



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 27, 2007

Mr. J. Grady Randle
Randle Law Office, Ltd., L.L.P.
Memorial City Plaza II
820 Gessner, Suite 1570
Houston, Texas 77024-4278

OR2007-08143

Dear Mr. Randle:

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# 282560.

The Meadows Place Police Department (the "department"), which you represent, received two requests for the personnel file of a named peace officer. One of the requestors additionally requests seven categories of information including documents identifying the time of service, and any reason for separation from service, city council agendas and minutes relating to the employment of the named officer, the Internal Affairs Division ("IAD") file, and any documents where the named officer is named as a suspect or accused. You claim that some of the submitted information is excepted from disclosure under sections 552.102, 552.108, and 552.1175 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.108 of the Government Code provides in pertinent part:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:

(1) release of the information would interfere with the detection, investigation, or prosecution of crime;

(2) 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). A governmental body has the burden of proving that the requested information must be withheld under the stated exception. *See id.* § 552.301(e)(1)(A). Although you raise section 552.108 of the Government Code as a basis for withholding the requested information, you submitted no arguments explaining the applicability of section 552.108 to this information. Therefore, you may not withhold any of the requested information under section 552.108 of the Government Code.

Section 552.102(a) of the Government Code 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(a) is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the Government Code. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976). Accordingly, we will address common-law privacy under section 552.101 and section 552.102(a) together.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.”¹ Gov't Code § 552.101. Section 552.101 encompasses common-law privacy. For information to be protected from public disclosure by the common-law right of privacy under section 552.101, the information must meet the criteria set out in *Industrial Foundation*. In *Industrial Foundation*, the Texas Supreme Court stated that information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts, the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. 540 S.W.2d at 685. This office has found some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under 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).

In addition, prior decisions of this office have found that personal financial information relating only to an individual ordinarily satisfies the first requirement of the test for common-

¹The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *Open Records Decision Nos. 481* (1987), *480* (1987), *470* (1987).

law privacy, but that there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. *See* Open Records Decision Nos. 600 (1992), 545 (1990), 373 (1983). For example, a public employee's allocation of his salary to a voluntary investment program or to optional insurance coverage which is offered by his employer is a personal investment decision and information about it is excepted from disclosure under the common-law right of privacy. *See* ORD 545. However, information revealing that an employee participates in a group insurance plan funded partly or wholly by the governmental body is not excepted from disclosure. *See* ORD 600 at 10. We note that this office has 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).

This office has also found a compilation of an individual's criminal history record information to be highly embarrassing information, the publication of which would be highly objectionable to a reasonable person. *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). Furthermore, we find that a compilation of a private citizen's criminal history is generally not of legitimate concern to the public. We have marked the information that the department must withhold as confidential under sections 552.101 and 552.102 in conjunction with common-law privacy. We find, however, that you have not demonstrated how any of the remaining information is either intimate or embarrassing or is not of a legitimate public interest. Therefore, none of the remaining information is confidential under the doctrine of common-law privacy and it may not be withheld under section 552.101 or 552.102.

Section 552.101 also encompasses information made confidential by statute. Criminal history record information ("CHRI") generated by the National Crime Information Center ("NCIC") or by the Texas Crime Information Center ("TCIC") 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 the CHRI it generates. *See 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; 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. 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* ORD 565. Furthermore, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 in conjunction with chapter 411, subchapter F of the Government Code. However, 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). We have marked the information that constitutes CHRI generated by TCIC and NCIC and is confidential under section 411.083. Therefore, the information we have marked must be withheld under section 552.101 of the Government Code.

Section 552.101 also encompasses chapter 560 of the Government Code. The submitted information contains fingerprint cards. The public availability of fingerprints is governed by sections 560.001, 560.002, and 560.003 of the Government Code. Section 560.001 defines "biometric identifier," for the purposes of these sections, as meaning "a retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry." *Id.* § 560.001(1). Section 560.002 provides that a governmental body that possesses a biometric identifier of an individual:

(1) may not sell, lease, or otherwise disclose the biometric identifier to another person unless:

(A) the individual consents to the disclosure;

(B) the disclosure is required or permitted by a federal statute or by a state statute other than [the Act]; or

(C) the disclosure is made by or to a law enforcement agency for a law enforcement purpose; and

(2) shall store, transmit, and protect from disclosure the biometric identifier using reasonable care and in a manner that is the same as or more protective than the manner in which the governmental body stores, transmits, and protects its other confidential information.

Id. § 560.002. Section 560.003 provides that "[a] biometric identifier in the possession of a governmental body is exempt from disclosure under [the Act]." *Id.* § 560.003. As there is no indication that the requestor has a right of access under section 560.002 to the fingerprints we have marked, that information is confidential under section 560.003 and must be withheld from disclosure under section 552.101 of the Government Code.

Section 552.101 also encompasses section 411.192 of the Government Code. Section 411.192 of the Government Code governs the release of all information maintained

by the Department of Public Safety ("DPS") concerning the licensure of individuals to carry a concealed handgun, and provides as follows:

(a) [DPS] shall disclose to a criminal justice agency information contained in its files and records regarding whether a named individual or any individual named in a specified list is licensed under this subchapter. Information on an individual subject to disclosure under this section includes the individual's name, date of birth, gender, race, and zip code. Except as otherwise provided by this section and by Section 411.193, all other records maintained under this subchapter are confidential and are not subject to mandatory disclosure under the open records law, Chapter 552.

(b) An applicant or license holder may be furnished a copy of disclosable records regarding the applicant or license holder on request and payment of a reasonable fee.

Act of May 11, 2007, 80th Leg., R.S., H.B. 991, § 1 (to be codified as an amendment to Gov't Code § 411.192(a), (b), (d)). In this instance, the requestors are not criminal justice agencies nor is either requestor the license holder. We note that section 411.193 is not applicable because the submitted information does not contain a statistical report. Gov't Code § 411.193 (making a statistical report including the number of licenses issued, denied, revoked, or suspended by the Department of Public Safety during the preceding month available to the public). Therefore, the department must withhold the concealed handgun license information, which we have marked, pursuant to section 552.101 in conjunction with section 411.192 of the Government Code.

Section 552.101 also encompasses section 1701.306 of the Occupations Code. Section 1701.306 provides as follows:

(a) The [Texas Commission on Law Enforcement Officer Standards and Education] 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). The L-2 (Declaration of Medical Condition) and L-3 (Declaration of Psychological and Emotional Health) forms are confidential under section 1701.306 of the Occupations Code, and must be withheld under section 552.101 of the Government Code.

Section 552.101 also encompasses the Medical Practice Act (“MPA”), chapter 159 of the Occupations Code. Section 159.002 of the Occupations Code provides in pertinent 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.

Occ. Code § 159.002(b), (c). Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See* Occ. Code §§ 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). Medical records may only be released in accordance with the MPA. *See* Open Records Decision No. 598 (1991). Upon review, the department may only release the medical records we have marked in accordance with the MPA.

The requested documents also contains information that is excepted from disclosure under section 552.117(a)(2) of the Government Code. Section 552.117(a)(2) excepts from disclosure “information that relates to the home address, home telephone number, or social security number” of a peace officer, or information that reveals whether the peace officer has family members, regardless of whether the officer complies with section 552.024 or section 552.1175.² Gov’t Code § 552.117(a)(2). Accordingly, we conclude that the department must withhold the information we have marked pursuant to section 552.117(a)(2).

²Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. *See* Crim. Proc. Code art. 2.12.

We note that a portion of the submitted information may be excepted under section 552.1175 of the Government Code, which provides in part as follows:

(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.

Id. § 552.1175(b). If the peace officers at issue are not officers employed by the department and they notify the department that they choose to keep the information we have marked confidential in accordance with section 552.1175, the department must withhold this information pursuant to section 552.1175 of the Government Code. If they are employed by the department, the information we marked is confidential under section 552.117(a)(2) regardless of whether the officers elected confidentiality.

Finally, the requested information contains Texas issued motor vehicle record information. 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 . . . or a personal identification document issued by an agency of this state. . . .” *Id.* § 552.130(a). Therefore, pursuant to section 552.130, the department must withhold the Texas-issued motor vehicle and driver’s license information we have marked.

In summary, the department must withhold the following items pursuant to section 552.101 of the Government Code: the marked CHRI in conjunction with section 411.083 of the Government Code; the marked fingerprint information in conjunction with section 560.003 of the Government Code; the concealed handgun license information in conjunction with section 411.192 of the Government Code; the L-2 (Declaration of Medical Condition) and L-3 (Declaration of Psychological and Emotional Health) forms in conjunction with section 1701.306 of the Occupations Code. The department also must withhold the information we have marked under sections 552.101 and 552.102 in conjunction with common-law privacy. The department must withhold the marked medical records in accordance with the MPA. Finally, the department must withhold the personal information we marked under section 552.117(a)(2) of the Government Code and Texas issued motor vehicle record and driver’s license information we marked under section 552.130. Finally, the department must withhold the personal information we have marked of the peace officers

not employed by the department under section 552.1175, if these officers notify the department of their desire to keep this information confidential. The remaining information must be released.³

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).

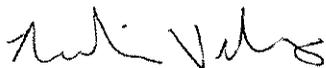
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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.

³We note that the submitted information contains social security numbers. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

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,



Melanie J. Villars
Assistant Attorney General
Open Records Division

MJV/jb

Ref: ID# 282560

Enc. Submitted documents

c: Mr. Mark R. Thiessen
2000 Smith Street
Houston, Texas 77002
(w/o enclosures)

Mr. Larry P. McDougal
1000 Austin Street, Suite A
Richmond, Texas 77469
(w/o enclosures)