



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 27, 2007

Ms. Rebecca Brewer  
Abernathy, Roeder, Boyd & Joplin, P.C.  
P.O. Box 1210  
McKinney, Texas 75070

OR2007-08137

Dear Ms. Brewer:

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# 282129.

The Frisco Police Department (the "department"), which you represent, received a request for the personnel files of two named officers. You claim that the requested information is excepted from disclosure under sections 552.101, 552.102, 552.117, 552.130, 552.136, and 552.140 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and reviewed the submitted information.<sup>2</sup>

Initially, you inform this office that the department sought clarification from the requestor. *See* Gov't Code § 552.222(b) (stating that if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used). We note that a governmental body has a duty to make a good faith effort to relate a request for information to information that the governmental body holds. *Open Records Decision No. 561 (1990)*. In this case, as you have submitted responsive

---

<sup>1</sup>Although you raised section 552.108 of the Government Code, you have not submitted arguments explaining how this exception applies to the submitted information. Therefore, we presume that you have withdrawn this exception. *See* Gov't Code §§ 552.301, .302.

<sup>2</sup>We note that the department has redacted some of the submitted information. As we are able in this instance to discern the nature of the redacted information, we will determine whether it is excepted from public disclosure. In the future, the department should refrain from redacting any information that it submits to this office in seeking an open records ruling. *See* Gov't Code §§ 552.301(e)(1)(D), .302.

information for our review and raised exceptions to disclosure for these documents, we consider the department to have made a good faith effort to identify information that is responsive to the request, and we will address the applicability of the claimed exceptions to the submitted information.

Next, we note that a portion of the submitted information is not responsive to the present request. The requestor has specifically excluded social security numbers and home addresses from the scope of the request. Accordingly, the submitted social security numbers and home addresses, which we have marked, are not responsive to the present request. This ruling does not address the public availability of any information that is not responsive to the present request, and the department need not release that information in response to this request.

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 42 U.S.C. §§ 1320d-1320d-8. 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* Health Insurance Portability and Accountability Act of 1996, 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 has 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* 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). Because the Privacy Rule does not make confidential information that is subject to disclosure under the Act, the department may withhold requested protected health information from the public only if an exception in subchapter C of the Act applies.

Section 552.101 also encompasses the Medical Practices Act (“MPA”). You claim that a portion of the submitted information consists of *medical records*, access to which is governed by the MPA. Occ. Code §§ 151.001-165.160. Section 159.002 of the MPA provides in part:

(a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.

(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. Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004; Open Records Decision No. 598 (1991). 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). Upon review, however, we determine that none of the submitted records consist of medical records subject to the MPA.

You argue a portion of the submitted information includes information that is subject to chapter 611 of the *Health and Safety Code*, which provides for the confidentiality of records created or maintained by a mental health professional. Section 611.002 of the *Health and Safety Code* provides in part the following:

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.

*Health & Safety Code* § 611.002(a). Sections 611.004 and 611.0045 of the *Health and Safety Code* provide for access to mental health records only by certain individuals. *See* Open Records Decision No. 565 (1990). Upon review, we find that none of the submitted information constitutes mental health records subject to chapter 611 of the *Health and Safety Code* and none of the submitted information may be withheld under section 552.101 of the *Government Code* on that basis.

You also claim section 1701.306 of the Occupations Code is applicable to a portion of the submitted information. Section 1701.306 makes confidential L-2 Declarations of Medical Condition and L-3 Declarations of Psychological and Emotional Health required by the Texas Commission on Law Enforcement Officer Standards and Education. *See* Occ. Code § 1701.306. However, the submitted information does not include any L-2 or L-3 declarations. Therefore, we find that section 1701.306 is inapplicable to any of the submitted information and none of it may be withheld under section 552.101 of the Government Code on that basis.

You claim that a portion of the submitted information constitutes criminal history record information (“CHRI”). CHRI generated by the National Crime Information Center or by the Texas Crime Information Center is confidential. 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; however, 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 - .127. Furthermore, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F. Although you indicate that the submitted information contains criminal history information that is confidential under chapter 411, upon review we find that none of this information is made confidential by section 411.083 of the Government Code. Therefore, the submitted information may not be withheld under section 552.101 on this basis.

Section 552.101 also encompasses information protected by common law privacy. Section 552.102 excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” Gov’t Code § 552.102(a). *In Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref’d n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), for information claimed to be protected under the doctrine of common law privacy as incorporated by section 552.101. We will therefore consider your claims regarding sections 552.101 and 552.102 together.

Common law privacy 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. *Indus. Found.*, 540 S.W.2d at 685. 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. In addition, this office has found that some kinds of medical information or information indicating disabilities or specific illnesses is protected by common law privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Furthermore, this office has found that personal financial information not relating to a financial transaction between an individual and a governmental body is generally protected by common law privacy. Open Records Decision Nos. 600 (1992) (employee's designation of retirement beneficiary, choice of insurance carrier, election of optional coverages, direct deposit authorization, forms allowing employee to allocate pretax compensation to group insurance, health care or dependent care), 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history) (1990), 523 (1989) (common law privacy protects credit reports, financial statements, and other personal financial information), 373 (1983) (common law privacy protects assets and income source information).

However, this office has also found that the public has a legitimate interest in information relating to employees of governmental bodies and their employment qualifications and job performance. *See* Open Records Decision Nos. 562 at 10 (1990), 542 at 5 (1990); *see also* Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow). We note that you seek, in part, to withhold portions of the submitted information that pertain to the named officers' criminal history. Generally, information revealing the results of an individual's criminal history compilation is highly embarrassing information. *Cf. U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989) (when considering prong regarding individual's privacy interest, court recognized distinction between public records found in courthouse files and local police stations and compiled summary of information and noted that individual has significant privacy interest in compilation of one's criminal history). This office has found that a compilation of a private citizen's criminal history is generally not of legitimate concern to the public. However, the information at issue does not pertain to private citizens but department officers and was used by the department in its hiring process and, presumably, played a role in the department's employment decisions. This office has ruled that there is a legitimate public interest in the background and qualifications of public employees, especially those who work in law enforcement. *See* Open Records Decision Nos. 562 at 10 (1990), 542 at 5 (1990); *see also* Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow).

Upon review, we have marked portions of the submitted information that must be withheld pursuant to section 552.101 in conjunction with common law privacy. We find, however, that you have failed to establish how any portion of the remaining submitted information is confidential under common law privacy.

You claim that a portion of the remaining submitted information is subject to section 552.117 of the Government Code. Section 552.117(a)(2) excepts from disclosure the home address, home telephone number, social security number, and family member information of a peace officer, regardless of whether the officer made an election under section 552.024 or 552.1175.<sup>3</sup> *See* Gov't Code § 552.117(a)(2); Open Records Decision No. 622 (1994). Thus, the department must withhold the information we have marked pursuant to section 552.117(a)(2) of the Government Code.

Next, we address your argument under section 552.130 of the Government Code. Section 552.130 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. In accordance with section 552.130 of the Government Code, the department must withhold the Texas motor vehicle record information we have marked.

Section 552.136 of the Government Code states "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136. The department must withhold the insurance policy number we have marked under section 552.136.

We note that a portion of the remaining submitted information is subject to section 552.137 of the Government Code.<sup>4</sup> Section 552.137 excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov't Code § 552.137(a)-(c). The e-mail addresses we have marked are not of a type specifically excluded by section 552.137(c). Therefore, the department must withhold these e-mail addresses in accordance with section 552.137 unless the department receives consent for their release.

Section 552.140 of the Government Code provides in relevant part:

- (a) This section applies only to a military veteran's Department of Defense Form DD-214 or other military discharge record that is first recorded with or

---

<sup>3</sup>"Peace Officer" is defined by article 2.12 of the Code of Criminal Procedure.

<sup>4</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

that otherwise first comes into the possession of a governmental body on or after September 1, 2003.

Gov't Code § 552.140(a). The submitted information does not contain a Form DD-214. We note that information derived from a DD-214 form is not subject to section 552.140 and may not be withheld on that basis. *Id.*

Finally, we note that a portion of the submitted information has a notice of copyright protection. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

In summary, the marked social security numbers and home addresses are not responsive to the request and need not be released in response to it. The department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common law privacy. The department must withhold the marked information under sections 552.117, 552.130, 552.136 and 552.137 of the Government Code. The remaining submitted information must be released; however, in releasing information that is protected by copyright, the department must comply with copyright law.

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

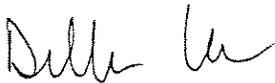
will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to 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,



Debbie K. Lee  
Assistant Attorney General  
Open Records Division

DKL/eeg

Ref: ID# 282129

Enc. Submitted documents

c: Ms. Sharon Curtis  
1216 North Central Expressway, Suite 101  
McKinney, Texas 75070  
(w/o enclosures)