



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

July 7, 2003

Ms. Elizabeth Lutton
Senior Attorney
City of Arlington
P. O. Box 90231
Arlington, Texas 76004-3231

OR2003-4677

Dear Ms. Lutton:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 183823.

The Arlington Police Department (the "department") received a request for a variety of information pertaining to a specified department police officer. You state that some responsive information will be released to the requestor. You claim, however, that portions of the remaining requested information are excepted from disclosure pursuant to sections 552.101, 552.115, 552.117, 552.119, 552.122, and 552.130 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information, which includes representative sample documents.¹

Initially, we must address the procedural requirements of section 552.301 of the Government Code. Pursuant to section 552.301(b), a governmental body must ask the attorney general for a decision as to whether requested information must be disclosed not later than the tenth business day after the date of receiving the written request for information. *See Gov't Code* § 552.301(b). You state that the department received the requestor's written request for information on April 16, 2003. Thus, the department had until April 30, 2003 to request a decision from us regarding whether any portion of the requested information must be disclosed. However, we note that the department did not request such a decision from us until May 1, 2003. Accordingly, we conclude that the department failed to request a decision from us in accordance with section 552.301 of the Government Code.

¹ We assume that the representative sample of records submitted to this office is truly representative of the requested records as a whole. *See Open Records Decision Nos. 499 (1988), 497 (1988)*. This open records letter does not reach and, therefore, does not authorize the withholding of any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *see also Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). Although you claim that portions of the requested information are excepted from disclosure pursuant to section 552.122 of the Government Code, we note that this particular exception to disclosure is a discretionary exception to disclosure under the Public Information Act (the "Act") that does not constitute a compelling interest sufficient to overcome the presumption that the requested information is now public.² Accordingly, we conclude that the department may not withhold any portion of the submitted information pursuant to section 552.122 of the Government Code. However, since compelling reasons exist where some other source of law makes the information confidential or where third party interests are at stake, we will address the department's remaining claimed exceptions to disclosure.

You claim that portions of the submitted information constitute medical record information, access to which is governed by the Medical Practice Act ("MPA"), chapter 159 of the Occupations Code. Section 159.002 provides in pertinent 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 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

² Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.*, Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation and does not itself make information confidential), 522 at 4 (1989) (discretionary exceptions in general), 473 (1987) (governmental body may waive statutory predecessor to section 552.111); *see also 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). Discretionary exceptions, therefore, do not constitute "other law" that makes information confidential.

(1982). Further, information that is subject to the MPA also includes information that was obtained from medical records. *See id.* § 159.002(a), (b), (c); *see also* Open Records Decision No. 598 (1991). Medical records must be released upon the governmental body's receipt of 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. *See* 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. *See* Open Records Decision No. 565 at 7 (1990). Based on our review of your arguments and the submitted information, we agree that the medical record information that you have marked is subject to the MPA. Absent the applicability of an MPA access provision, the department must withhold this marked information pursuant to the MPA.

You indicate that portions of the submitted information constitute mental health record information that is subject to chapter 611 of the Health and Safety Code. Chapter 611 provides for the confidentiality of records created or maintained by a mental health professional. Section 611.002(a) provides:

Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.

Health & Safety Code § 611.002. Section 611.001 defines a "professional" as (1) a person authorized to practice medicine, (2) a person licensed or certified by the state to diagnose, evaluate or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. *See* Health and Safety Code § 611.001. Sections 611.004 and 611.0045 provide for access to mental health records only for certain individuals. *See* Open Records Decision No. 565 (1990). Based on our review of your arguments and the submitted information, we agree that the mental health record information that you have marked is subject to chapter 611 of the Health and Safety Code. Absent the applicability of a mental health record access provision, the department must withhold this marked information pursuant to chapter 611 of the Health and Safety Code.

You also claim that portions of the submitted information are excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code.³ Section 1703.306 provides as follows:

(a) A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of

³ Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. *See* Gov't Code § 552.101. Section 552.101 encompasses information that is protected from disclosure by other statutes.

the person, may not disclose information acquired from a polygraph examination to another person other than:

- (1) the examinee or any other person specifically designated in writing by the examinee;
- (2) the person that requested the examination;
- (3) a member, or the member's agent, of a governmental agency that licenses a polygraph examiner or supervises or controls a polygraph examiner's activities;
- (4) another polygraph examiner in private consultation; or
- (5) any other person required by due process of law.

Occ. Code § 1703.306. Based on our review of your arguments and the submitted information, we agree that portions of this information constitute information that was acquired from polygraph examinations. It does not appear that any of the exceptions in section 1703.306 apply in this instance. *See* Open Records Decision 565 (1990) (construing predecessor statute). Accordingly, we conclude that the department must withhold the information that we have marked pursuant to section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code.

We note that portions of the submitted information are excepted from disclosure pursuant to section 552.101 in conjunction with section 2654 of title 29 of the United States Code, also known as the Family and Medical Leave Act (the "FMLA"). Section 825.500 of chapter V of title 29 of the Code of Federal Regulations identifies the record-keeping requirements for employers that are subject to the FMLA. Subsection (g) of section 825.500 states that

[r]ecords and documents relating to medical certifications, recertifications or medical histories of employees or employees' family members, created for purposes of FMLA, shall be maintained as confidential medical records in separate files/records from the usual personnel files, and if ADA is also applicable, such records shall be maintained in conformance with ADA confidentiality requirements . . . , except that:

- (1) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations;
- (2) First aid and safety personnel may be informed (when appropriate) if the employee's physical or medical condition might require emergency treatment; and

- (3) Government officials investigating compliance with FMLA (or other pertinent law) shall be provided relevant information upon request.

29 C.F.R. § 825.500(g). We note that portions of the submitted information appear to consist of FMLA paperwork that is contained in the file of the employee who is the subject of this request and which was collected and maintained by the department pursuant to the FMLA. This information is related to medical certifications that were created for purposes of the FMLA. We find that none of the release provisions of the FMLA apply in this instance. Accordingly, we conclude that the department must withhold the information that we have marked pursuant to section 552.101 of the Government Code in conjunction with section 2654 of title 29 of the United States Code.

In addition, we note that portions of the submitted information are confidential pursuant to section 552.101 in conjunction with section 1701.306 of the Occupations Code. Section 1701.306 makes declarations of medical condition and of psychological and emotional health confidential and provides:

- (a) The commission may not issue a license to a person as an officer or county jailer unless the person is examined by:

- (1) a licensed psychologist or by a psychiatrist who declares in writing that the person is in satisfactory psychological and emotional health to serve as the type of officer for which a license is sought; and

- (2) a licensed physician who declares in writing that the person does not show any trace of drug dependency or illegal drug use after a physical examination, blood test, or other medical test.

- (b) An agency hiring a person for whom a license as an officer or county jailer is sought shall select the examining physician and the examining psychologist or psychiatrist. The agency shall prepare a report of each declaration required by Subsection (a) and shall maintain a copy of the report on file in a format readily accessible to the commission. *A declaration is not public information.*

Occ. Code § 1701.306 (emphasis added). Accordingly, we conclude that the department must withhold the information that we have marked pursuant to section 552.101 of the Government Code in conjunction with section 1701.306 of the Occupations Code.

You also claim that portions of the submitted information are excepted from disclosure pursuant to section 552.101 in conjunction with section 58.007 of the Family Code. Juvenile law enforcement records relating to conduct that occurred on or after September 1, 1997 are confidential under section 58.007. Section 58.007(c) provides in pertinent part:

(c) Except as provided by Subsection (d), law enforcement records and files concerning a child and information stored, by electronic means or otherwise, concerning the child from which a record or file could be generated may not be disclosed to the public and shall be:

- (1) if maintained on paper or microfilm, kept separate from adult files and records;
- (2) if maintained electronically in the same computer system as records or files relating to adults, be accessible under controls that are separate and distinct from controls to access electronic data concerning adults; and
- (3) maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subchapter B.

Fam. Code § 58.007. After carefully reviewing your arguments and the submitted information, we find that no portion of the information consists of juvenile law enforcement records within the scope of section 58.007. Accordingly, we conclude that the department may not withhold any portion of the submitted information under section 552.101 of the Government Code in conjunction with section 58.007 of the Family Code.

You also claim that the submitted information contains I-9 and W-4 forms that are excepted from disclosure pursuant to section 552.101 in conjunction with federal law. We note that 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 the submitted I-9 forms in response to this request for information would be “for purposes other than for enforcement” of the referenced federal statutes. We also note that a W-4 form is confidential under section 6103(a) of title 26 of the United States Code. Accordingly, the department must withhold the submitted I-9 and W-4 forms that we have marked pursuant to section 552.101 of the Government Code in conjunction with federal law.

We note that criminal history record information (“CHRI”) generated by the National Crime Information Center (“NCIC”) or by the Texas Crime Information Center (“TCIC”) is confidential. 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. *See* Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *See id.* Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety (“DPS”) maintains, except that the 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. *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 Open Records Decision No. 565 (1990)*. Accordingly, to the extent that the requested information encompasses CHRI that was obtained from the NCIC or TCIC networks, the department must withhold that information pursuant to section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code.

You also claim that portions of the submitted information are excepted from disclosure pursuant to section 552.101 in conjunction with the common-law right to privacy. Section 552.101 also encompasses the doctrine of common-law privacy. We note that information must be withheld from disclosure under the common-law right to privacy when 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. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The type 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 Open Records Decision No. 339 (1982), we concluded that a sexual assault victim has a common-law privacy interest which prevents disclosure of information that would identify the victim. *See also Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, *writ denied*) (identity of witnesses to and victims of sexual harassment was highly intimate or embarrassing information and public did not have a legitimate interest in such information).

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, e.g.*, Open Records Decision No. 600 (1992) (information revealing that employee participates in group insurance plan funded partly or wholly by governmental body is not excepted from disclosure). In addition, this office has found that the following types of information are excepted from required public disclosure under common-law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps)*, personal financial information not relating to the financial transaction between an individual and a governmental body, *see Open Records Decision Nos. 545 (1990), 523 (1989) (individual's mortgage payments, assets, bills, and credit history)*, certain personal choices relating to financial transactions between the

individual and the governmental body, *see* Open Records Decision No. 600 (1992) (designation of beneficiary of employee's retirement benefits and optional insurance coverage; choice of particular insurance carrier; direct deposit authorization; and forms allowing employee to allocate pretax compensation to group insurance, health care, or dependent care), information concerning the intimate relations between individuals and their family members, *see* Open Records Decision No. 470 (1987), and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982).

Based on our review of your arguments and the submitted information, we find that portions of this information are protected from disclosure by the common-law right to privacy. Accordingly, we conclude that the department must withhold most of the information that it has marked under common-law privacy pursuant to section 552.101 in conjunction with the common-law right to privacy. However, we have marked portions of this particular information that are not protected from disclosure under the common-law right to privacy and may not be withheld from disclosure on that basis. Further, we have marked additional information that was not marked by the department which must also be withheld pursuant to section 552.101 of the Government Code in conjunction with the common-law right to privacy.

You also assert that portions of the submitted information constitute birth records that are excepted from disclosure pursuant to section 552.115 of the Government Code. We note that birth or death records maintained by the bureau of vital statistics of the Texas Department of Health or a local registration official are excepted from disclosure under section 552.115. However, because the department is not the bureau of vital statistics or a local registration official, any birth records held by the department are not excepted from disclosure under section 552.115 of the Government Code.

You also contend that portions of the submitted information are excepted from disclosure pursuant to section 552.117 of the Government Code. We note that section 552.117(2) excepts from disclosure "information that relates to the home address, home telephone number, or social security number" of a peace officer, or that reveals whether the peace officer has family members. *See* Gov't Code § 552.117(2). Accordingly, we conclude that the department must withhold the section 552.117 information that it has marked pursuant to section 552.117(2). Further, we conclude that the department must withhold the additional section 552.117 information that we have marked pursuant to section 552.117(2) of the Government Code.

You also claim that a portion of the submitted information is excepted from disclosure pursuant to section 552.119 of the Government Code. Section 552.119 excepts from disclosure a photograph of a peace officer⁴ 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

⁴"Peace officer" is defined by article 2.12 of the Code of Criminal Procedure.

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. Section 552.119 also provides that a photograph that is excepted from disclosure under this section may be made public only if the peace officer gives written consent to the disclosure. *See* Open Records Decision No. 502 (1988). The submitted information includes photographs depicting a peace officer and it does not appear that any of the exceptions described above are applicable in this instance. You also have not informed us that the peace officer who is depicted in this photograph has executed any written consent regarding its disclosure. Accordingly, we conclude that the department must withhold the photographs that it has marked pursuant to section 552.119 of the Government Code.

Finally, you claim that portions of the submitted information are excepted from disclosure pursuant to section 552.130 of the Government Code. Section 552.130 excepts from disclosure information that relates to a motor vehicle operator's or driver's license or permit issued by an agency of this state or a motor vehicle title or registration issued by an agency of this state. *See* Gov't Code § 552.130. Accordingly, we conclude that the department must withhold the Texas motor vehicle information that it has marked pursuant to section 552.130 of the Government Code.

In summary, absent the applicability of an access provision, the department must withhold the information that it has marked pursuant to the MPA and chapter 611 of the Health and Safety Code. The department must withhold the information that we have marked pursuant to section 552.101 of the Government Code in conjunction with sections 1701.306 and 1703.306 of the Occupations Code and section 2654 of title 29 of the United States Code. The department must also withhold the submitted I-9 and W-4 forms that we have marked pursuant to section 552.101 in conjunction with federal law. To the extent that the requested information encompasses CHRI that was obtained from the NCIC or TCIC networks, the department must withhold that information pursuant to section 552.101 in conjunction with chapter 411 of the Government Code. The department must withhold most of the information that it has marked pursuant to section 552.101 in conjunction with the common-law right to privacy. However, the department must release the portions of that particular information which we have marked for release. The department must also withhold the additional information that we have marked pursuant to section 552.101 in conjunction with the common-law right to privacy. The department must withhold the information that it has marked pursuant to sections 552.117(2), 552.119, and 552.130 of the Government Code. The department must also withhold the additional information that we have marked pursuant to section 552.117(2). The department must release the remaining submitted information to the requestor.

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).

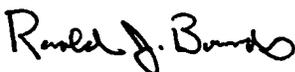
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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 Dep't of Pub. 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 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

RJB/lmt

Ref: ID# 183823

Enc. Marked documents

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