



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

January 4, 2012

Ms. Laura Ingram  
Assistant District Attorney  
Wichita County District Attorney's Office  
900 Seventh Street  
Wichita Falls, Texas 76301-2482

OR2012-00148

Dear Ms. Ingram:

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# 441356.

The Wichita County District Attorney's Office (the "district attorney") received a request for all documents regarding a specified assault. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.108, 552.1325, 552.130, and 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we must address the district attorney's obligations under the Act. Section 552.301 describes the procedural obligations placed on a governmental body that receives a written request for information it wishes to withhold. Pursuant to section 552.301(b) of the Government Code, the governmental body must request a ruling from this office and state the exceptions to disclosure that apply within ten business days after receiving the request. *See* Gov't Code § 552.301(b). Pursuant to section 552.301(e) of the Government Code, the governmental body is required to submit to this office within fifteen business days of receiving the request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See id.* § 552.301(e). In this instance, you state the district attorney received the request for information on September 27, 2011. Accordingly, the district

attorney's ten- and fifteen-business-day deadlines were October 11, 2011, and October 18, 2011, respectively. You state the district attorney deposited its request for a ruling from this office, comments explaining why its stated exceptions apply, and a copy of the information requested "into the courthouse mailing system" on October 11, 2011. However, we note the original request for ruling was submitted in an envelope with a postmark of October 12, 2011. Further, you state, and the submitted information reflects, the original submission was returned to the district attorney for insufficient postage and the district attorney again mailed the required information to this office in an envelope bearing a postmark of October 25, 2011. Section 552.308 of the Government Code provides when a submission within a specified time period is required under the Act, the time requirement is met if the submission is sent by first class United States mail "with postage . . . prepaid" and the postmark date is within the required time period. *See id.* § 552.308. Because the district attorney did not submit the information required by sections 552.301(b) and 552.301(e) within the required time periods, we find the district attorney failed to comply with the requirements of section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the requirements of section 552.301 results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See id.* § 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); Open Records Decision No. 630 (1994). Generally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third party interests are at stake. Open Records Decision No. 150 at 2 (1977). We note sections 552.103, 552.107, and 552.108 of the Government Code are discretionary in nature. They serve only to protect a governmental body's interests, and may be waived; as such, they do not constitute compelling reasons to withhold information for purposes of section 552.302. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 676 at 11-12 (2002) (attorney-client privilege under section 552.107 subject to waiver), 665 at 2 n.5 (2000) (discretionary exceptions in general), 663 at 5 (1999) (waiver of discretionary exceptions), 177 at 3 (1977) (statutory predecessor to section 552.108 subject to waiver). Thus, no portion of the submitted information may be withheld under sections 552.103, 552.107, or 552.108 of the Government Code. However, because sections 552.101, 552.130, and 552.1325 of the Government Code can provide compelling reasons to withhold information, we will consider the applicability of your claims under these exceptions for 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. This exception encompasses the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code, which governs medical records. *See Occ. Code* §§ 151.001-167.202. 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.

(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(a)-(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). The submitted information contains an individual's medical records, which we have marked. The marked medical records must be withheld under section 552.101 of the Government Code in conjunction with section 159.002 of the MPA unless the district attorney receives the required consent for release under the MPA. ORD 598.

Section 552.101 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. 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 CHRI does not include information relating to routine traffic violations. *See id.* § 411.082(2)(B). You assert portions of the remaining information are confidential pursuant to section 411.083. Upon review, we find the information we have marked constitutes CHRI for purposes of chapter 411. Accordingly, the district attorney must withhold this information under section 552.101 in conjunction with section 411.083. However, none of the remaining information constitutes CHRI for purposes of chapter 411 and the district attorney may not withhold any of this remaining information under section 552.101 on that basis.

The remaining information contains a fingerprint. Section 552.101 also encompasses section 560.003 of the Government Code, which provides “[a] biometric identifier in the possession of a governmental body is exempt from disclosure under [the Act].” *Id.* § 560.003; *see id.* § 560.001(1) (“biometric identifier” means retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry). There is no indication the requestor has a right of access to the fingerprint under section 560.002. *See id.* § 560.002(1)(A) (governmental body may not sell, lease, or otherwise disclose individual’s biometric identifier to another person unless the individual consents to disclosure). Therefore, the district attorney must withhold the fingerprint you have marked under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code.<sup>1</sup>

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 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 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). Furthermore, a compilation of a private citizen’s criminal history is generally not of legitimate concern to the public. This office has also found that personal financial information not relating to a financial transaction between an individual and a governmental body is generally protected by common-law privacy. *See Open Records Decision Nos. 545 at 4* (1990) (attorney general has found kinds of financial information not excepted from public disclosure by common-law privacy to generally be those regarding receipt of governmental funds or debts owed to governmental entities), *373 at 4* (1983) (determination of whether public’s interest in obtaining personal financial information is sufficient to justify its disclosure must be made

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<sup>1</sup>This office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including fingerprints under section 552.101 in conjunction with section 560.003, without the necessity of requesting an attorney general decision.

on case-by-case basis). We find the information we have marked is highly intimate or embarrassing and a matter of no legitimate public interest and must be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.130 of the Government Code provides information relating to a motor vehicle operator's license or driver's license issued by a Texas agency, or an agency of another state or country, is excepted from public release. Gov't Code § 552.130(a)(1). Therefore, the district attorney must withhold the driver's license number you have marked in the remaining information under section 552.130 of the Government Code. However, none of the remaining information you have marked is subject to section 552.130 and the district attorney may not withhold it on that basis.

You assert some of the remaining information is excepted under section 552.1325 of the Government Code, which provides:

(a) In this section:

(1) "Crime victim" means a person who is a victim as defined by Article 56.32, Code of Criminal Procedure.

(2) "Victim impact statement" means a victim impact statement under Article 56.03, Code of Criminal Procedure.

(b) The following information that is held by a governmental body or filed with a court and that is contained in a victim impact statement or was submitted for purposes of preparing a victim impact statement is confidential:

(1) the name, social security number, address, and telephone number of a crime victim; and

(2) any other information the disclosure of which would identify or tend to identify the crime victim.

Gov't Code § 552.1325. The definition of a victim under article 56.32 of the Code of Criminal Procedure includes an individual who suffers physical or mental harm as a result of criminally injurious conduct. Crim. Proc. Code § 56.32(a)(10), (11). The information at issue consists of a victim impact statement as defined by article 56.03 of the Code of Criminal Procedure that was completed by the victim in the case at issue. *See id.* § 56.03. The statement reflects the victim suffered economic and mental harm as a result of the criminally injurious conduct. Therefore, the district attorney must withhold the crime victim's name, address, telephone number, and other identifying information we have marked in the information at issue under section 552.1325 of the Government Code.

Section 552.147(a) of the Government Code excepts the social security number of a living individual from public disclosure. Gov't Code § 552.147. The district attorney may

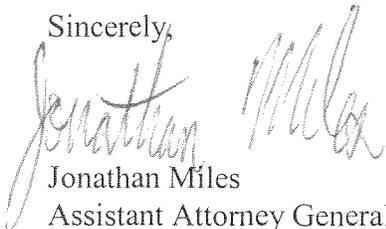
withhold social security numbers from the remaining information under section 552.147 of the Government Code.

In summary, the district attorney may only release the medical information we have marked in accordance with the MPA. The district attorney must withhold the CHRI we have marked under section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code, the fingerprint you have marked under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code, the personal financial information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy, the driver's license number you have marked in the remaining information under section 552.130 of the Government Code, and the crime victim's name, address, telephone number, and other identifying information we have marked in the victim impact statement under section 552.1325 of the Government Code. The district attorney may withhold the social security numbers in the submitted information under section 552.147 of the Government Code. The remaining 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](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,



Jonathan Miles  
Assistant Attorney General  
Open Records Division

JM/em

Ref: ID# 441356

Enc. Submitted documents

c: Requestor  
(w/o enclosures)