



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

May 7, 2008

Ms. YuShan Chang
Assistant City Attorney
City of Houston
P.O. Box 1562
Houston, Texas 77251-1562

OR2008-06238

Dear Ms. Chang:

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# 309496.

The Houston Police Department (the "department") received a request for all information related to two specified case numbers. You state you will provide some of the requested information to the requestor.¹ You claim that portions of the submitted incident report and investigation documents are excepted from disclosure under sections 552.101 and 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

First, we note, and you acknowledge, that the department has not complied with the time periods prescribed by section 552.301 of the Government Code in requesting a decision from this office. When a governmental body fails to comply with the requirements of section 552.301, the information at issue is presumed public. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); *City of Houston v. Houston Chronicle Publ'g Co.*, 673 S.W.2d 316, 323 (Tex. App.—Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). To overcome this presumption, the governmental body must show a compelling reason to withhold the information. *See* Gov't Code § 552.302; *Hancock*, 797 S.W.2d at 381. Normally, a compelling reason is demonstrated when some other source of law makes the information at issue confidential or third-party interests are at stake. *See* Open Records Decision No. 150

¹ Although you state you will release incident report number 086345995Q, we note that you have submitted that report and a related investigation report for our review. Therefore, we will consider whether your claimed exceptions apply to incident report number 086345995Q, as well as the other submitted information.

at 2 (1977). Because section 552.101 of the Government Code can provide a compelling reason to withhold information, we will consider the applicability of this exception to the submitted incident report and investigation documents.

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 section encompasses information protected by other statutes, such as section 242.127 of the Health and Safety Code. Subchapter E of chapter 242 of the Health and Safety Code concerns reports of abuse and neglect at convalescent and nursing homes and related institutions. *See* Health & Safety Code §§ 242.121 *et seq.* Section 242.127 provides:

A report, record, or working paper used or developed in an investigation made under [subchapter E, chapter 242 is] . . . confidential and may be disclosed only for purposes consistent with the rules adopted by the board or the designated agency. The report, record, or working paper . . . shall be disclosed to a law enforcement agency as necessary to permit the law enforcement agency to investigate a report of abuse or neglect or other complaint in accordance with Section 242.135.

Id. § 242.127. You state that Exhibit 3 constitutes a report and working papers used or developed by the Texas Department of Human Services ("DHS") during an investigation conducted under subchapter E, chapter 242 into suspected abuse at a nursing home. *See id.* §§ 242.125(a) (report of abuse or neglect shall be made to the department), .126(a) (department shall make a thorough investigation or reported abuse or neglect), .002(4) ("Department" means the Texas Department of Human Services."). You further state that disclosure of Exhibit 3 would not be consistent with the rules adopted by the DHS, and that the requestor is not a law enforcement agency. Based on your representations and our review, we find that Exhibit 3 is within the scope of section 242.127 of the Health and Safety Code. We note that a portion of Exhibit 3, which we have marked, is quoted in Exhibit 2. Therefore, the department must withhold Exhibit 3 and the information we have marked in Exhibit 2 under section 552.101 of the Government Code in conjunction with section 242.127 of the Health and Safety Code.

Section 552.101 also encompasses section 242.123 of the Health and Safety Code. You assert that portions of Exhibit 2 are confidential under section 242.123, which provides, in part:

(c) [A] report of abuse or neglect under Section 242.122 or of other conduct or conditions under Section 242.1225 should . . . include the address or phone number of the person making the report The phone number and address as well as the name of the person making the report must be deleted from any copy of any type of report that is released to the public, to the institution, or to an owner or agent of the institution.

Id. § 242.123. You state the police incident report submitted as Exhibit 2 pertains to a department investigation regarding an alleged assault at a nursing home. We note that the person whose identifying information you seek to withhold was a witness in the department's investigation and did not report suspected abuse to the department. We therefore determine that section 242.123 is not applicable to Exhibit 2. Accordingly, the department may not withhold any part of Exhibit 2 under section 552.101 in conjunction with section 242.123 of the Health and Safety Code.

You assert that some of the information in Exhibit 2 is protected by common-law privacy. Section 552.101 also encompasses the doctrine of common-law privacy, which protects information if the information contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and 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). This office has found that some kinds of medical information or information indicating disabilities or specific illnesses are excepted from 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). Upon review of Exhibit 2, we find that some of the information is highly intimate or embarrassing and is not of legitimate public concern. Thus, the department must withhold the medical information we have marked in Exhibit 2 under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.101 also encompasses laws that make criminal history record information ("CHRI") confidential. CHRI generated by the National Crime Information Center or by the Texas Crime Information Center is confidential under federal and state law. 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 at 7 (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 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 the 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. Similarly, any CHRI obtained from the 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. Furthermore, a compilation of a private citizen's criminal history is highly embarrassing information that is generally not of legitimate public interest. *Cf. United States 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). Accordingly, we have marked the criminal history information in Exhibit 2 that must be withheld under section 552.101 of the Government Code.

We note that some of the remaining information in Exhibit 2 is confidential under section 552.130 of the Government Code, which provides that information relating to a motor vehicle operator's license, driver's license, motor vehicle title, or registration issued by a Texas agency is excepted from public release. Gov't Code § 552.130(a)(1), (2). The department must withhold the Texas motor vehicle record information we have marked in Exhibit 2 under section 552.130 of the Government Code.

In summary, the department must withhold: Exhibit 3 under section 552.101 of the Government Code in conjunction with section 242.127 of the Health and Safety Code; the medical information we have marked in Exhibit 2 under section 552.101 of the Government Code in conjunction with common-law privacy; the criminal history information we have marked in Exhibit 2 under section 552.101 of the Government Code; and the Texas motor vehicle record information we have marked in Exhibit 2 under section 552.130 of the Government Code. The remaining information must be released.²

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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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

² We note 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.

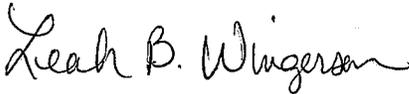
Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can challenge 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,



Leah B. Wingerson
Assistant Attorney General
Open Records Division

LBW/eeg

Ref: ID# 309496

Enc. Submitted documents

c: Ms. Dana Fields
2010 North Loop West, Suite 270
Houston, Texas 77019
(w/o enclosures)