



**ATTORNEY GENERAL OF TEXAS**  
**GREG ABBOTT**

November 14, 2003

Mr. Jeb McNew  
County Attorney  
Montague County  
P.O. Box 336  
Montague, Texas 76251-0336

OR2003-8176

Dear Mr. McNew:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 191113.

The Montague County Attorney's Office (the "county attorney") received a request for information relating to several alleged assault incidents. You indicate that the county attorney does not have information regarding one of the alleged assault incidents. We note that the Public Information Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.--San Antonio 1978, writ dism'd); Open Records Decision No. 452 at 3 (1986). You also state that the county attorney has released some of the requested information. However, you claim that the remainder of the requested information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We begin by noting that some of the submitted information is subject to 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).

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). We have marked medical records contained in Exhibit B that are subject to the MPA and, therefore, may be released only in accordance therewith.

Next, we address your argument under section 552.108(a)(2) of the Government Code with respect to the remainder of the information in Exhibit B and the information in Exhibit E. Section 552.108(a)(2) excepts from disclosure information concerning an investigation that concluded in a result other than conviction or deferred adjudication. A governmental body claiming section 552.108(a)(2) must demonstrate that the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. You contend that the information in Exhibits B and E is excepted from disclosure under section 552.108(a)(2) because in both matters the statutes of limitations have run, no charges were filed, and the files have been closed. Based on the information you provided, we understand you to assert that the information in Exhibits B and E pertains to cases that concluded in results other than conviction or deferred adjudication. Therefore, we agree that section 552.108(a)(2) generally applies to the remaining information in Exhibit B and the information in Exhibit E.

However, section 552.108 is inapplicable to basic information about an arrested person, an arrest, or a crime. Gov't Code § 552.108(c). We believe such basic information refers to the information held to be public in *Houston Chronicle Publishing Co. v. City of Houston*, 531

S.W.2d 177 (Tex. Civ. App. --Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Thus, with the exception of the information subject to the MPA and basic front page offense and arrest information, you may withhold the information in Exhibits B and E based on section 552.108(a)(2).

In addition, you argue that the information in Exhibits C and F is excepted from disclosure because the information was prepared by the county attorney's office in anticipation of litigation and it reflects a prosecutor's mental impressions or legal reasoning. Section 552.108(a)(4) of the Government Code provides that information is excepted from public disclosure if it is information that is either prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation or information that reflects the mental impressions or legal reasoning of an attorney representing the state. Based on your assertions and our review of the information in Exhibits C and F, we agree that the information was either prepared by an attorney or reflects an attorney's mental process or legal reasoning. Therefore, the county attorney may withhold the information in Exhibits C and F under section 552.108(a)(4).

You also contend that some of the submitted information is excepted from disclosure 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." You contend that Exhibits D and G contain confidential criminal history. 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. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* Section 411.083 of the Government Code deems confidential CHRI 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. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the <sup>1</sup>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). 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

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<sup>1</sup>We note that an individual can obtain his or her own CHRI from DPS. Gov't Code § 411.083(b)(3).

Code chapter 411, subchapter F. We agree that some of the information contained in Exhibits D and G consists of CHRI generated by TCIC and NCIC. Accordingly, this information, which we have marked, is excepted from required public disclosure by section 552.101 of the Government Code.

You also contend that certain highlighted information contained in Exhibit H, including social security numbers and driver's license numbers, is confidential under common law privacy. Section 552.101 encompasses the doctrine of common law privacy. Common law privacy 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). 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. 540 S.W.2d at 683. Upon review of the information you have highlighted in Exhibit H, we find that none of it consists of highly intimate or embarrassing information for the purpose of common law privacy. *See Open Records Decision Nos. 488 (1988)* ("Absent a showing of special circumstances, common-law and constitutional privacy do not protect home addresses and telephone numbers."), 169 (1977) (social security numbers not protected under common law privacy). Therefore, none of the information in Exhibit H is confidential under common law privacy.

Nevertheless, the social security numbers contained in Exhibit H may be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See Open Records Decision No. 622 (1994)*. These amendments make confidential social security numbers and related records that are 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 id.* We have no basis for concluding that any of the social security numbers in Exhibit H are 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 any social security number in Exhibit H, you should ensure that no such information was obtained or is maintained by the county attorney pursuant to any provision of law, enacted on or after October 1, 1990. We note that the portions of Exhibit D and G that do not consist of CHRI contain the requestor's social security number. However, the requestor has a special right of access to her own social security number. *See Gov't Code § 552.023*.

In addition, Texas driver's license information and license plate information is protected under section 552.130 of the Government Code. Section 552.130 provides in relevant part:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

- (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]
- (2) a motor vehicle title or registration issued by an agency of this state[.]

Therefore, the county attorney must withhold the Texas driver's license and vehicle title and registration information that we have marked in Exhibit H under section 552.130. We note that portions of Exhibit D and G that do not consist of CHRI contain the requestor's driver's license and license plate information. However, the requestor has a special right of access to this information. See Gov't Code § 552.023.

In summary, we have marked medical records contained in Exhibit B that are subject to the MPA and may be released only in accordance therewith. With the exception of basic information, the remainder of the information in Exhibits B and E may be withheld under section 552.108(a)(2). The information in Exhibits C and F may be withheld under section 552.108(a)(4) of the Government Code. We have marked portions of Exhibits D and G that consist of CHRI and must be withheld under section 552.101 in conjunction with federal regulations and chapter 411 of the Government Code. Social security numbers contained in Exhibit H must be withheld under section 552.101 in conjunction with the federal Social Security Act if the numbers were obtained or are maintained pursuant to a provision of law enacted on or after October 1, 1990. We have marked Texas driver's license and vehicle title and registration information in Exhibit H that must be withheld under section 552.130 of the Government Code. The remainder of the submitted information must be released to the requestor.<sup>2</sup>

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.

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<sup>2</sup>Because the requestor has a right of access to information that is normally considered confidential with respect to the general public, the county attorney should again seek our decision if it receives a future request for this information from an individual other than the requestor or her authorized representative.

*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); *Tex. 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,



Karen E. Hattaway  
Assistant Attorney General  
Open Records Division

KEH/lmt

Ref: ID# 191113

Enc: Submitted documents

c: Ms. Arlene Johnson  
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(w/o enclosures)