



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

May 7, 2003

Mr. G. Dwayne Pruitt
County Attorney
500 West Main, Room 208E
Brownfield, Texas 79316

OR2003-3057

Dear Mr. Pruitt:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 180240.

The Terry County Sheriff's Office (the "sheriff") received a request for "any letters, reports, memorandum or documents relating to the income of [a named sheriff's deputy], performance evaluations, complaints filed against him, as well as any investigations conducted regarding him." You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.108, 552.117, 552.119, and 552.130 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that you did not submit any performance evaluations, complaints filed against the deputy, or any investigations conducted regarding him for our review. Further, you have not indicated that such information does not exist or that you wish to withhold any such information from disclosure. Therefore, to the extent information responsive to this aspect of the request exists, we assume that you have released it to the requestor. If you have not released any such information, you must release it to the requestor at this time. *See* Gov't Code §§ 552.301(a), .302; Open Records Decision No. 664 (2000) (governmental body must

¹The Office of the Attorney General will raise a mandatory exception like section 552.101 on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

promptly release public information not excepted from required disclosure under Public Information Act).

We next note that some of the records at issue are medical records, access to which is governed by the Medical Practice Act (the "MPA"), chapter 159 of the Occupations Code. Section 159.002 of the MPA provides:

(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.

The 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 the medical records subject to the MPA.

As your section 552.103 claim is potentially the most inclusive, we will address it first. Section 552.103 of the Government Code provides in part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The governmental body has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate: (1) that litigation was pending or reasonably anticipated on the date of its receipt of the request for information *and* (2) that the information at issue is related to that litigation. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); *see also* Open Records Decision No. 551 at 4 (1990). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *Id.*

You represent to this office that the requested information relates to a pending criminal prosecution. You indicate that the prosecution was pending when the sheriff received this request for information. We note, however, that the sheriff is not a party to the pending criminal litigation. *See* Gov't Code § 552.103(a); Open Records Decision No. 575 at 2 (1990). In such a situation, we require an affirmative representation from the prosecuting attorney representing the governmental body that is a party to the litigation that he or she wants the submitted information withheld from disclosure under section 552.103. *See* Open Records Decision No. 392 (1983) (finding predecessor to section 552.103 only applicable to governmental body who has litigation interest). However, while you state that the named deputy is the arresting and complaining officer, as well as a witness, in the pending case, you fail to provide such an affirmative representation from a prosecuting attorney. Furthermore, you fail to explain how the requested information relates to the pending prosecution. Consequently, the information is not excepted by section 552.103 in this instance. *See* Gov't Code § 552.103.

You also claim that “any information containing any ongoing investigation, if any,” is excepted from disclosure under section 552.108 of the Government Code. Section 552.108(a) 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.” Generally, a governmental body claiming section 552.108 must reasonably explain, if the information does not supply the explanation on its face, how and why the release of the requested information would interfere with law enforcement. *See* Gov’t Code §§ 552.108(a)(1), (b)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). However, you have not demonstrated that any portion of the submitted information deals with the detection, investigation, or prosecution of crime, and you have failed to show that the release of any portion of the information at issue would interfere with the detection, investigation, or prosecution of crime. Thus, as you have failed to meet your burden, none of the submitted information may be withheld under section 552.108.

Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This section encompasses information protected by other statutes. Federal regulations prohibit the release of criminal history record information (“CHRI”) maintained in state and local CHRI systems to the general public. *See* 28 C.F.R. § 20.21(c)(1) (“Use of criminal history record information disseminated to noncriminal justice agencies shall be limited to the purpose for which it was given.”), (2) (“No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself.”). Section 411.083 provides that any CHRI maintained by the Department of Public Safety (“DPS”) is confidential. Gov’t Code § 411.083(a). Similarly, CHRI obtained from the DPS pursuant to statute is also confidential and may only be disclosed in very limited instances. *Id.* § 411.084; *see also id.* § 411.087 (restrictions on disclosure of CHRI obtained from DPS also apply to CHRI obtained from other criminal justice agencies). Therefore, assuming that the sheriff possesses CHRI and it falls within the ambit of these state and federal regulations, the sheriff must withhold the CHRI from the requestor.

The submitted documents also contain the deputy’s I-9 and W-4 forms. Section 1324a of title 8 of the United States Code provides that an Employment Eligibility Verification Form I-9 “may not be used for purposes other than for enforcement of this chapter” and for enforcement of other federal statutes governing crime and criminal investigations. *See* 8 U.S.C. § 1324a(b)(5); *see also* 8 C.F.R. § 274a.2(b)(4). The release of submitted I-9 forms in response to this request for information would be “for purposes other than for enforcement” of the referenced federal statutes. A Form I-9 may be released only for purposes of compliance with the federal laws and regulations governing the employment

verification system. A W-4 form is confidential under section 6103 of title 26 of the United States Code. Therefore, the sheriff must withhold the I-9 and W-4 forms under section 552.101 of the Government Code in conjunction with federal law.

You argue that a portion of the submitted information consists of "school records" which are excepted from disclosure under the Family Educational Rights and Privacy Act of 1974 ("FERPA"). FERPA provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information (other than directory information) contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. *See* 20 U.S.C. § 1232g(b)(1). "Education records" means those records that contain information directly related to a student and are maintained by an educational agency or institution or by a person acting for such agency or institution. *Id.* § 1232g(a)(4)(A). A "student" is defined to include "any person with respect to whom an educational agency or institution maintains education records or personally identifiable information, but does not include a person who has not been in attendance at such agency or institution. *Id.* § 1232g(a)(6); *see also* 34 C.F.R. § 99.3. Section 552.026 of the Government Code provides as follows:

This chapter does not require the release of information contained in education records of an educational agency or institution, except in conformity with the Family Educational Rights and Privacy Act of 1974, Sec. 513, Pub. L. No. 93-380, 20 U.S.C. Sec. 1232g.

Thus, FERPA and the accompanying Government Code provisions govern the availability of student or education records held by educational agencies or institutions. *See* 20 U.S.C. § 1232g(b)(1); Gov't Code §§ 552.026, 552.114. FERPA generally does not govern access to records in the custody of governmental bodies that are not educational agencies or institutions. *See* Open Records Decision No. 390 at 3 (1983). An exception to this rule applies if the governmental body received the records from an educational agency pursuant to the written consent of the student. 20 U.S.C. 1232g(b)(4)(B).

A portion of the information at issue appears to be transcripts from West Texas A&M University and from Brownfield High School. Consequently, we believe the information at issue is an education record under FERPA while it is maintained by the respective educational agency. Thus, if the sheriff received the information at issue under the written

consent of the student, this information must be withheld from the requestor under FERPA. *See id.* § 1232g(a)(3), (b)(4)(B). However, if the sheriff obtained these documents in some other manner than from the educational agency under the written consent of the student, the information may not be withheld under FERPA. We have marked the applicable information.

Next, we address your contention that school records contained in the submitted information are confidential under sections 28.058, 39.030, and 39.096 of the Education Code. Section 28.058 makes confidential “[a]ll information regarding an individual student received by the commissioner under [subchapter C, chapter 28 of the Education Code] from a school district or student” Similarly, section 39.096 makes confidential “[a]ll information and reports received by the commissioner under [subchapter E, chapter 39 of the Education Code] from schools or school districts.” Thus, sections 28.058 and 39.096 apply only to information received by the commissioner. The commissioner, for the purpose of sections 28.058 and 39.096, is the commissioner of education. Educ. Code § 5.001(3). Because the information here is maintained by the sheriff, not the commissioner of education, we find that none of the information is confidential under section 28.058 or 39.096 of the Education Code.

Section 39.030 of the Education Code states:

(a) In adopting academic skills assessment instruments under [subchapter B, chapter 39 of the Education Code], the State Board of Education or a school district shall ensure the security of the instruments and tests in their preparation, administration, and grading. Meetings or portions of meetings held by the State Board of Education or a school district at which individual assessment instruments or assessment instrument items are disclosed or adopted are not open to the public under Chapter 551, Government Code, and the assessment instruments or assessment instrument items are confidential.

(b) The results of individual student performance on academic skills assessment instruments administered under [subchapter B, chapter 39 of the Education Code] are confidential and may be released only in accordance with [FERPA].

Educ. Code § 39.030. You do not indicate, nor does it appear, that the submitted information contains any assessment instruments, assessment instrument items, or results of individual

student performance on academic skills assessment instruments as contemplated by subchapter B, chapter 39 of the Education Code. Therefore, we find that none of the submitted information is confidential under section 39.030 of the Education Code.

You next argue that some of the submitted information is excepted from disclosure under sections 181.001 and 181.101 of the Health and Safety Code. Section 181.101 of the Health and Safety Code states the following:

A covered entity shall comply with the Health Insurance Portability and Accountability Act and Privacy Standards relating to:

.....

(3) uses and disclosures of protected health information, including requirements relating to consent[.]

.....

Health & Safety Code § 181.101. This section requires certain entities to comply with the federal Health Insurance and Portability and Accountability Act and Privacy Standards (“HIPAA”). Health & Safety Code § 181.101; *see also* Attorney General Opinion JC-0508 (2002). A covered entity shall comply with the requirements of Chapter 181 not later than September 1, 2003. Act of May 27, 2001, 77th Leg., R.S., ch. 1511, § 5, Tex. Gen. Laws 5384, 5393.

However, compliance with chapter 181 is not required until September 1, 2003. *See* Act of May 27, 2001, 77th Leg., R.S., ch. 1511, § 5, Tex. Gen. Laws 5384, 5393. Thus, there are no legal ramifications for failing to comply before this date. That is, the provisions of chapter 181 cannot provide any possible confidentiality protection to the information before September 1, 2003.² Consequently, the sheriff cannot rely on chapter 181 at this time to assert confidentiality for the requested information.

² We note the 78th Legislature passed Senate Bill 330, which repeals section 181.101 of the Health and Safety Code. Tex. S.B. 330, 78th Leg., R.S. (2003); *see* Health & Safety Code § 181.101 (requiring covered entities to comply with HIPAA). This act, signed by Governor Perry on April 10, 2003, becomes effective September 1, 2003.

Next, we address the issue of whether the submitted information falls within the purview of HIPAA. At the direction of Congress, the Secretary of Health and Human Services (“HHS”) promulgated regulations setting privacy standards for medical records, which HHS issued as the Federal Standards for Privacy of Individually Identifiable Health Information. *See* Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 1320d-2 (Supp. IV 1998) (historical & statutory note); Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. Pts. 160, 164; *see also* Attorney General Opinion JC-0508 at 2 (2002). These standards govern the releasability of protected health information by a covered entity. *See* 45 C.F.R. Pts. 160, 164. Under these standards, a covered entity may not use or disclose protected health information, excepted as provided by parts 160 and 164 of the Code of Federal Regulations. 45 C.F.R. § 164.502(a).

Section 160.103 defines a covered entity as a health plan, a health clearinghouse, or a healthcare provider who transmits any health information in electronic form in connection with a transaction covered by this subchapter. 45 C.F.R. § 160.103, *see also* Health & Safety Code § 181.001 (defining covered entity). In this instance, because the sheriff has not explained how it qualifies as a covered entity under HIPAA, we have no basis to conclude the information warrants protection under the federal act.

You further claim that section 1701.454 of the Occupations Code is applicable to some of the requested information. Chapter 1701 of the Occupations Code is applicable to the Texas Commission on Law Enforcement Officer Standards and Education (the “commission”). Section 1701.454 provides as follows:

- (a) A report or statement submitted to the commission under this subchapter is confidential and is not subject to disclosure under Chapter 552, Government Code, 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 section, a commission member or other person may not release the contents of a report or statement submitted under this subchapter. The report or statement may be released only by the commission employee having the responsibility to maintain the report or statement and only if:

(1) the head of a law enforcement agency or the agency head's designee makes a written request on the agency's letterhead for the report or statement accompanied by the agency head's or designee's signature; and

(2) the person who is the subject of the report or statement authorizes the release by providing a sworn statement on a form supplied by the commission that includes the person's waiver of liability regarding an agency head who is responsible for or who takes action based on the report or statement.

Occ. Code § 1701.454. Based upon our careful review of the submitted documents however, we find that section 1701.454 is inapplicable to the information at issue. Therefore, you may not withhold any portion of the submitted information under section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code.

Common-law privacy under section 552.101 also protects the specific types of information that the Texas Supreme Court held to be intimate or embarrassing in *Industrial Foundation*. See 540 S.W.2d at 683 (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). This office has since concluded that other types of information also are private under section 552.101. See generally Open Records Decision No. 659 at 4-5 (1999) (summarizing information attorney general has determined to be private); see also Open Records Decision Nos. 470 at 4 (1987) (illness from severe emotional job-related stress), 455 at 9 (1987) (prescription drugs, illnesses, operations, and physical handicaps), 343 at 1-2 (1982) (references in emergency medical records to drug overdose, acute alcohol intoxication, obstetrical/gynecological illness, convulsions/seizures, or emotional/mental distress). We have marked a small amount of medical information that the sheriff must withhold under section 552.101 in conjunction with common-law privacy.

Certain types of personal financial information also are private under section 552.101. Prior decisions of this office have found that financial information relating only to an individual ordinarily satisfies the first requirement of the test for common-law privacy, but that there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. See Open Records Decision Nos. 600 (1992), 545 (1990), 373 (1983). For example, a public employee's allocation of his salary to a voluntary

investment program or to optional insurance coverage which is offered by his employer is a personal investment decision and information about it is excepted from disclosure under the common-law right of privacy. *See* Open Records Decision No. 545 (1990). Likewise, an employee's designation of a retirement beneficiary is excepted from disclosure under the common-law right to privacy. *See* Open Records Decision No. 600 (1992). However, information revealing that an employee participates in a group insurance plan funded partly or wholly by the governmental body is not excepted from disclosure. *See* Open Records Decision No. 600 at 10 (1992). We have marked financial information that must be withheld under section 552.101 in conjunction with common-law privacy.

The requested records also contain information that is excepted from disclosure under section 552.117(2). Section 552.117(2) excepts from required public disclosure the home address, home telephone number, social security number, and the family member information of peace officers as defined by article 2.12 of the Code of Criminal Procedure. The department must also withhold the officers' *former* home addresses and telephone information from disclosure. *See* Open Records Decision No. 622 (1994). Section 552.117 also encompasses a personal cell telephone number, provided that the cell phone 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 mobile phone numbers paid for by governmental body and intended for official use). We have marked a representative sample of the information that must be withheld under this exception.

We further note that section 552.130 of the Government Code excepts from public disclosure information relating to a driver's license or motor vehicle title or registration issued by an agency of this state. Thus, we have marked a representative sample of the information in the submitted documents that the sheriff must withhold pursuant to section 552.130.

In summary, medical records may be released only as provided under the MPA. If the sheriff received the submitted transcripts under the written consent of the student, this information must be withheld from the requestor under FERPA. If the sheriff otherwise obtained the transcripts, this information may not be withheld under FERPA. The sheriff must withhold forms I-9, W-4, the marked information that is confidential under common-law privacy, and any CHRI in the sheriff's possession under section 552.101. We have marked a

representative sample of the information that must be withheld under sections 552.117(2) and 552.130. The remaining submitted information must be released to the requestor.³

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.

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).

³As our ruling is dispositive, we do not address your remaining arguments.

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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 Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



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Assistant Attorney General
Open Records Division

CN/jh

Ref: ID# 180240

Enc. Submitted documents

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