



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 12, 2007

Ms. Kathleen Wells
Taylor Olson Adkins Sralla Elam, L.L.P
6000 Western Place, Suite 200
I-30 at Bryant-Irvin Road
Fort Worth, Texas 76107-4654

OR2007-02720

Dear Ms. Wells:

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#273356.

The Richland Hills Police Department (the "department"), which you represent, received a request for an incident and arrest report regarding a named person on a specified date. You state that some of the requested information has been released to the requestor. You claim that some of the submitted 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.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. The informer's privilege, incorporated into the Act by section 552.101, has long been recognized by Texas courts. *Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928). It protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided that the subject of the information does not already know the informer's identity. Open Records Decision Nos. 515 at 3 (1998), 208 at 1-2 (1978). The informer's privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties

to “administrative officials having a duty of inspection or of law enforcement within their particular spheres.” *Open Records Decision No. 279 at 2 (1981) citing Wigmore, Evidence, § 2374, at 767 (McNaughton rev. ed. 1961)*. The report must be of a violation of a criminal or civil statute. *See Open Records Decision Nos. 582 at 2 (1990), 515 at 4-5 (1988)*. However, the informer’s privilege protects the content of the communication only to the extent that it identifies the informant. *Roviaro v. United States, 353 U.S. 53, 60 (1957)*.

You state that the redacted information on pages 2 and 9 of the submitted information is protected by the informer’s privilege and excepted from disclosure under section 552.101. You state that the individual at issue provided information relating to a violation of a criminal statute to the department, the law enforcement entity charged with enforcing the statute. Based upon our review, however, the individual at issue did not report a violation of a criminal or civil statute to the department. The individual at issue called the department to seek a welfare check on the caller’s daughter. Therefore, we find that section 552.101 in conjunction with the informer’s privilege is inapplicable to the redacted information on pages 2 and 9 of the submitted information.

You claim that the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”) may except a portion of the submitted information from disclosure. At the direction of Congress, the Secretary of Health and Human Services (“HHS”) 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, except as provided by parts 160 and 164 of the Code of Federal Regulations. *45 C.F.R. § 164.502(a)*.

This office addressed the interplay of the Privacy Rule and 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 ORD 681 at 8; see also Gov’t Code §§ 552.002, .003, .021*. We therefore held that disclosures under the Act come within section 164.512(a) of title 45 of the Code of Federal Regulations. The Third Court of Appeals has also held that disclosures under the Act come within section 164.512(a). *See Abbott v. Tex. Dep’t of Mental Health & Mental Retardation, No. 03-04-00743-CV, 2006 WL 1649003 (Tex. App.—Austin, June 16, 2006, no. pet. h.)*. 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; *see also* Open Records Decision No. 478 (1987) (as a general rule, statutory confidentiality requires express language making information confidential). Because the Privacy Rule does not make confidential information that is subject to disclosure under the Act, the department may withhold protected health information from the public only if the information is confidential under other law or an exception in subchapter C of the Act applies.

Section 552.101 encompasses information made confidential under Title I of the American with Disabilities Act of 1990 (the "ADA"). You claim that a portion of the submitted information is confidential under the ADA. Title I of the ADA provides that information about the medical conditions and medical histories of applicants or employees must be (1) collected and maintained on separate forms, (2) kept in separate medical files, and (3) treated as a confidential medical record. In addition, an employer's medical examination or inquiry into the ability of an employee to perform job-related functions is to be treated as a confidential medical record. 29 C.F.R. § 1630.14 (c); *see also* Open Records Decision No. 641 (1996).

As such, the ADA only applies to the medical information of applicants or employees. In this instance, the information at issue is part of the named person's arrest record and is not information relating to the medical condition or medical history of an "applicant" or "employee" of the department for ADA purposes. Therefore, based upon our review, we find that the ADA is inapplicable to the information you have marked.

You also claim that some of the submitted information is confidential under the Texas Medical Practice Act (the "MPA"), chapter 159 of the Occupations Code. Section 159.002 of the MPA provides, in part, 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 must be released upon the patient's or patient's personal representative'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). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). In this instance, the submitted information does not constitute a record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that was created or maintained by a physician. Therefore, based upon our review, the MPA is inapplicable to the submitted information.

Section 773.091 of the Health and Safety Code, the *Emergency Medical Services Act*, provides:

(a) A *communication* between certified emergency medical services personnel or a physician providing medical supervision and a patient that is made in the course of providing emergency medical services to the patient is confidential and privileged and may not be disclosed except as provided by this chapter.

(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.

...

(g) The privilege of confidentiality under this section does not extend to information regarding the presence, nature of injury or illness, age, sex, occupation, and city of residence of a patient who is receiving emergency medical services. . . .

Health & Safety Code § 773.091(a), (b), (g). In this instance, you claim that some of the submitted information is subject to Chapter 773 of the Health and Safety Code. However, we find that the information at issue does not consist of communications between certified emergency medical services personnel providing medical supervision and a patient that is made in the course of providing emergency medical services to the patient. *See* Health and Safety Code § 773.091(a). Furthermore, the information does not consist of a record of the identity, evaluation, or treatment of a patient by emergency medical services personnel providing medical supervision that was created by emergency medical services personnel or maintained by an emergency medical services provider. *See* Health and Safety § 773.091(b). Therefore, section 773.091 is inapplicable to the submitted information.

We note, however, that section 552.101 of the Government Code encompasses the common law right of privacy, which protects information if 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. *Indus. Found. v. Tex. Indus.*

Accident Bd., 540 S.W.2d 668, 685 (Tex. 1976). The types 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. In addition, this office has found that the following types of information are excepted from required public disclosure under common law privacy: an individual's criminal history when compiled by a governmental body, *see* Open Records Decision No. 565 (*citing United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989)); personal financial information not relating to a financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990); 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); and identities of victims and sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). The department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common law privacy.

We also note that 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. Therefore, pursuant to section 552.130, the department must withhold the Texas driver's license and motor vehicle record information that we have marked in the submitted information.

Section 552.147 of the Government Code provides that "[t]he social security number of a living person is excepted from" required public disclosure under the Act. Therefore, the department must withhold the marked social security number in the submitted information.

In summary, the department must withhold the information we have marked under section 552.101 in conjunction with common law privacy. The department must withhold the Texas driver's license and motor vehicle record information that we have marked in the submitted information under section 552.130. The department must withhold the marked social security number under section 552.147. The remaining information must be released.

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,

A handwritten signature in black ink, appearing to read "Lori A. Cobos". The signature is fluid and cursive, with a large initial "L" and "C".

Lori A. Cobos
Assistant Attorney General
Open Records Division

LC/jb

Ref: ID# 273356

Enc. Submitted documents

c: Mr. Matt Lambert
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(w/o enclosures)