



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

October 24, 2007

Ms. Meredith Ladd  
Brown & Hofmeister, L.L.P.  
740 East Campbell Road, Suite 800  
Richardson, Texas 75081

OR2007-13892

Dear Ms. Ladd:

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# 292783.

The McKinney Police Department (the "department"), which you represent, received a request for personnel information pertaining to two named department officers and all incident and arrest reports written or sponsored by the officers for 30 days prior to February 28, 2007 and 30 days after a specified arrest.<sup>1</sup> You claim that the requested information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.<sup>2</sup>

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<sup>1</sup>We note that the requestor agreed to allow the department to redact the officers' social security numbers and places of residence. *See* Gov't Code § 552.222 (governmental body may ask requestor to clarify or narrow scope of request). As this information is no longer encompassed by the request, it is not responsive and we do not address its availability in this ruling.

<sup>2</sup>We assume that the representative sample of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Initially, we note that the sample of information you have submitted for review consists only of personnel information pertaining to the two officers. The sample does not include any incident or arrest reports written or sponsored by the officers for the specified time period. To the extent any responsive incident or arrest reports existed on the date the department received this request, we assume that information has been released. If you have not released any such records, you must do so at this time. *See* Gov't Code §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

We next note that some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides in part that

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

- (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body[.]

Gov't Code § 552.022(a)(1). The personnel records you submitted to this office include a completed evaluation pertaining to one of the named officers as well as a completed report. These documents are subject to section 552.022 and must be released, unless they are expressly confidential under other law or excepted from disclosure under section 552.108 of the Government Code.<sup>3</sup> Although you assert that this information is excepted under section 552.103 of the Government Code, this section is a discretionary exception to disclosure that protects a governmental body's interests and may be waived by the governmental body. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103 ); Open Records Decision No. 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived). Therefore, section 552.103 does not constitute other law for purposes of section 552.022. Accordingly, the department may not withhold the evaluation or the completed report under section 552.103 of the Government Code. As this information is not otherwise confidential, the department must release it to the requestor.

We next address your arguments under section 552.103 for the remaining information. Section 552.103 provides in relevant part as follows:

- (a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the

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<sup>3</sup>We note that the department does not claim an exception to disclosure under section 552.108 for this information.

state or a political subdivision is or may be a party or to which an officer or employee of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The department has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The department must meet both prongs of this test for information to be excepted under section 552.103(a).

You state, and provide documentation showing, that there is a pending prosecution. We note, however, that the department is not a party to this litigation. See Gov't Code § 552.103(a); Open Records Decision No. 575 at 2 (1990) (stating that predecessor to section 552.103 only applies when governmental body is party to litigation). In such a situation, we require an affirmative representation from the governmental body with the litigation interest that the governmental body wants the information at issue withheld from disclosure under section 552.103. You have provided a letter from the Collin County District Attorney's Office (the "district attorney") that states that the district attorney is a party to the pending prosecution. However, the letter does not provide our office with a representation from the district attorney that he wants the requested information in this specific instance withheld. As you have not provided us with an adequate representation from the district attorney, the department may not withhold the remaining personnel records under section 552.103 of the Government Code. We note, however, that portions of the remaining information are subject to sections 552.101, 552.117, 552.130, and 552.137 of the Government Code, which are "other law" for the purposes of section 552.022.<sup>4</sup>

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."

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

Gov't Code § 552.101. This section encompasses information protected by other statutes, such as the Medical Practices Act ("MPA"), subtitle B of title 3 of the Occupations Code. 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.

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). Furthermore, we 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 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 medical records that are subject to the MPA. The department may only disclose these records in accordance with the access provisions of the MPA. Absent the applicability of an MPA access provision, the department must withhold these records pursuant to the MPA. *See* Open Records Decision No. 598 (1991).

Section 552.101 also encompasses criminal history record information ("CHRI") generated by the National Crime Information Center or by the Texas Crime Information Center. 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 CHRI it generates. *Id.* Section 411.083 of the Government Code deems confidential CHRI that the Texas 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. We have marked the CHRI that must be withheld under section 552.101 of the Government Code in conjunction with federal law and subchapter F of chapter 411 of the Government Code.

We next note that the submitted information contains fingerprints, which are excepted from disclosure under section 552.101 in conjunction with chapter 560 of the Government Code. Chapter 560 provides that a governmental body may not release fingerprint information except in certain limited circumstances. *See* Gov't Code §§ 560.001 (defining "biometric identifier" to include fingerprints), .002 (prescribing manner in which biometric identifiers must be maintained and circumstances in which they can be released), .003 (providing that biometric identifiers in possession of governmental body are exempt from disclosure under Act). You do not inform us, and the submitted information does not indicate, that section 560.002 permits the disclosure of the submitted fingerprint information. Accordingly, the submitted fingerprint information, which we have marked, is confidential under section 560.003 and must be withheld under section 552.101 of the Government Code.

Section 552.101 also encompasses the common-law right of 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. *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 met. *Id.* This office has found that the following types of information are excepted from required public disclosure under common-law privacy: 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 of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). Further, 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 (1990). We have marked the information that the department must withhold under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.117 of the Government Code excepts from disclosure the current and former home addresses and home telephone numbers, social security number, and family member information of a peace officer, regardless of whether the officer made an election under section 552.024 of the Government Code or complies with section 552.1175 of the Government Code. *See* Gov't Code § 552.117(a)(2). This section applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. Therefore, to the extent the information we have marked pertains to a peace officer employed by the department, this information must be withheld under section 552.117(a)(2) of the Government Code.

The submitted documents also contain information that is excepted from disclosure pursuant to section 552.130 of the Government Code. Section 552.130 provides in relevant part:

(a) Information is excepted from required public disclosure if the information relates to:

(1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]

(2) a motor vehicle title or registration issued by an agency of this state; or

(3) a personal identification document issued by an agency of this state or a local agency authorized to issue an identification document.

*Id.* § 552.130(a). The department must withhold the Texas motor vehicle record information we have marked under section 552.130 of the Government Code.

We note that some of the remaining information is excepted under section 552.137 of the Government Code. 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 id.* § 552.137(a)-(c). We note that subsection (c) specifically excludes an e-mail address "provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public. *Id.* at § 552.137(c)(4). The e-mail addresses at issue do not appear to be of a type specifically excluded by section 552.137(c), and you do not inform us that the individuals to whom the e-mail addresses belong consent to their release. Therefore, the department must withhold the e-mail addresses we have marked under section 552.137 of the Government Code.

In summary, the department may only disclose the medical records we have marked in accordance with the access provisions of the MPA. In conjunction with section 552.101 of the Government Code, the department must withhold (1) the CHRI we have marked in conjunction with federal law and subchapter F of chapter 411 of the Government Code, (2)

the fingerprint information we have marked under section 560.003 of the Government Code, and (3) the information we have marked under common-law privacy. We have marked the information that must be withheld under sections 552.117(a)(2), 552.130, and 552.137 of the Government Code. The remaining submitted 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,



Cindy Nettles  
Assistant Attorney General  
Open Records Division

CN/mcf

Ref: ID# 292783

Enc. Submitted documents

c: Ms. Sharon Curtis  
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(w/o enclosures)