



April 11, 2001

Ms. Pamela Smith
Assistant General Counsel
Texas Department of Public Safety
P.O. Box 4087
Austin, Texas 78773-0001

OR2001-1453

Dear Ms. Smith:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 145873.

The Texas Department of Public Safety (the "department") received three requests for information relating to the department's investigation into alleged excessive use of force by a police officer. You state that the department will release most of the requested information to the requestors. However, you claim that some of the requested information is excepted from disclosure under sections 552.101 and 552.119 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

You first contend that some of the responsive information is confidential under the Medical Practice Act (the "MPA"). Section 159.002 of the MPA provides:

- (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.

Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See* Occ. Code §§ 159.002, .004; Open Records Decision No. 598 (1991). 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). We have further found that 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). Medical records may be released only as provided under the MPA. Occ. Code §§ 159.002, .004, .005; Open Records Decision No. 598 (1991).

We agree that most of the submitted information is subject to the MPA and, therefore, may be released only in accordance therewith. However, the remaining information you believe to be subject to the MPA does not appear to consist of either a confidential communication between a physician and patient or information in a medical record dealing with the identity, diagnosis, evaluation, or treatment of a patient. We have marked the information that is not subject to the MPA with green tabs.

With respect to the information that is not subject to the MPA, we note that some of the information is excepted under section 552.101 of the Government Code. Section 552.101 excepts “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Section 552.101 encompasses the doctrine of common law privacy, which 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. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). This office has previously found that information revealing an individual’s choice of insurance carrier is protected under common law privacy. Open Records Decision No. 600 at 10-11 (1992). We have marked the information that is protected by common law privacy.

Social security numbers may also be protected from disclosure in some circumstances under section 552.101 of the Government Code. A social security number or “related record” is confidential under the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), if it was obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 (1994). We have no basis for concluding that the social security number in the file is confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Public Information Act imposes criminal penalties for the release of confidential information. Prior to releasing the social security number information, you should ensure that it was not obtained or is not maintained by the department pursuant to any provision of law, enacted on or after October 1, 1990.

We note that the one of the requestors, an attorney, indicates that he represents the individual whose social security number is included in the submitted information and whose privacy interests are implicated. Under section 552.023 of the Government Code, “[a] person or a 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.” The common law privacy doctrine and section 405(c)(2)(C)(viii)(I) of the Social Security Act are designed to protect a person’s privacy interest. Therefore, the attorney for the individual whose privacy interest is implicated has a special right of access to the information that is confidential under common law privacy and the Social Security Act. The department must therefore release this information to the individual’s attorney.

You also contend that a responsive videotape is excepted from disclosure under section 552.119 of the Government Code. Section 552.119 excepts from public disclosure a photograph of a peace officer¹ that, if released, would endanger the life or physical safety of the officer unless one of three exceptions applies. The three exceptions are: (1) the officer is under indictment or charged with an offense by information; (2) the officer is a party in a fire or police civil service hearing or a case in arbitration; or (3) the photograph is introduced as evidence in a judicial proceeding. This section also provides that a photograph exempt from disclosure under this section may be made public only if the peace officer gives written consent to the disclosure. Open Records Decision No. 502 (1988). The videotape in question includes the images of two peace officers. It does not appear that any of the exceptions to section 552.119 apply. Furthermore, you have not informed us that the peace officers depicted in the videotape executed written consents to disclosure of their pictures. Therefore, the department must withhold the videotape under section 552.119 of the Government Code to the extent that the videotape necessarily depicts the peace officers in a manner that reveals their identities. Because you state that “it is impossible for the Department to edit out the images of the officers,” we find that you must withhold the videotape in its entirety.

In summary, the department must withhold most of the submitted information under the MPA unless otherwise authorized thereunder. The department must also withhold certain portions of the remaining information in the submitted documents under section 552.101 of the Government Code and common law privacy. Finally, the department must withhold the submitted videotape under section 552.119 of the Government Code. The department must release the remainder of the information, which we have marked.

This letter ruling is limited to the particular records 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 records or any other circumstances.

¹“Peace officer” is defined by article 2.12 of the Code of Criminal Procedure.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

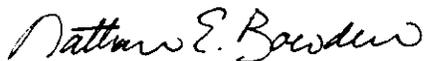
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Nathan E. Bowden
Assistant Attorney General
Open Records Division

NEB/er

Ref: ID# 145873

Encl: Submitted documents

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