



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 2, 2007

Ms. Cary Grace
Assistant City Attorney
City of Austin
P.O. Box 1088
Austin, Texas 78767-8828

OR2007-03662

Dear Ms. Grace:

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# 274706.

The Austin Police Department (the "department") received a request for "all documents" relating to a specified arrest. You claim that some of the requested information is excepted from disclosure under sections 552.101, 552.108, 552.117, 552.130, and 552.147 of the Government Code. We have considered the exceptions you claim and have reviewed the information you submitted.¹ We also have considered the comments that we received from the requestor.² *See* Gov't Code § 552.304 (any person may submit written comments stating why information at issue in request for attorney general decision should or should not be released). We assume that the department has released any other information that is responsive to this request, to the extent that such information existed when the department

¹You indicate that a portion of one of the submitted documents is not responsive to this request for information. This decision does not address the public availability of that information, and it need not be released.

²The requestor asserts, among other things, that the department did not comply with section 552.301 of the Government Code in requesting this decision. *See* Gov't Code §§ 552.301(a)-(b), (d)-(e), .302. Having considered the requestor's arguments and the department's representations, we are satisfied that the department has complied with section 552.301.

received the request.³ If not, then any such information must be released immediately.⁴ See Gov't Code §§ 552.221, .301, .302; Open Records Decision No. 664 (2000).

We note that the department appears to have obtained some of the submitted information pursuant to a grand jury subpoena. The judiciary is expressly excluded from the requirements of the Act. See Gov't Code § 552.003(1)(B). This office has determined that a grand jury, for purposes of the Act, is a part of the judiciary and therefore not subject to the Act. See Open Records Decision No. 411 (1984). Further, records kept by another person or entity acting as an agent for a grand jury are considered to be records in the constructive possession of the grand jury and therefore are not subject to the Act. See Open Records Decisions Nos. 513 (1988), 398 (1983); *but see* Open Records Decision No. 513 at 4 (defining limits of judiciary exclusion). The fact that information collected or prepared by another person or entity is submitted to the grand jury does not necessarily mean that such information is in the grand jury's constructive possession when the same information is also held in the other person's or entity's own capacity. Information held by another person or entity but not produced at the direction of the grand jury may well be protected under one of the Act's specific exceptions to disclosure, but such information is not excluded from the reach of the Act by the judiciary exclusion. See Open Records Decision No. 513. Thus, to the extent that the department has possession of the submitted information as an agent of the grand jury, such information is in the grand jury's constructive possession and is not subject to the Act. This decision does not address the public availability of any such information. To the extent that the department does not have possession of the submitted information as an agent of the grand jury, the information is subject to the Act and must be released unless it falls within an exception to public disclosure.

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. This exception encompasses the doctrine of common-law privacy, which 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. See *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both elements of this test must be established. *Id.* at 681-82. The common-law right to privacy encompasses the specific types of information that are held to be intimate or embarrassing in *Industrial Foundation*. See 540 S.W.2d at 683 (information relating to sexual assault, pregnancy, mental or physical abuse in workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual

³We note that tangible items are not subject to disclosure under the Act. See Gov't Code § 552.002; Open Records Decision No. 581 (1990).

⁴We note that the Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App. – San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

organs). This office has determined that other types of information also are private under section 552.101. *See generally* Open Records Decision No. 659 at 4-5 (1999) (summarizing information attorney general has held to be private). We also have concluded that a compilation of an individual's criminal history is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person, and is generally not of legitimate concern to the public. *Cf. United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989)

You contend that some of the submitted information is protected by common-law privacy. We agree that the department would ordinarily be required to withhold portions of the information on that basis. In this instance, however, the requestor identifies himself as an authorized representative of the individual who is the subject of the private information. As such, the requestor has a special right of access to that information under section 552.023 of the Government Code. *See* Gov't Code § 552.023(a).⁵ Therefore, the department may not withhold any of the submitted information under section 552.101 in conjunction with common-law privacy. *See* Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning himself).

Section 552.101 also encompasses information that other statutes make confidential. Criminal history record information ("CHRI") obtained from the National Crime Information Center or the Texas Crime Information Center is confidential under federal and state law. 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."⁶ Gov't Code § 411.082(2). Federal law governs the dissemination of CHRI obtained from the National Crime Information Center network. Federal regulations prohibit the release to the general public of CHRI maintained in state and local CHRI systems. *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") and (c)(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"). The federal regulations allow each state to follow its own individual law with respect to CHRI that it generates. *See* Open Records Decision No. 565 at 10-12 (1990); *see generally* Gov't Code ch. 411 subch. F. Sections 411.083(b)(1) and 411.089(a) of the Government Code 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. *See id.*

⁵Section 552.023(a) provides that "[a] person or a person's authorized representative has a special right of access, beyond the right of the general public, to information held by a governmental body that relates to the person and that is protected from public disclosure by laws intended to protect that person's privacy interests." Gov't Code § 552.023(a).

⁶We note that the statutory definition of CHRI does not encompass driving record information maintained by the Texas Department of Public Safety under subchapter C of chapter 521 of the Transportation Code. *See* Gov't Code § 411.082(2).

§ 411.089(b). Therefore, the department must withhold any CHRI contained in the submitted documents under federal law and subchapter F of chapter 411 of the Government Code.⁷

Section 552.101 also encompasses section 143.089 of the Local Government Code.⁸ Section 143.089 provides for the existence of two different types of personnel files relating to a police officer, including one that must be maintained as part of the officer's civil service file and another that the police department may maintain for its own internal use. *See* Local Gov't Code § 143.089(a), (g). The officer's civil service file must contain certain specified items, including commendations, periodic evaluations by the police officer's supervisor, and documents relating to any misconduct in any instance in which the department took disciplinary action against the officer under chapter 143 of the Local Government Code. *Id.* § 143.089(a)(1)-(2). Chapter 143 prescribes the following types of disciplinary actions: removal, suspension, demotion, and uncompensated duty. *Id.* §§ 143.051-.055. In cases in which a police department investigates a police officer's misconduct and takes disciplinary action against an officer, it is required by section 143.089(a)(2) to place all investigatory records relating to the investigation and disciplinary action, including background documents such as complaints, witness statements, and documents of like nature from individuals who were not in a supervisory capacity, in the police officer's civil service file maintained under section 143.089(a). *See Abbott v. Corpus Christi*, 109 S.W.3d 113, 122 (Tex. App. – Austin 2003, no pet.). All investigatory materials in a case resulting in disciplinary action are "from the employing department" when they are held by or are in the possession of the department because of its investigation into a police officer's misconduct, and the department must forward them to the civil service commission for placement in the civil service personnel file. *Id.* Such records may not be withheld under section 552.101 of the Government Code in conjunction with section 143.089 of the Local Government Code. *See* Local Gov't Code § 143.089(f); Open Records Decision No. 562 at 6 (1990). Information relating to alleged misconduct or disciplinary action taken must be removed from the police officer's civil service file if the police department determines that there is insufficient evidence to sustain the charge of misconduct or that the disciplinary action was taken without just cause. *See* Local Gov't Code § 143.089(b)-(c).

Subsection (g) of section 143.089 authorizes the police department to maintain, for its own use, a separate and independent internal personnel file relating to a police officer. Section 143.089(g) provides as follows:

A fire or police department may maintain a personnel file on a fire fighter or police officer employed by the department for the department's use, but the department may not release any information contained in the department file

⁷We note that an individual may obtain his own CHRI from the Texas Department of Public Safety. *See* Gov't Code § 411.083(3).

⁸We understand that the City of Austin is a civil service municipality under chapter 143 of the Local Government Code.

to any agency or person requesting information relating to a fire fighter or police officer. The department shall refer to the director or the director's designee a person or agency that requests information that is maintained in the fire fighter's or police officer's personnel file.

Id. § 143.089(g). In *City of San Antonio v. Texas Attorney General*, 851 S.W.2d 946 (Tex. App. – Austin 1993, writ denied), the court addressed a request for information contained in a police officer's personnel file maintained by the police department for its use and the applicability of section 143.089(g) to that file. The records included in the departmental personnel file related to complaints against the police officer for which no disciplinary action was taken. The court determined that section 143.089(g) made these records confidential. See *City of San Antonio*, 851 S.W.2d at 949; see also *City of San Antonio v. San Antonio Express-News*, 47 S.W.3d 556 (Tex. App. – San Antonio 2000, no pet.) (restricting confidentiality under Local Gov't Code § 143.089(g) to "information reasonably related to a police officer's or fire fighter's employment relationship"); Attorney General Opinion JC-0257 at 6-7 (2000) (addressing functions of Local Gov't Code § 143.089(a) and (g) files).

You have marked information that the department seeks to withhold under section 143.089(g). You state that the marked information is maintained in departmental files under section 143.089(g) and is related to investigations that have not resulted in disciplinary action under chapter 143 of the Local Government Code. Based on your representations, we agree that the department must withhold the marked information under section 143.089(g) of the Local Government Code.

Medical records are confidential under the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. See Occ. Code § 151.001. Section 159.002 of the MPA provides in 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.

Id. § 159.002(b)-(c). This office has determined that in governing access to a specific subset of information, the MPA prevails over the more general provisions of the Act. See Open Records Decision No. 598 (1991). We also have concluded that when a file is created as the result of a hospital stay, all of the documents in the file that relate to diagnosis and treatment constitute either physician-patient communications or records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a

physician. *See* Open Records Decision No. 546 (1990). Medical records must be released on 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. *See* Occ. Code §§ 159.004, .005. Any subsequent release of medical records must be consistent with the purposes for which the governmental body obtained the records. *See id.* § 159.002(c); Open Records Decision No. 565 at 7 (1990). We have marked medical records that the department must withhold under the MPA, unless the requestor provides written consent for release in accordance with sections 159.004 and 159.005 of the MPA. *See* Open Records Decision No. 598 (1991).

Mental health records are confidential under section 611.002 of the Health and Safety Code, which provides in part:

- (a) Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.
- (b) Confidential communications or records may not be disclosed except as provided by Section 611.004 or 611.0045.

Health & Safety Code § 611.002(a)-(b); *see also id.* § 611.001 (defining "patient" and "professional"). Sections 611.004 and 611.0045 provide for access to information that is made confidential by section 611.002 only by certain individuals. *See id.* §§ 611.004, 611.0045; Open Records Decision No. 565 (1990). We have marked mental health records that must be withheld under section 611.002, unless the requestor has a right of access to the information under sections 611.004 and 611.0045.

Next, we address your claim under section 552.108 of the Government Code. Section 552.108(a)(2) excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication.[.]" Gov't Code § 552.108(a)(2). A governmental body that claims an exception to disclosure under section 552.108 must reasonably explain how and why this exception is applicable to the information at issue. *See id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You have marked information that the department seeks to withhold under section 552.108. You state that the marked information relates to a closed criminal investigation that did not result in a conviction or a deferred adjudication. Based on your representation, we conclude that section 552.108(a)(2) is applicable in this instance.

Section 552.108 does not except from disclosure "basic information about an arrested person, an arrest, or a crime." Gov't Code § 552.108(c). Section 552.108(c) refers to the basic front-page 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). *See* 531 S.W.2d at 186-88. The department must

release basic information under section 552.108(c), even if the information does not literally appear on the front page of an offense or arrest report. *See* Open Records Decision No. 127 at 3-4 (1976) (summarizing types of information deemed public by *Houston Chronicle*). The department may withhold the rest of the marked information under section 552.108(a)(2).

You also raise section 552.117 of the Government Code. Section 552.117(a)(2) excepts from disclosure the home address, home telephone number, and social security number of a peace officer, as well as information that reveals whether the peace officer has family members, regardless of whether the peace officer complies with sections 552.024 or 552.1175. Section 552.117(a)(2) adopts the definition of peace officer found at article 2.12 of the Code of Criminal Procedure. You have marked information that the department seeks to withhold under section 552.117. We agree that peace officers' home addresses and telephone numbers must be withheld under section 552.117(a)(2). The officers' cell telephone and pager numbers also must be withheld under section 552.117(a)(2) if the officers, rather than a governmental entity, pay for the cell phone or pager service. *See* Open Records Decision No. 670 at 6 (2001); *see also* Open Records Decision No. 506 at 5-6 (1988) (Gov't Code § 552.117 not applicable to cellular mobile phone numbers paid for by governmental body and intended for official use).

You also seek to withhold information relating to city firefighters under section 552.117. Section 552.117(a)(1) excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former employee of a governmental body who requests that this information be kept confidential under section 552.024 of the Government Code. Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee who did not timely request under section 552.024 that the information be kept confidential. Therefore, the home address and telephone number of a firefighter must be withheld under section 552.117(a)(1) if the firefighter timely requested confidentiality for that information under section 552.024.

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. *See* Gov't Code § 552.130(a)(1). You have marked Texas driver's license information that the department seeks to withhold under this exception. We agree that the department must withhold most of the marked information under section 552.130. We note, however, that the requestor is the authorized representative of the individual to whom the rest of the driver's license information pertains. Thus, because section 552.130 protects personal privacy, the requestor has a right of access to the remaining driver's license information under section 552.023. *See* Gov't Code § 552.023(a); Open Records Decision No. 481 at 4.

In summary: (1) to the extent that the department has possession of the submitted information as an agent of the grand jury, such information is in the grand jury's constructive possession and is not subject to the Act; (2) any responsive CHRI must be withheld under federal law and subchapter F of chapter 411 of the Government Code; (3) the information that you have marked under section 143.089(g) of the Local Government Code must be withheld; (4) the medical records that we have marked must be withheld under the MPA, unless the requestor provides written consent for release in accordance with sections 159.004 and 159.005 of the MPA; (5) the mental health records that we have marked must be withheld under section 611.002 of the Health and Safety Code, unless the requestor has a right of access under sections 611.004 and 611.0045 of the Health and Safety Code; (6) the department may withhold the marked information that is related to the concluded criminal investigation under section 552.108(a)(2) of the Government Code, except for the basic information that must be released under section 552.108(c); (7) the department must withhold the marked home addresses and telephone numbers of peace officers, as well as their personal cell telephone or pager numbers if the officers paid for their cell phone or pager service, under section 552.117(a)(2) of the Government Code; (8) the marked home addresses and telephone numbers of firefighters must be withheld under section 552.117(a)(1) if the firefighter timely requested confidentiality for that information under section 552.024 of the Government Code; and (9) except for the information to which the requestor has a right of access under section 552.023 of the Government Code, the highlighted Texas driver's license information must be withheld under section 552.130 of the Government Code. The rest of the submitted information must be released.⁹

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

⁹Should the department receive another request for these same records from a requestor who would not have a right of access to the private information, the department should resubmit these records and request another decision. See Gov't Code §§ 552.301(a), .302.

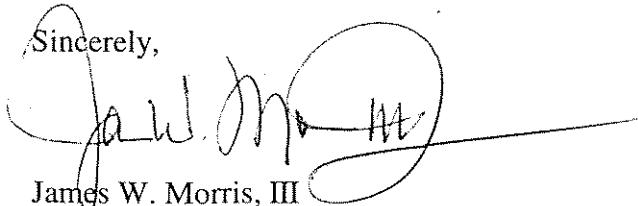
statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental 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 "James W. Morris, III", with a long horizontal line extending to the right.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/jb

Ref: ID# 274706

Enc: Submitted documents

c: Mr. Wayne Krause
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