ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 28, 2012

Ms. Donna L. Johnson
For the City of Cleveland
Olson & Olson L.L.P.
2727 Allen Parkway, Suite 600
Houston, Texas 77019-2133

OR2012-19136

Dear Ms. Johnson:

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# 472154 (Ref No. COC12-044).

The City of Cleveland (the "city"), which you represent, received a request for information pertaining to an incident involving the requestor that occurred on a specified date. You state you will redact information subject to section 552.147(b) of the Government Code.[1] You claim a portion of the submitted information is excluded from the requirements of the Act. You also claim portions of the submitted information are excepted from disclosure under sections 552.101 and 552.130 of the Government Code. We have considered your arguments and reviewed the submitted information.

Initially, you inform us some of the submitted information consists of grand jury information that is not subject to the Act. The Act applies only to information that is "collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business by a governmental body." Gov't Code § 552.002(a)(1). However, the Act's definition of "governmental body" "does not include the judiciary." *See id.* § 552.003(1)(B). Information that is "collected, assembled or maintained by or for the judiciary" is not subject

[1]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 an attorney general decision under the Act. *See* Gov't Code § 552.147(b).

to the Act. *Id.* § 552.0035(a); *see also* Tex. Sup. Ct. R. 12. Consequently, records of the judiciary need not be released under the Act. *See* Attorney General Opinion DM-166 (1992). *But see Benavides v. Lee*, 665 S.W.2d 151 (Tex. App.—San Antonio 1983, no writ); Open Records Decision No. 646 at 4 (1996) ("function that a governmental entity performs determines whether the entity falls within the judiciary exception to the . . . Act."). This office has determined a grand jury, for purposes of the Act, is a part of the judiciary and is, therefore, 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). However, the fact that information collected or prepared by another person or entity is submitted to the grand jury does not necessarily mean 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 id.*

You do not inform us whether the city has possession of the information at issue as an agent for the grand jury. Thus, to the extent the information at issue is held by the city as an agent of the grand jury, it consists of records of the judiciary not subject to disclosure under the Act, and we do not address its public availability. To the extent the information at issue does not consist of records of the judiciary, we will address your exceptions to disclosure.

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. The city seeks to withhold grand jury information under article 20.02 of the Code of Criminal Procedure. Article 20.02(a) provides "[t]he proceedings of the grand jury shall be secret." Crim. Proc. Code art. 20.02(a). Article 20.02, however, does not define "proceedings" for purposes of subsection (a). Therefore, we have reviewed case law for guidance and found that Texas courts have not often addressed the confidentiality of grand jury subpoenas under article 20.02. Nevertheless, the court in *In re Reed* addressed the issue of what constitutes "proceedings" for purposes of article 20.02(a) and stated that although the court was aware of the policy goals behind grand jury secrecy, the trial court did not err in determining the grand jury summonses at issue were not proceedings under article 20.02. *See In re Reed*, 227 S.W.3d 273, 276 (Tex. App.—San Antonio 2007, orig. proceeding). The court further stated that the term "proceedings" could "reasonably be understood as encompassing matters that take place before the grand jury, such as witness testimony and deliberations." *Id.* at 276. The court also discussed that, unlike federal law, article 20.02 does not expressly make subpoenas confidential. *See id.*; FED. R. CRIM. P. 6(e)(6).

Subsequent to the ruling in *Reed*, the 80th Legislature, modeling federal law, added subsection (h) to article 20.02 to address grand jury subpoenas. *See* Crim. Proc. Code art. 20.02; *see also* FED. R. CRIM. P. 6(e)(6) ("Records, orders, and subpoenas relating to grand-jury proceedings must be kept under seal to the extent and as long as necessary to prevent the unauthorized disclosure of a matter occurring before a grand jury."). Article 20.02(h) states that "[a] subpoena or summons relating to a grand jury proceeding or investigation must be kept secret to the extent and for as long as necessary to prevent the unauthorized disclosure of a matter before the grand jury." Crim. Proc. Code art. 20.02(h). This provision, however, does not define or explain what factors constitute "necessary to prevent the unauthorized disclosure of a matter before the grand jury." *Id.* Because article 20.02(h) is modeled on federal law, we reviewed federal case law for guidance on a definition or explanation of the factors that would constitute "necessary to prevent the unauthorized disclosure of a matter before the grand jury" for the purposes of keeping grand jury subpoenas secret. Our review of federal case law revealed that federal courts have ruled inconsistently on the issue of whether or not grand jury subpoenas must be kept secret. FED. R. CRIM. P. 6(e)(6) advisory committee's note (stating federal case law has not consistently stated whether or not subpoenas are protected by rule 6(e)). Furthermore, even if we considered article 20.02 to be a confidentiality provision, information withheld under this statute would only be secret "for as long as necessary to prevent the unauthorized disclosure of a matter before the grand jury." *Id.*

You have not submitted any arguments explaining how the matter upon which the submitted information was based is still "before the grand jury" to warrant keeping the information secret. Furthermore, you have provided a representation from the Cleveland Police Department stating this matter ended in a conviction. Therefore, upon review of article 20.02 and related case law, it is not apparent, and you have not otherwise explained, how this provision makes any of the submitted information confidential. *See* Open Records Decision No. 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). Consequently, the submitted subpoenas may not be withheld under section 552.101 in conjunction with article 20.02 of the Code of Criminal Procedure.

The city also seeks to withhold the documents responsive to the subpoenas under article 20.02. We note, however, that the information at issue consists of information the city compiled in the normal course of business. The requestor did not request records subpoenaed by a grand jury; she requested records the city normally maintains. The fact that certain records may have been subpoenaed by a grand jury does not make the records confidential under article 20.02. Upon review, we find you have not explained how the information at issue falls within the categories of information that Texas courts have construed at "proceedings" for the purposes of article 20.02 of the Code of Criminal Procedure. We therefore conclude the city may not withhold any of the submitted information under section 552.101 in conjunction with article 20.02(a) of the Code of Criminal Procedure. *Cf.* Open Records Decision No. 513 at 4 (1988) (fact that information

collected or prepared by another person or entity is submitted to grand jury does not necessarily mean that such information is confidential in possession of district attorney).

Section 552.101 also encompasses section 371.206 of the Finance Code, which reads as follows:

> Information obtained during an examination or inspection authorized by this subchapter is confidential and privileged except for use by the [consumer credit] commissioner or in a criminal investigation or prosecution.

Fin. Code § 371.206. Additionally, section 371.204 of the Finance Code requires a pawnbroker to allow a peace officer to inspect the pawnbroker's books, accounts, papers, correspondence, or other records that relate to the business of the pawnbroker at any reasonable time without judicial writ or other process. *See id.* § 371.204. You indicate a portion of the submitted information was acquired from an inspection of a pawn shop as authorized under section 371.204. Based upon your representation and our review, we conclude the information we have marked is confidential pursuant to section 371.206 of the Finance Code. Therefore, the city must withhold the information we have marked under section 552.101 in conjunction with section 371.206 of the Finance Code.

Section 552.101 of the Government Code also encompasses information protected by the Medical Practice Act ("MPA"), subtitle B of title 3 of the Occupations Code. Section 159.002 of the MPA provides in relevant part:

> (b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.
>
> (c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

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). We have also found when a file is created as the result of a hospital stay, all the documents in the file relating to diagnosis and treatment constitute physician-patient communications or "[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician." Open Records Decision No. 546 (1990). Upon review, we find the information we have marked must be withheld

under section 552.101 in conjunction with the MPA. However, we find none of the remaining information you seek to withhold constitutes medical records or information obtained from medical records. Accordingly, the city may not withhold any of the remaining information under section 552.101 in conjunction with the MPA.

Section 552.101 of the Government Code also encompasses chapter 772 of the Health and Safety Code which authorizes the development of local emergency communication districts. Sections 772.118, 772.218, and 772.318 of the Health and Safety Code are applicable to emergency 9-1-1 districts established in accordance with chapter 772. *See* Open Records Decision No. 649 (1996). These sections make the originating telephone numbers and addresses of 9-1-1 callers furnished by a service supplier confidential. *Id.* at 2. Section 772.118 applies to an emergency communication district for a county with a population of more than two million. Section 772.218 applies to an emergency communication district for a county with a population of more than 860,000. Section 772.318 applies to an emergency communication district for a county with a population of more than 20,000.

We understand the city is part of an emergency communication district established under section 772.318. You indicate the telephone numbers and addresses you have marked to be withheld under section 772.318 are the originating telephone numbers and addresses of 9-1-1 callers. Provided the telephone numbers and addresses you have marked were furnished by a service supplier, the city must withhold the telephone numbers and addresses under section 552.101 of the Government Code in conjunction with section 772.318 of the Health and Safety Code. However, if the 9-1-1 callers' telephone numbers and addresses were not furnished by a service supplier, then this information may not be withheld under section 552.101 in conjunction with section 772.318 and must be released.

Section 552.101 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.* 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. Sections 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). 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* ORD 565. 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. Upon review, we find the Federal Bureau of Investigation ("FBI") number, which we have marked, constitutes CHRI generated by the FBI. Accordingly, the city 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.

Section 552.101 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 met. *Id.* at 681-82. The types 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. *See id.* at 683. In addition, 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. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). This office has also found 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) (finding significant privacy interest in compilation of individual's criminal history by recognizing distinction between public records found in courthouse files and local police stations and compiled summary of criminal history information). Furthermore, we find a compilation of a private citizen's criminal history is generally not of legitimate concern to the public. Upon review, we find portions of the remaining information are highly intimate or embarrassing and of no legitimate public interest. Accordingly, the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy.

You state you will redact driver's license numbers subject to section 552.130(c).[2] Section 552.130 of the Government Code provides information relating to a motor vehicle operator's license, driver's license, motor vehicle title or registration, and personal

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[2]Section 552.130(c) of the Government Code authorizes a governmental body to redact the information described in subsections 552.130(a)(1) and (a)(3) without the necessity of requesting a decision from this office. *See* Gov't Code § 552.130(c); *see also id.* § 552.130(d)-(e) (requestor may appeal governmental body's decision to withhold information under section 552.130(c) to attorney general, and governmental body withholding information pursuant to section 552.130(c) must provide notice to requestor).

identification document issued by an agency of this state or another state or country is excepted from public release. Gov't Code § 552.130(a)(1)-(3). We note portions of the information you have marked does not consist of motor vehicle record information. Additionally, the submitted information contains additional motor vehicle record information. Accordingly, the city must withhold the information we have marked under section 552.130 of the Government Code.

Section 552.137 of the Government Code excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body," unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c).[3] *Id.* § 552.137(a)-(c). Accordingly, the city must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the addresses have affirmatively consented to their release. *See id.* § 552.137(b).

In summary, to the extent the city maintains the submitted grand jury information as an agent of the grand jury, that information is not subject to the Act and need not be released. The city must withhold the information we have marked under section 552.101 in conjunction with section 371.206 of the Finance Code. The city must withhold the information we have marked under section 552.101 in conjunction with the MPA. To the extent the telephone numbers and addresses you have marked were furnished by a service supplier, the city must withhold the telephone numbers and addresses under section 552.101 of the Government Code in conjunction with section 772.318 of the Health and Safety Code. The city 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 and common-law privacy. The city must withhold the information we have marked under section 552.130 of the Government Code. The city must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the addresses have affirmatively consented to their release. 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.

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

[4]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 an attorney general decision under the Act. *See* Gov't Code § 552.147(b).

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,

Kathleen J. Santos
Assistant Attorney General
Open Records Division

KJS/som

Ref: ID# 472154

Enc. Submitted documents

c: Requestor
(w/o enclosures)