



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 1, 2004

Mr. Robert E. Hager
Nichols, Jackson, Dillard, Hager & Smith, L.L.P.
500 North Akard, Suite 1800
Dallas, Texas 75201

OR2004-5383

Dear Mr. Hager:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 204421.

The Rowlett Police Department (the "department"), which you represent, received a request for information pertaining to the arrest of a named individual on January 31, 2003. You indicate that the department does not object to the release of a redacted version of the information at issue. You claim, however, that the information you seek to withhold from the submitted documents is excepted from disclosure under sections 552.101, 552.108, 552.117, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

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 information made confidential by other statutes. You contend that information regarding the individual's blood alcohol concentration contained in the narrative portion of the submitted records is confidential pursuant to the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), sections 1320d through 1320d-8 of title 42 of the United States Code, and under section 773.091 of the Health and Safety Code. At the direction of Congress, the Secretary of Health and Human Services ("HHS") has promulgated regulations setting privacy standards for medical records, which HHS issued as the Federal Standards for Privacy of Individually Identifiable Health Information. *See* HIPAA, 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 ("Privacy

Rule”); *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).

This office recently addressed the interplay of the Privacy Rule and the Public Information Act (the “Act”). *See* Open Records Decision No. 681 (2004). In that decision, we noted that section 164.512 of title 45 of the Code of Federal Regulations provides that a covered entity may use or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law. *See* 45 C.F.R. § 164.512(a)(1). We further noted that the Act “is a mandate in Texas law that compels Texas governmental bodies to disclose information to the public.” *See* Open Records Decision No. 681 at 8 (2004); *see also* Gov’t Code §§ 552.002, .003, .021. We therefore held that the disclosures under the Act come within section 164.512(a). Consequently, the Privacy Rule does not make information confidential for the purpose of section 552.101 of the Government Code. Open Records Decision No. 681 at 9 (2004); *see also* Open Records Decision No. 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). We therefore determine that the department may not withhold the blood alcohol concentration information at issue pursuant to section 552.101 in conjunction with HIPAA.

You also raise section 773.091 of the Health and Safety Code, which governs access to emergency medical service (“EMS”) records. *See* Open Records Decision No. 598 (1991). Section 773.091 provides in part:

(b) Records of the identity, evaluation, or treatment of a patient by emergency medical services personnel or by a physician providing medical supervision that are created by the emergency medical services personnel or physician or maintained by an emergency medical services provider are confidential and privileged and may not be disclosed except as provided by this chapter.

Health & Safety Code § 773.091(b). The submitted arrest information does not consist of records of the identity, evaluation, or treatment of a patient by EMS personnel. Accordingly, we find that the department may not withhold any portion of the submitted information pursuant to section 552.101 in conjunction with section 773.091 of the Health and Safety Code.

Next, you contend that information in the narrative portion of the submitted documents is excepted from disclosure under section 552.108 of the Government Code. Section 552.108(b)(1) excepts from disclosure “[a]n internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to

law enforcement or prosecution . . . if: (1) release of the internal record or notation would interfere with law enforcement or prosecution.” Section 552.108(b)(1) is intended to protect “information which, if released, would permit private citizens to anticipate weaknesses in a police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate the laws of this State.” *City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet.).¹ To prevail on a claim that section 552.108(b)(1) excepts information from disclosure, a law-enforcement agency must do more than merely make a conclusory assertion that releasing the information would interfere with law enforcement. Instead, the governmental body must meet its burden of explaining how and why release of the requested information would interfere with law enforcement and crime prevention. *See* Open Records Decision No. 562 at 10 (1990) (construing statutory predecessor). In addition, generally known policies and techniques may not be withheld under section 552.108. *See, e.g.*, Open Records Decision Nos. 531 at 2-3 (1989) (Penal Code provisions, common law rules, and constitutional limitations on use of force are not protected under law enforcement exception), 252 at 3 (1980) (governmental body did not meet burden because it did not indicate why investigative procedures and techniques requested were any different from those commonly known). The determination of whether the release of particular records would interfere with law enforcement is made on a case-by-case basis. *See* Open Records Decision No. 409 at 2 (1984) (construing statutory predecessor).

You assert that the release of the information you seek to withhold under section 552.108 would interfere with law enforcement. Having considered your representations and the information at issue, we find that you have failed to explain how the information differs from procedures and techniques that are commonly known and have failed to meet your burden of explaining how and why release of this information would interfere with law enforcement and crime prevention. *See* Open Records Decision No. 562 at 10 (1990). Consequently, we determine that the department may not withhold any portion of the submitted information pursuant to section 552.108(b)(1).

You contend that the date of birth, age, sex, race, height, weight, home address, and telephone number of the individual at issue are excepted from disclosure under section 552.130 of the Government Code, on the basis that this information “was transcribed from the driver’s license of the arrestee.”² You also contend that the booking photograph

¹ You cite to the decision of the Texas Supreme Court in *A & T Consultants, Inc. v. Sharp*, 904 S.W.2d 668 (Tex. 1995). In that decision, the supreme court notes that section 552.108 serves the same function as the law enforcement exception under the federal Freedom of Information Act, which “prevents the disclosure of investigatory records which would reveal law enforcement methods, techniques, and strategies.” 904 S.W.2d at 678; *see also* 5 U.S.C. § 552(b)(7). As section 552.108(b)(1) incorporates this aspect of the law enforcement exception, we consider your claim pursuant to section 552.108(b)(1) and we need not address the applicability of the court’s holding in *A & T Consultants* to the submitted information.

² We note that a Texas motor vehicle driver’s license does not include the licensee’s home telephone number.

included in the submitted information is excepted under section 552.130. Section 552.130 of the Government Code provides as follows:

(a) Information is excepted from [required public disclosure] if the information relates to:

(1) a motor vehicle operator's or driver's license or permit issued by an agency of this state;

(2) a motor vehicle title or registration issued by an agency of this state; or

(3) a personal identification document issued by an agency of this state or a local agency authorized to issue an identification document.

(b) Information described by Subsection (a) may be released only if, and in the manner, authorized by Chapter 730, Transportation Code.

Gov't Code § 552.130. You contend that the information you seek to withhold from the submitted arrest records under section 552.130 is excepted under that section because such information "is nothing more than a summary" of the information in the individual's driver's license. We note, however, that section 552.130 does not except information that may also be contained in a driver's license, wherever such information may be found. Rather, section 552.130 generally excepts motor vehicle driver's license, title, and registration records from disclosure, and information in other records that is solely related to motor vehicle driver's license, title, and registration records. Accordingly, we have marked a Texas motor vehicle driver's license number and a Texas license plate number in the submitted documents that must be withheld under section 552.130. Gov't Code § 552.130(a)(1), (2). The remainder of the information at issue is not excepted under section 552.130 of the Government Code and may not be withheld on that basis.

We next consider your claim under section 552.117 of the Government Code. We understand you to contend that the arrested individual's address, telephone number, height, weight, eye color, and next of kin information are excepted under section 552.117(a)(1), because the individual at issue is an elected public official of the City of Rowlett. Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who timely elect to keep this information confidential pursuant to section 552.024. We note that section 552.117(a)(1) does not except information describing the physical characteristics of a public official. Thus, the individual's height, weight, and eye color are not within the scope of section 552.117 and may not be withheld on that basis. Furthermore, we note that the protections of section 552.117 only apply to information that a governmental body holds in its capacity as an employer. *See* Gov't Code

§ 552.117 (providing that employees of governmental entities may protect certain personal information in the hands of their employer); *see also* Gov't Code § 552.024 (establishing election process for section 552.117). In this instance, the information you seek to withhold under section 552.117 is held by the department in its capacity as a law enforcement entity, not as the employer of the individual at issue. Accordingly, we determine that the department may not withhold any portion of the information at issue pursuant to section 552.117(a)(1).

We note, however, that the submitted records contain the home telephone number of an officer of the Dallas Police Department, which may be excepted under section 552.1175. Section 552.1175 of the Government Code provides in part:

(b) Information that relates to the home address, home telephone number, or social security number of [a peace officer as defined by article 2.12 of the Code of Criminal Procedure], or that reveals whether the individual has family members is confidential and may not be disclosed to the public under this chapter if the individual to whom the information relates:

(1) chooses to restrict public access to the information; and

(2) notifies the governmental body of the individual's choice on a form provided by the governmental body, accompanied by evidence of the individual's status.

Gov't Code § 552.1175(b). We have marked the home telephone number of an officer of the Dallas Police Department contained in the submitted information. If the department receives notice from the officer at issue in accordance with section 552.1175(2) that the officer chooses to keep the telephone number confidential, the department must withhold this information pursuant to section 552.1175 of the Government Code. Otherwise, the marked telephone number must be released.

Finally, you contend that the social security number of the arrested individual is excepted from disclosure under section 552.101 of the Government Code in conjunction with the federal Social Security Act, section 405(c)(2)(C)(viii)(I) of title 42 of the United States Code. A social security number may be withheld in some circumstances under section 552.101 in conjunction with the 1990 amendments to the Social Security Act. *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained or 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.* You state that the social security number at issue is "information held confidential by law" because the social security number "is required to be given as part of the arrest procedure" and "is not voluntarily released." You do not, however, inform us that the department obtained the social security number pursuant to any provision of law enacted on or after

October 1, 1990. Accordingly, we have no basis for concluding that the social security number at issue 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. *See id;* *see also Houston Chronicle Publ'g 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); Open Records Decision No. 127 (1976) (social security number of arrestee is basic information about crime or arrest that is subject to public release). We caution, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, the department should ensure that no such information was obtained or is maintained by the department pursuant to any provision of law enacted on or after October 1, 1990.

In summary, the department must withhold the marked Texas driver's license number and motor vehicle license plate number pursuant to section 552.130 of the Government Code. If the department receives notice in accordance with section 552.1175(b) that the officer of the Dallas Police Department whose home telephone number appears in the submitted records chooses to keep the number confidential, the department must withhold the number under section 552.1175 of the Government Code. Otherwise, the number must be released. The arrested individual's social security number may be confidential under section 552.101 of the Government Code in conjunction with federal law. The remainder of the 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 thirty calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within ten 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 ten 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 ten 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 ten calendar days of the date of this ruling.

Sincerely,



David R. Saldivar
Assistant Attorney General
Open Records Division

DRS/seg

Ref: ID# 204421

Enc: Submitted documents

c: Mr. Nicholas Kreekon
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(w/o enclosures)