



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 20, 2009

Ms. Rebecca Brewer
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P.O. Box 1210
McKinney, Texas 75070-1210

OR2009-10037

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# 349627.

The Wylie Police Department (the "department"), which you represent, received a request for personnel records of a named police officer, as well as arrest reports written by the named officer for a specified time period. You claim portions of the requested information are excepted from disclosure under sections 552.101, 552.102, 552.108, 552.117, 552.130, and 552.136 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that the requestor has agreed to the redaction of the named officer's social security number and home address. Accordingly, the officer's social security number and home address are not responsive to the request for information. We also note some of the submitted police reports and both of the submitted audio recordings are not responsive to the request because they were created outside the date range specified by the requestor. We have marked this non-responsive information. This ruling does not address the public availability of any information that is not responsive to the request and the department is not required to release that information.¹

¹As we are able to make this determination, we need not address your arguments against the disclosure of this information.

We next address the responsive information in the submitted police reports. 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, including section 261.201 of the Family Code, which provides as follows:

(a) The following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

(1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and

(2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Fam. Code § 261.201(a). Because report number 08024345 was used or developed in an investigation of child abuse, this report is within the scope of section 261.201 of the Family Code. *See id.* § 261.001(1), (4) (defining "abuse" and "neglect" for purposes of Fam. Code ch. 261); *see also id.* § 101.003(a) (defining "child" for purposes of this section as person under 18 years of age who is not and has not been married or who has not had the disabilities of minority removed for general purposes). You have not indicated that the department has adopted a rule that governs the release of this type of information. Therefore, we assume that no such regulation exists. Given that assumption, report number 08024345 is confidential pursuant to section 261.201 of the Family Code and must be withheld in its entirety under section 552.101 of the Government Code.² *See* Open Records Decision No. 440 at 2 (1986) (predecessor statute).

Section 552.101 also encompasses section 58.007 of the Family Code, which makes confidential juvenile law enforcement records relating to conduct that occurred on or after September 1, 1997. The relevant language of section 58.007(c) reads as follows:

(c) Except as provided by Subsection (d), law enforcement records and files concerning a child and information stored, by electronic means or otherwise, concerning the child from which a record or file could be generated may not be disclosed to the public and shall be:

²As our ruling is dispositive, we need not address your remaining arguments against the disclosure of this report.

- (1) if maintained on paper or microfilm, kept separate from adult files and records;
- (2) if maintained electronically in the same computer system as records or files relating to adults, be accessible under controls that are separate and distinct from controls to access electronic data concerning adults; and
- (3) maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subchapters B, D, and E.

Fam. Code § 58.007(c). Report numbers 08025254 and 09000204 involve juvenile delinquent conduct that occurred after September 1, 1997. *See id.* § 51.03 (defining “delinquent conduct” and “conduct indicating a need for supervision”). It does not appear that any of the exceptions in section 58.007 apply; therefore, report numbers 08025254 and 09000204 are confidential pursuant to section 58.007(c) of the Family Code and must be withheld in their entirety under section 552.101 of the Government Code.³

We next note that police report number 08025632 contains a breath test result of an individual’s blood alcohol content. Full information concerning the analysis of the specimen must be made available upon the request of the person who has given a specimen at the request of a peace officer. Transp. Code § 724.018. We note that the requestor may represent the individual whose blood alcohol content is at issue. Thus, if the requestor is the authorized representative of the individual at issue, the department must release the blood alcohol test results to this requestor. To the extent this requestor is not the individual’s authorized representative, we will consider your arguments against the disclosure of this information.

Next, you raise section 552.108 of the Government Code for some of the remaining information, including police report number 08025632. Section 552.108 provides in part:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of Section 552.021 if:

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

³As our ruling is dispositive, we need not address your remaining arguments against the disclosure of these reports.

(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)(1), (2). Section 552.108(a)(1) protects information that pertains to a specific pending criminal investigation or prosecution. In contrast, section 552.108(a)(2) protects information that relates to a concluded criminal investigation or prosecution that did not result in conviction or deferred adjudication. A governmental body claiming section 552.108(a)(1) must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). A governmental body that claims section 552.108(a)(2) must demonstrate that the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. *See Gov't Code* §§ 552.108(a)(2), .301(e)(1)(A).

You state report numbers 09008036, 08023899, 08023932, 08024847, 08024915, 08025632, 08025963, 08026042, and 09000017 relate to pending criminal cases. Based on your representation and our review, we conclude that release of these reports would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases). Thus, we find section 552.108(a)(1) is applicable to report numbers 09008036, 08023899, 08023932, 08024847, 08024915, 08025632, 08025963, 08026042, and 09000017.

You also state some of the remaining reports relate to concluded criminal cases that did not result in conviction or deferred adjudication. We note that a portion of the information you have marked is related to administrative investigations. Section 552.108 is generally not applicable to records of an administrative investigation that did not result in a criminal investigation or prosecution. *See Morales v. Ellen*, 840 S.W.2d 519, 525-26 (Tex. Civ. App.—El Paso 1992, writ denied) (addressing statutory predecessor to Gov't Code § 552.108). However, the department may withhold the remaining reports you have marked under section 552.108(a)(2) of the Government Code.

We note, however, section 552.108 does not except from disclosure “basic information about an arrested person, an arrest, or a crime.” Gov't Code § 552.108(c). Section 552.108(c) refers to the basic front-page information held to be public in *Houston Chronicle*, including a detailed description of the offense. *See* 531 S.W.2d at 186-88; *see also* Open Records Decision No. 127 at 3-4 (1976) (summarizing types of information deemed public by *Houston Chronicle*). With the exception of basic information, the department may withhold the marked reports under section 552.108 of the Government Code.

Section 552.101 also encompasses section 773.091 of the Health and Safety Code, the Emergency Medical Services Act, which provides:

(a) A communication between certified emergency medical services personnel or a physician providing medical supervision and a patient that is made in the course of providing emergency medical services to the patient is confidential and privileged and may not be disclosed except as provided by this chapter.

(b) Records of the identity, evaluation, or treatment of a patient by emergency medical services personnel or by a physician providing medical supervision that are created by the emergency medical services personnel or physician or maintained by an emergency medical services provider are confidential and privileged and may not be disclosed except as provided by this chapter.

(g) The privilege of confidentiality under this section does not extend to information regarding the presence, nature of injury or illness, age, sex, occupation, and city of residence of a patient who is receiving emergency medical services.

Health & Safety Code § 773.091(a), (b), (g). In this instance, you claim that some of the remaining information is subject to chapter 773 of the Health and Safety Code. However, we find the remaining information at issue consists of police records, not emergency medical service records. Further, you do not argue, nor does it appear otherwise, that any of the information at issue was obtained from emergency medical service records. Therefore, section 773.091 is inapplicable to the remaining information and it may not be withheld under section 552.101 on this basis.

Section 552.101 also encompasses the doctrine of common-law privacy. Section 552.102(a) of the Government Code excepts from public 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). Section 552.102 is applicable to information that relates to public officials and employees. *See* Open Records Decision No. 327 at 2 (1982) (anything relating to employee’s employment and its terms constitutes information relevant to person’s employment relationship and is part of employee’s personnel file). 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 common-law privacy test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976). Accordingly, we will consider your section 552.101 and section 552.102(a) privacy claims 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. *Id.* at 685. The types 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 the following types of information are excepted from required public disclosure under common-law privacy: 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). You assert some of the remaining information in the submitted police reports consists of medical information that is confidential under common-law privacy. We agree some of the information at issue, which we have marked, consists of medical information that is highly intimate or embarrassing information that is of no legitimate public interest. Therefore, the department must withhold the information we have marked in the police reports under section 552.101 in conjunction with common-law privacy. However, the remaining information in the police reports is not medical information. Therefore, no portion of the remaining information in the police reports is confidential under common-law privacy and it may not be withheld under section 552.101 on this basis.

You state the information in the submitted personnel file contains financial information related to the officer that must be withheld under section 552.102(a). This office has found financial information relating only to an individual ordinarily satisfies the first requirement of the test for common-law privacy, but 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) (finding personal financial information to include designation of beneficiary of employee's retirement benefits and optional insurance coverage; choice of particular insurance carrier; direct deposit authorization; and forms allowing employee to allocate pretax compensation to group insurance, health care, or dependent care), 545 at 4 (1990) (attorney general has found kinds of financial information not excepted from public disclosure by common-law privacy to generally be those regarding receipt of governmental funds or debts owed to governmental entities). Upon review, we agree some of the information in the officer's personnel file constitutes personal financial information. This information, which we have marked, is not of legitimate public concern. *See* ORD 600. Thus, the department must withhold the personnel information we have marked under section 552.102(a).

We next address your remaining arguments for the submitted personnel file. Section 552.101 also encompasses chapter 411 of the Government Code, which makes confidential criminal history record information ("CHRI") generated by the National Crime Information Center ("NCIC") or by the Texas Crime Information Center ("TCIC"). The federal regulations

allow each state to follow its individual law with respect to CHRI it generates. *See* Gov't Code § 411.083. Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety ("DPS") maintains, except that DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See id.* 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. A portion of the submitted personnel information constitutes CHRI generated by TCIC and NCIC. We have marked the information the department must withhold pursuant to section 552.101 in conjunction with chapter 411 of the Government Code.

Next, you raise the federal 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, except as provided by parts 160 and 164 of the Code of Federal Regulations. *See id.* § 164.502(a).

This office has addressed the interplay of the Privacy Rule and the Act. In Open Records Decision No. 681 (2004), 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* ORD 681 at 8; *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. *See Abbott v. Tex. Dep't of Mental Health & Mental Retardation*, 212 S.W.3d 648 (Tex. App.—Austin 2006, no pet.); ORD 681 at 9; *see also* Open Records Decision No. 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). Thus, because the Privacy Rule does not make information that is subject to disclosure under the Act

confidential, the department may withhold protected health information from the public only if the information is confidential under other law or an exception in subchapter C of the Act applies. Therefore, we will consider your arguments under the Act for the medical information at issue.

Section 552.101 also encompasses section 611.002 of the Health and Safety Code, which governs the public availability of mental health records. Section 611.002 provides in part:

(a) 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); *see id.* § 611.001 (defining “patient” and “professional”). We have marked mental health records that the department must withhold under section 611.002 of the Health and Safety Code.

Section 552.101 encompasses the Medical Practice Act (“MPA”), subtitle B of title 3 of the Occupations Code. Occ. Code §§ 151.001-165.160. Section 159.002 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.

Id. § 159.002(b), (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). Further, information that is subject to the MPA also includes information that was obtained from medical records. *See* Occ. Code. § 159.002(a), (b), (c); *see also* Open Records Decision No. 598 (1991). We have marked a medical record that is subject to the MPA and must be withheld under section 552.101 of the Government Code.

The remaining personnel information contains a L-3 (Declaration of Psychological and Emotional Health) form that is excepted from disclosure pursuant to section 552.101 in conjunction with 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). We have marked the declaration that is confidential under section 1701.306 of the Occupations Code and must be withheld under section 552.101 of the Government Code.⁴

Section 552.101 also encompasses section 1703.306 of the Occupations Code, which governs access to information obtained during the course of a polygraph examination. Section 1703.306 provides in relevant part:

(a) A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person other than:

(1) the examinee or any other person specifically designated in writing by the examinee[.]

Id. § 1703.306. Accordingly, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 1703.306(a)(1) of the Occupations Code.

⁴As our ruling is dispositive, we need not address your remaining arguments against the disclosure of this information.

Section 552.117(a)(2) of the Government Code 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.⁵ Gov't Code § 552.117(a)(2). Thus, the department must withhold the information we have marked under section 552.117(a)(2) of the Government Code.

The remaining documents also contain information pertaining to peace officers who are not employed by the department.⁶ Section 552.1175 of the Government Code provides in part:

(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). We note that section 552.1175 is also applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 506-at 5-6 (1998). If the individuals in question are still peace officers and elect to restrict access to their personal information in accordance with section 552.1175, the department must withhold the information we have marked under section 552.1175. *See, e.g.,* Open Records Decision No. 678 (2003). Otherwise, this information must be released.

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. Accordingly, the department must withhold the Texas driver's license numbers and motor vehicle record information we have marked in the police reports and personnel file pursuant to section 552.130 of the Government Code.

⁵"Peace officer" is defined by Article 2.12 of the Texas Code of Criminal Procedure.

⁶The 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).

Finally, you raise section 552.136 of the Government Code. Section 552.136(b) states “[n]otwithstanding any other provision of [the Act], 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.” *Id.* § 552.136(b); *see id.* § 552.136(a) (defining “access device”). This office has determined that insurance policy numbers constitute access device numbers for purposes of section 552.136. Therefore, the department must withhold the insurance policy, bank account, and checking account numbers we have marked under section 552.136 of the Government Code.

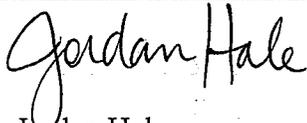
In summary, the department must withhold report number 08024345 under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code. Report numbers 08025254 and 09000204 must be withheld under section 552.101 in conjunction with section 58.007 of the Family Code. To the extent the requestor is the authorized representative of the individual whose blood alcohol content is at issue, the department must release the submitted blood alcohol content to the requestor. With the exception of basic information, the department may withhold the marked reports under section 552.108 of the Government Code. The information we have marked in the submitted police reports must be withheld under section 552.101 in conjunction with common-law privacy. The information we have marked in the personnel records must be withheld under section 552.102(a) of the Government Code. The CHRI we have marked must be withheld under section 552.101 in conjunction with chapter 411 of the Government Code. The marked mental health records must be withheld under section 552.101 in conjunction with section 611.002 of the Health and Safety Code. The medical record we have marked must be withheld under section 552.101 in conjunction with the MPA. The declaration we have marked must be withheld under section 552.101 in conjunction with section 1701.306 of the Occupations Code and the polygraph information we have marked must be withheld under section 552.101 in conjunction with section 1703.306 of the Occupations Code. The department must withhold the information we have marked under section 552.117(a)(2) of the Government Code, and, if the individuals in question are still peace officers and elect to restrict access to their personal information in accordance with section 552.1175, the department must withhold the information we have marked under section 552.1175 of the Government Code. The department must withhold the information we have marked under sections 552.130 and 552.136 of the Government Code. The remaining responsive information must be released.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General’s Open Government Hotline, toll free,

at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Jordan Hale
Assistant Attorney General
Open Records Division

JH/jb

Ref: ID# 349627

Enc. Submitted documents

cc: Requestor
(w/o enclosures)