



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 6, 2007

Mr. Galen Gatten
Assistant City Attorney
City of Midland
P.O. Box 1152
Midland, Texas 79702

OR2007-11665

Dear Mr. Gatten:

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# 288319.

The Midland Police Department (the "department") received a request for information related to allegations of police brutality or harassment between January 1, 1987 and May 31, 2007. You claim that a portion of the requested information is excepted from disclosure under section 552.130 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, we must address the department's procedural obligations under section 552.301 of the Government Code. Section 552.301 prescribes 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). You state that the department received the present request on June 14, 2007, but you did not request a ruling from this office until June 29, 2007. Therefore, the department failed to request a ruling within the ten-business-day deadline prescribed by section 552.301(b).

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released, unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). The applicability of the exception that you claim, section 552.130, can provide a compelling reason to withhold information. In addition, portions of the submitted information are excepted from disclosure under sections 552.101 and 552.117 of the Government Code, which can also provide compelling reasons to withhold information.¹ *See Open Records Decision No. 150 (1977)* (compelling reason exists when third-party interests are at stake or when information is confidential under other law).

Section 552.130 prohibits the release of 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. *See Gov't Code* § 552.130. We note, however, that section 552.130 is designed to protect individuals' privacy and that the right to privacy expires at death. *See Moore v. Charles B. Pierce Film Enters. Inc.*, 589 S.W.2d 489 (Tex. Civ. App.—Texarkana 1979, writ ref'd n.r.e.); *see also Justice v. Belo Broadcasting Corp.*, 472 F. Supp. 145, 146-47 (N.D. Tex. 1979); Attorney General Opinions JM-229 (1984); H-917 (1976); Open Records Decision No. 272 at 1 (1981). Therefore, information from motor vehicle records that were issued to a person who is now deceased may not be withheld under section 552.130. Accordingly, the department must withhold the Texas driver's license information we have marked pursuant to section 552.130 of the Government Code.

We next address the mandatory exceptions that are applicable to the remaining information. 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." This exception encompasses information made confidential by other statutes. Portions of the submitted information were obtained from medical records. Access to such information is governed by the Medical Practice Act ("MPA"), chapter 159 of the Occupations Code. Section 159.002 of the MPA provides 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.

¹The Office of the Attorney General will raise mandatory exceptions like sections 552.101 and 552.117 of the Government Code on behalf of a governmental body, but ordinarily will not raise other exceptions. *See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).*

(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(a)-(c). 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 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. *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 the information obtained from medical records that is subject to the MPA and may only be released in accordance therewith.

Section 552.101 also encompasses information protected by section 1703.306 of the Occupations Code, which governs information obtained in the course of conducting a polygraph examination and provides that "a person for whom a polygraph examination is conducted . . . may not disclose information acquired from a polygraph examination" except to certain categories of people. Occ. Code § 1703.306(a). The remaining information includes information from a polygraph examination. Therefore, the department must withhold the information we have marked under section 552.101 in conjunction with section 1703.306 of the Occupations Code.

Section 552.101 also encompasses the common law right to privacy. Common law privacy protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) of no legitimate public interest. *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 prongs of this test must be demonstrated. *Id.* at 681-82. 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 and an individual's criminal history when compiled by a governmental body are confidential 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), 565 (1989). We also note that common law privacy generally protects the identifying information of juvenile offenders. *See* Open Records Decision No. 394 (1983); *cf.* Fam. Code § 58.007. We have reviewed the remaining records and marked the information that must be withheld pursuant to section 552.101 in conjunction with common law privacy.

We note that some of the remaining information is subject to section 552.117(a)(2) of the Government Code, which excepts from disclosure the current and former home addresses and telephone numbers, social security numbers, and family member information regarding a peace officer regardless of whether the officer elected under section 552.024 or 552.1175 of the Government Code to keep such information confidential.² We have marked information that must be withheld under section 552.117(a)(2) of the Government Code.³

In summary, the department must withhold the Texas motor vehicle record information that we have marked under section 552.130 of the Government Code. The information taken from medical records, which we have also marked, may only be released in accordance with the MPA. The department must also withhold the information obtained from a polygraph examination, which we have marked, under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code. We have also marked information that must be withheld under section 552.101 in conjunction with common law privacy. Finally, we have marked information that must be withheld under section 552.117(a)(2) of the Government Code. The remaining information must be released to the requestor.⁴

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

²"Peace officer" is defined by Article 2.12 of the Texas Code of Criminal Procedure.

³We note that in Open Records Decision No. 670 (2001), the attorney general determined that all governmental bodies may withhold information that reveals a peace officer's home address, home telephone number, personal cellular phone number, personal pager number, social security number, and information that reveals whether the individual has family members without the necessity of requesting an attorney general decision as to whether the exception under section 552.117(a)(2) applies.

⁴We note that the remaining 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.

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/eeg

Ref: ID# 288319

Enc. Submitted documents

c: Ms. Lulu Corona
Civil Right Chairperson
Permian Basin League of United Latin American Citizens
P.O. Box 9722
Midland, Texas 79708
(w/o enclosures)