6. The question of whether specific information falls within the scope of section 552.122(b) must be determined on a case-by-case basis. *Id.* Traditionally, this office has applied section 552.122 where release of “test items” might compromise the effectiveness of future examinations. *Id.* at 4-5; *see also* Open Records Decision No. 118 (1976). Section 552.122 also protects the answers to test questions when the answers might reveal the questions themselves. *See* Attorney General Opinion JM-640 at 3 (1987); ORD 626 at 8. You seek to withhold the submitted entrance exam under section 552.122. Having considered your arguments, we find the entrance exam at issue qualifies as a test item under section 552.122(b). We therefore conclude the sheriff may withhold the entrance exam under section 552.122 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.³ Gov’t Code § 552.147. We note that the remaining information does not contain any social security numbers. Therefore, no portion of the remaining information may be withheld under section 552.147 of the Government Code.

In summary, the sheriff 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 sheriff must withhold the L-2 and L-3 forms under section 552.101 in conjunction with section 1701.306 of the Occupations Code. The sheriff must withhold the F-5 forms we have marked under section 552.101 in conjunction with section 1701.454 of the Occupations Code. The sheriff may only release the marked mental health record if it receives the proper authorization for release of the record under sections 611.004 and 611.0045 of the Occupations Code. The sheriff may only release the marked medical record if it receives proper consent pursuant to the MPA. The sheriff must withhold the information we have marked under section 552.101 in conjunction with common-law privacy. The sheriff may withhold the information you have marked related to the ongoing criminal investigation under section 552.108(a)(1) of the Government Code. The sheriff may withhold the work cellular telephone numbers of sheriff’s deputies under section 552.108(b)(1) of the Government Code. The sheriff must withhold the home address and telephone number, and family member information of sheriff’s deputies, which we have marked, under section 552.117(a)(2) of the Government Code. The sheriff must withhold the personal

³Section 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. Gov’t Code § 552.147(b).

cellular telephone numbers of sheriff's deputies pursuant to section 552.117(a)(2) of the Government Code if the service is paid for with personal funds. If the individuals whose information we have marked under section 552.1175 are individuals described by section 552.1175(a) and elect to restrict access to their information, the sheriff must withhold this information under section 552.1175 of the Government Code. The sheriff must withhold the personal cellular telephone numbers we have marked under section 552.1175 if the service is paid for with personal funds and the individuals have elected to restrict access to this information. The sheriff may withhold the entrance exam under section 552.122 of the Government Code. The remaining information must be released.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 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,



Jessica Marsh
Assistant Attorney General
Open Records Division

JM/em

Ref: ID# 438049

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁴As you acknowledge, the requestor, as the authorized representative of the subject of the information, has a right of access to some of the information being released. *See* Gov't Code § 552.023(b) (governmental body may not deny access to person to whom information relates, or that person's representative, solely on grounds that information is considered confidential by privacy principles). Because this information would be confidential with respect to the general public, if the sheriff receives another request for this information, the sheriff must again seek a ruling from this office.