



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 22, 2004

Mr. Kevin Pagan
Deputy City Attorney
City of McAllen
P.O. Box 220
McAllen, Texas 78505

OR2004-5085

Dear Mr. Pagan:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 203893.

The City of McAllen (the "city") received a request for the following: (1) the arrest record of a named individual for a specified incident and (2) any and all arrest records and/or police offenses involving fifteen named individuals. The city received a second request from the same requestor for a copy of the criminal background check on a named individual and a copy of a specified arrest record. You contend that you do not have responsive information related to the specified arrest record of a named individual. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986) (governmental body not required to disclose information that did not exist at time request was received). You claim that the remaining requested information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, we note that section 552.301(e) of the Government Code provides that a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. You state that the city received the first request for information on April 5, 2004. Thus, the fifteen day deadline to submit the requested information or representative samples was April 26, 2004. Because you have not submitted any responsive information relating to fourteen of the fifteen named individuals, we conclude

that you have failed to comply with section 552.301 with respect to this information. Therefore, the requested information pertaining to these fourteen named individuals is presumed to be public and must be released, to the extent it exists, unless there is a compelling reason to withhold the information from the public. Gov't Code § 552.302; *see also Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ).

Generally, a governmental body may demonstrate a compelling reason to withhold information by a showing that the information is made confidential by another source of law or affects third party interests. *See Open Records Decision No. 630 (1994)*. However, because you did not submit any information responsive to the request for information relating to fourteen named individuals for our review, we have no basis for concluding that this information is excepted from disclosure pursuant to section 552.101 of the Government Code. We therefore conclude that the city must release any responsive information regarding these fourteen individuals to the requestor pursuant to section 552.302. If you believe this information is confidential and may not lawfully be released, you must challenge the ruling in court as outlined below.

Upon review of the information submitted in response to the second request, we note that the information was responsive to a portion of the first request for information. Thus, the city was required to submit this information in response to the first request by April 26, 2004. However, the city did not submit this information to us until April 29, 2004. Although the city failed to comply with the requirements of section 552.301, section 552.101 of the Government Code can provide a compelling reason to withhold this information. Thus, we will address your section 552.101 argument with regard to the submitted information.

First, we note that the submitted information includes a medical record, access to which is governed by the Medical Practice Act ("MPA"), subtitle B of title 3 of the Occupations Code. Section 159.002 of the MPA 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 (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). 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 at 1 (1990).

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). The medical record we have marked may be released only as provided under the MPA. Open Records Decision No. 598 (1991).

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision” and encompasses laws that make criminal history record information (“CHRI”) confidential. CHRI “means information collected about a person by a criminal justice agency that consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions” but does not include “driving record information maintained by [the Department of Public Safety (“DPS”)] under Subchapter C, Chapter 521, Transportation Code.” Gov’t Code § 411.082(2).

Federal regulations prohibit the release of 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.”). Under chapter 411 of the Government Code, a criminal justice agency may obtain CHRI from DPS or from another criminal justice agency. Gov’t Code §§ 411.083(b)(1), .087(a)(2), .089(a). However, CHRI so obtained is confidential and may only be disclosed in very limited instances. Gov’t Code § 411.084; *see also* Gov’t Code § 411.087 (restrictions on disclosure of CHRI obtained from DPS also apply to CHRI obtained from other criminal justice agencies). Therefore, to the extent that the submitted documents contain CHRI that was obtained pursuant to these state and federal regulations, such information must be withheld under section 552.101 as information made confidential by law.

Section 552.101 also encompasses the common-law right to privacy, which protects information if it is highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person and the public has no legitimate interest in it. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). Where an individual’s

criminal history information has been compiled by a governmental entity, the information takes on a character that implicates the individual's right to privacy. *See U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989). However, information that refers to an individual solely as a victim, witness, or involved person is not private under *Reporters Committee* and may not be withheld under section 552.101 on that basis.

In this instance, the requestor asks the city for a criminal background check and any arrest records and/or police offense reports regarding a named individual. Thus, these requests implicate the named individual's right to privacy. Therefore, to the extent the responsive information includes records, other than those that pertain to routine traffic violations, in which the named individual is portrayed as a suspect, defendant, or arrestee, or that constitute a compilation of the criminal history of any individual, the city must withhold such records pursuant to section 552.101 and the common-law privacy concerns expressed in *Reporters Committee*.

We note that a portion of the submitted information is excepted from disclosure under section 552.130 of the Government Code.¹ Section 552.130 prohibits the release of 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. Thus, the city must withhold the Texas driver's license and motor vehicle information we have marked pursuant to section 552.130.

In summary, absent the applicability of an MPA access provision, the city must withhold the medical record that we have marked pursuant to the MPA. Any CHRI that is confidential under federal law or subchapter F of chapter 411 of the Government Code and any criminal history information compiled by the city that is private under *Reporters Committee* must be withheld under section 552.101 of the Government Code. The department must withhold the information we have marked pursuant to section 552.130 of the Government Code. The remaining submitted information must be released 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

¹ The Office of the Attorney General will raise mandatory exceptions like section 552.130 on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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).

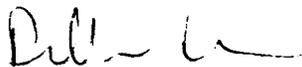
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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,



Debbie K. Lee
Assistant Attorney General
Open Records Division

DKL/seg

Ref: ID# 203893

Enc. Submitted documents

c: Dr. Anthony Rogers
Citizens for a Better and Safer McAllen
8506 Chivalry
San Antonio, Texas 78254
(w/o enclosures)