



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 25, 2012

Lieutenant Carol Taylor
Commander - Communications/Records
Taylor County Sheriff's Office
450 Pecan Street
Abilene, Texas 79602

OR2012-01224

Dear Lieutenant Taylor:

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# 443538.

The Taylor County Sheriff's Office (the "sheriff") received a request for information pertaining to a named individual. You claim the requested information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, you assert some of the submitted information is not responsive to the present request. Upon review, we find the information we have marked pertains solely to individuals other than the named individual. Thus, the information we have marked is not responsive to the present request. The sheriff need not release nonresponsive information in response to this request, and this ruling will not address that information. However, the remaining information you assert is not responsive is contained in statements written by the named individual and Officer's Incident Reports regarding events in which the named individual was involved. Upon review, we find this information pertains to the named individual. Therefore, this information is responsive to the present request and must be released unless an exception to disclosure applies.

Next, you inform us the responsive information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2011-14921 (2011). You seek to withhold the responsive information pursuant to that previous ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney

general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). In Open Records Letter No. 2011-14921, we determined that, to the extent the sheriff maintained law enforcement records depicting the named individual as a suspect, arrestee, or criminal defendant, the sheriff must withhold such information under section 552.101 of the Government Code in conjunction with common-law privacy. While the requestor in the present request is the same requestor as in Open Records Letter No. 2011-14921, we note the requestor is now acting as the authorized representative of the individual whose private information is at issue. *See* Gov't Code § 552.023 (governmental body may not deny access to person to whom information relates or person's agent on grounds that information is considered confidential by privacy principles). Accordingly, because the law, facts, and circumstances on which Open Records Letter No. 2011-14921 was based have changed, the sheriff may not rely on Open Records Letter No. 2011-14921 as a previous determination and, thus, may not withhold the responsive information on the basis of that ruling. We will now address your arguments against disclosure of the responsive 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." *Id.* § 552.101. This section 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. 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, we find that a compilation of a private citizen's criminal history is generally not of legitimate concern to the public.

The present request requires the sheriff to compile unspecified law enforcement records, thus implicating the privacy of the named individual. We note, however, the requestor has provided a form signed by the named individual authorizing the requestor to receive the requested information. Thus, as the named individual's authorized representative, the requestor has a special right of access to information that would ordinarily be withheld to protect the named individual's privacy interests. *See* Gov't Code § 552.023(b). Accordingly, the requestor has a special right of access to the information at issue, and the sheriff may not withhold any of this information under section 552.101 in conjunction with common-law privacy as a criminal history compilation.

We next note the submitted responsive information contains the named individual's fingerprints. Access to fingerprint information is governed by sections 560.001, 560.002, and 560.003 of the Government Code. Section 560.001 provides in part that "[i]n this chapter . . . '[b]iometric identifier' means a retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry." *Id.* § 560.001(1). Section 560.003 provides that "[a] biometric identifier in the possession of a governmental body is exempt from disclosure under [the Act]." *Id.* § 560.003. Section 560.002 provides, however, that "[a] governmental body that possesses a biometric identifier of an individual . . . may not sell, lease, or otherwise disclose the biometric identifier to another person unless . . . the individual consents to the disclosure[.]" *Id.* § 560.002(1)(A). Thus, section 560.002(1)(A) of the Government Code gives an individual or her authorized representative a right of access to her own fingerprint information. Accordingly, as the named individual's authorized representative, the requestor has a right of access to the named individual's fingerprints under section 560.002(1)(A). Therefore, the sheriff must release the submitted fingerprints to this requestor under section 560.002 of the Government Code.

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. *See id.* § 411.082(2)(B) (term CHRI does not include driving record information). Upon review, we find the information we have marked constitutes CHRI the sheriff must withhold under section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code and federal law.

Section 552.101 also encompasses information protected by section 261.201(a) of the Family Code, which provides as follows:

- (a) [T]he following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for

purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

- (1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and
- (2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Fam. Code § 261.201(a). We note the information we have marked consists of files, reports, records, communications, audiotapes, video tapes, or working papers used or developed in an investigation of alleged child abuse or neglect under chapter 261. *See id.* § 261.001(1), (4) (defining “abuse” and “neglect” for the purposes of chapter 261 of the Family Code); Penal Code § 22.041(c) (concerning offense of endangering a child). Accordingly, we find the sheriff must withhold the marked information under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code.

Section 552.101 also encompasses medical records, which are confidential under 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.
- (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 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). Medical records must be released on receipt of signed, written consent, provided that 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 id.* §§ 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); ORD 565 at 7. We have marked the named individual’s medical records. In this instance, the requestor has provided an authorization signed by the named individual for disclosure of

the marked medical records. Consequently, if the sheriff determines the requestor has provided proper consent in accordance with the MPA, it must release the marked medical records. If the sheriff determines the requestor has not provided proper consent, it must withhold the marked medical records under section 552.101 of the Government Code in conjunction with the MPA.

Section 552.101 also encompasses constitutional privacy. Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4(1987). The first type protects an individual's autonomy within "zones of privacy," which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common-law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)).

This office has applied privacy to protect certain information about incarcerated individuals. See Open Records Decision Nos. 430 (1985), 428 (1985), 185 (1978). Citing *State v. Ellefson*, 224 S.E.2d 666 (S.C. 1976), as authority, this office held those individuals who correspond with inmates possess a "first amendment right . . . to maintain communication with [the inmate] free of the threat of public exposure." This office ruled this right would be violated by the release of information that identifies those correspondents because such a release would discourage correspondence. See ORD 185. The information at issue in this ruling was the identities of individuals who had corresponded with inmates. In Open Records Decision No. 185, our office found that "the public's right to obtain an inmate's correspondence list is not sufficient to overcome the first amendment right of the inmate's correspondents to maintain communication with him free of the threat of public exposure." *Id.* Implicit in this holding is the fact that an individual's association with an inmate may be intimate or embarrassing. In Open Records Decision Nos. 428 and 430, our office determined inmate visitor and mail logs that identify inmates and those who choose to visit or correspond with inmates are protected by constitutional privacy because people who correspond with inmates have a First Amendment right to do so that would be threatened if their names were released. ORD 430. Further, we recognized inmates had a constitutional right to visit with outsiders and could also be threatened if their names were released. See also ORD 185. The rights of those individuals to anonymity were found to outweigh the public's interest in this information. *Id.*; see ORD 430 (list of inmate visitors protected by constitutional privacy of both inmate and visitors). We have marked the identifying information of individuals who corresponded with the named individual when she was an inmate. Although the requestor is the authorized representative of the inmate at issue, we note the requestor does not have a right of access to the marked information under section 552.023 of the Government Code because the constitutional rights of the other parties are also implicated. See ORD 430. Accordingly, the sheriff must withhold the information

we have marked under section 552.101 in conjunction with constitutional privacy.¹ The remaining information you have marked pertains to the named inmate's family members when those family members are not listed as visitors or correspondents, but only as emergency contact information. Upon review, we find you have failed to demonstrate how this information falls within the zones of privacy or implicates an individual's privacy interests for purposes of constitutional privacy. Therefore, the sheriff may not withhold any of the remaining information you have marked under section 552.101 on the basis of constitutional privacy.

You also claim the remaining information you have marked is subject to the doctrine of common-law privacy. As previously discussed, common-law privacy is encompassed by section 552.101. Common-law privacy 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.*, 540 S.W.2d 668, 685. The type 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. We note names, addresses, and telephone numbers of individuals are not highly intimate or embarrassing. *See* ORD 455 at 7 (names and addresses not protected by privacy). Upon review, we find you have failed to demonstrate how the remaining information you have marked is highly intimate or embarrassing and not of legitimate public interest. Therefore, the sheriff may not withhold any portion of the remaining information you have marked under section 552.101 in conjunction with common-law privacy.

In summary, the sheriff must release the submitted fingerprints to this requestor under section 560.002 of the Government Code. The sheriff must withhold the information we have marked under section 552.101 in conjunction with chapter 411 of the Government Code and federal law. The sheriff must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code. If the sheriff determines the requestor has provided proper consent in accordance with the MPA, it must release the marked medical records. If the sheriff determines the requestor has not provided proper consent, it must withhold the marked medical records under section 552.101 in conjunction with the MPA. The sheriff must withhold the information we have marked under section 552.101 in conjunction with constitutional privacy. The remaining responsive information must be released to this requestor.²

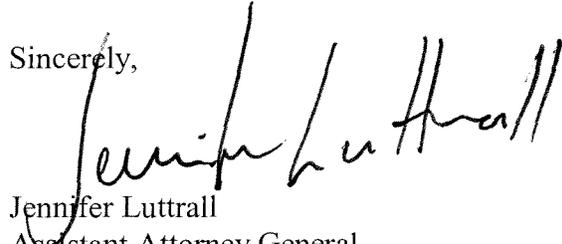
¹As our ruling on this information is dispositive, we need not address your remaining argument against its disclosure.

²Because the requestor has a right of access to certain information that otherwise would be excepted from release under the Act, the sheriff must again seek a decision from this office if it receives a request for this information from a different requestor.

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,

A handwritten signature in black ink that reads "Jennifer Luttrall". The signature is written in a cursive style with a large initial "J".

Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/dls

Ref: ID# 443538

Enc. Submitted documents

c: Requestor
(w/o enclosures)