



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 18, 2005

Sheriff Thomas Kerrs
Nacogdoches County Sheriff's Office
2306 Douglass Highway
Nacogdoches, Texas 75961

OR2005-09456

Dear Sheriff Kerrs:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 234436.

The Deep East Texas Regional Narcotics Task Force (the "task force") received a request for nine categories of information pertaining to task force case logs, agents, and confidential informants, excluding the names and identifying information of any current informants. You state that the task force does not maintain information responsive to the request for quarterly or annual reports submitted to the Department of Public Safety, polygraph examinations of criminal informants, or citizen complaints filed with the task force.¹ You claim that the submitted information is excepted from disclosure under sections 552.101, 552.108, 552.119, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.²

¹The Act does not require a governmental body to disclose information that did not exist at the time the request was received, nor does it require a governmental body to prepare new information in response to a request. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Attorney General Opinion H-90 (1973); Open Records Decision Nos. 452 at 2-3 (1986), 342 at 3 (1982), 87 (1975); see also Open Records Decision Nos. 572 at 1 (1990), 555 at 1-2 (1990), 416 at 5 (1984).

²We 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.

Initially, we note that, for the requested copies of current confidential informant agreements, the requestor states that “names and identifying information redacted is fine[.]” Thus, the names and other identifying information of current informants in the submitted information is not responsive to the request for information. This ruling therefore does not address the public availability of this nonresponsive information, and the task force is not required to release this information in response to this request.

Next, we address your obligations under section 552.301 of the Government Code. This section prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(b) requires the governmental body to ask for the attorney general’s decision and state the exceptions to disclosure not later than the tenth business day after the date of its receipt of the written request for information. *See Gov’t Code § 552.301(b)*.

While you requested the attorney general’s decision within the deadlines of section 552.301, you did not state any exceptions to disclosure within the ten-business-day deadline prescribed by section 552.301(b). Section 552.108 is a discretionary exception to disclosure that protects a governmental body’s interests and may be waived. *See Gov’t Code § 552.007; Open Records Decision Nos. 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions), 177 (1977) (statutory predecessor to section 552.108 subject to waiver). But see Open Records Decision No. 586 at 2-3 (1991) (claim of another governmental body under statutory predecessor to section 552.108 can provide compelling reason for non-disclosure)*. In failing to comply with section 552.301, the task force has waived its claim under section 552.108. Therefore, the task force may not withhold any of the submitted information under section 552.108. Although you also failed to timely assert sections 552.101, 552.119, and 552.130, these exceptions can provide compelling reasons to withhold information. Thus, we will consider your arguments regarding these exceptions.

Section 552.101, which encompasses “information considered to be confidential by law, either constitutional, statutory, or by judicial decision,” generally can provide a compelling reason to overcome the presumption of openness. *See Open Records Decision No. 630 (1994)*. The informer’s privilege, however, is held by the governmental body and serves to protect its interests in preserving the flow of information to the governmental body. *See Roviato v. United States, 353 U.S. 53, 59 (1957)*. Accordingly, a governmental body is free to waive the informer’s privilege and release information for which it otherwise could claim the exception. *Open Records Decision No. 549 at 6 (1990)*. Thus, the informer’s privilege does not constitute a compelling reason to overcome the presumption of openness. We therefore determine that the identities of inactive confidential informants may not be withheld pursuant to the informer’s privilege.

The task force also raises section 552.101 in conjunction with the common law right to privacy. Information is protected from disclosure by the common law right to privacy

when (1) it is highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities and (2) there is no legitimate public interest in its disclosure. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). 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. *Id.* at 683. Information may also be withheld under section 552.101 in conjunction with common law privacy upon a showing of "special circumstances." *See Open Records Decision No. 169 (1977)*. This office considers "special circumstances" to refer to a very narrow set of situations in which the release of information would likely cause someone to face "an imminent threat of physical danger." *Id.* at 6. Such "special circumstances" do not include "a generalized and speculative fear of harassment or retribution." *Id.*

In this instance, the information at issue relates to undercover task force officers. You argue that the public release of these individuals' identifying information would cause them to face an imminent threat of physical danger and threaten undercover operations. Accordingly, we conclude that, to the extent identifying information contained in the submitted documents pertains to undercover officers, this information is excepted from disclosure under section 552.101 in conjunction with the "special circumstances" aspect of common law privacy. *See Open Records Decision No. 169 (1977)*. Such identifying information includes: the undercover officers' name and alias; home address and telephone number; former home address and telephone number; social security number; work telephone number; personal and work e-mail addresses; and any information that reveals whether the person has family members. Identifying information does not include: date of birth; age; height; name and address of the employing agency; general phone number of the employing agency; pay period and pay rate; names of colleagues and supervisors who do not work undercover; names of training departments and dates of training completion; schools attended; outside employers and locations of meetings and locations of arrests.

Section 552.101 also encompasses information protected by other statutes. The information submitted by the task force also contains a W-4 form. Section 6103(a) of Title 26 of the United States Code provides that tax return information is confidential. *See 26 U.S.C. § 6103(a)(2), (b)(2)(A), (p)(8); see also Open Records Decision No. 600 (1992); Attorney General Op. MW-372 (1981)*. Accordingly, the task force must withhold this form pursuant to section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code.

Section 552.101 also encompasses the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code, which governs access to medical records. Section 159.002 of the MPA provides the following:

(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). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). 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, 159.005. 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 the portion of the submitted information that constitutes medical records and that may only be released in accordance with the MPA. Open Records Decision No. 598 (1991). We note however the urinalysis tests submitted as Exhibit 2B do not constitute records created or maintained by a physician and are therefore not subject to the MPA and may not be withheld on that basis.

The task force also claims that the urinalysis tests submitted as Exhibit 2B are confidential under sections 1701.306 and 1701.454 of the Occupations Code and must be withheld under section 552.101. Section 1701.306 of the Occupations Code provides as follows:

(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(a), (b).

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. You claim that "the [t]ask [f]orce reads these two statutes together to prohibit releasing the results of the urinalyses tests included in Exhibit 2B." Upon review, however, we find that the submitted information does not consist of declarations submitted to the Texas Commission on Law Enforcement Officer Standards and Education for licensure purposes. Therefore, the submitted urinalysis tests are not confidential under section 1701.306. Furthermore, we find that the information at issue does not include any employment termination reports made confidential by section 1701.454. Therefore, we conclude that no portion of Exhibit 2B may not be withheld under section 552.101 in conjunction with either of these statutes.

You also claim that the L-1 (Report of Appointment/License Application) and F-5 (Report of Resignation or Separation of License Holder) forms submitted as Exhibit 5 are confidential pursuant to section 1701.454. We agree that the task force must withhold the

submitted F-5 forms pursuant to section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code. However, the L-1 forms are not reports or statements required to be filed with the commission under subchapter J of the chapter 1701 and may not be withheld on this basis.

Criminal history record information (“CHRI”) generated by the National Crime Information Center or by the Texas Crime Information Center 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, but 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 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.* §§ 411.090-411.127. 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).* We note that driving record information is not made confidential by the confidentiality provisions that govern CHRI. *See Gov’t Code § 411.082(2)(B)* (definition of CHRI does not include driving record information). The CHRI obtained from DPS or any other criminal justice agency in the submitted information is confidential under chapter 411, subchapter F of the Government Code, and the task force must withhold this information, which we have marked, under section 552.101 of the Government Code.

The submitted information contains fingerprints. Chapter 560 of the Government Code provides that a governmental body may not release fingerprint information except in certain limited circumstances. *See Gov’t Code §§ 560.001* (defining “biometric identifier” to include fingerprints), 560.002 (prescribing manner in which biometric identifiers must be maintained and circumstances in which they can be released), 560.003 (providing that biometric identifiers in possession of governmental body are exempt from disclosure under Act). You do not inform us, and the submitted information does not indicate, that section 560.002 permits the disclosure of the submitted fingerprint information. Therefore, the task force must withhold this information, which we have marked, under section 552.101 in conjunction with section 560.003 of the Government Code.

Section 552.130 of the Government Code 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.” Gov’t Code

§ 552.130. Accordingly, the task force must withhold the Texas-issued motor vehicle record information we have marked pursuant to section 552.130 of the Government Code. We note, however, that the purpose of section 552.130 is to protect the privacy interests of individuals. Since the right of privacy lapses at death, Texas motor vehicle record information that pertains to the deceased individual may not be withheld under section 552.130. *See generally Moore v. Charles E. Pierce Film Enters. Inc.*, 589 S. W. 2d 489 (Tex. Civ. App.— Texarkana 1979, writ ref'd n.r.e.); *Justice v. Belo Broadcasting Corp.*, 472 F. Supp. 145, 146-147 (N.D. Tex. 1979); Attorney General Opinions JM-229 (1984); H-917 (1976); Open Records Decision No. 272 at 1 (1981) (privacy rights lapse upon death).

In summary, the identifying information of undercover officers are excepted from disclosure under section 552.101 in conjunction with the “special circumstances” aspect of common law privacy. The submitted W-4 form is confidential under section 6103(a) of title 26 of the United States Code and must be withheld under section 552.101 of the Government Code. The submitted medical records, which we have marked, may only be released in accordance with the MPA. The submitted F-5 (Report of Resignation or Separation of License Holder) forms must be withheld under section 552.101 in conjunction with section 1701.454 of the Occupations Code. The submitted CHRI, which we have marked, must be withheld under section 552.101 in conjunction with section 411.083 of the Government Code. The fingerprints that we have marked are confidential under section 560.003 of the Government Code and must also be withheld under section 552.101. Finally, the Texas-issued motor vehicle record information pertaining to living people must be withheld under 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 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, upon receiving this ruling, the governmental body

will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Office of the Attorney General 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. 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,



L. Joseph James
Assistant Attorney General
Open Records Division

LJJ/seg

Ref: ID# 234436

Enc. Submitted documents

c: Mr. Scott Henson
ACLU of Texas Police Accountability Project
P.O. Box 12905
Austin, Texas 78711
(w/o enclosures)