



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 20, 2009

Ms. Pamela Smith
Assistant General Counsel
Texas Department of Public Safety
P.O. Box 4087
Austin, Texas 78773-0001

OR2009-11744

Dear Ms. Smith:

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# 352837 (OR 09-1128).

The Texas Department of Public Safety (the "department") received a request for information relating to an investigation involving a Lubbock police officer. You inform us that some of the responsive information has been redacted from responsive records pursuant to the previous determination issued to the department under section 552.130 of the Government Code in Open Records Letter No. 2001-2047 (2001). *See* Gov't Code § 552.301(a); Open Records Decision No. 673 (2001) (previous determinations). You also state that some of the requested information has been released. You claim that the rest of the requested information is excepted from disclosure under sections 552.101, 552.108, and 552.136 of the Government Code.¹ We have considered the exceptions you claim and reviewed the information you submitted.²

¹You also seek to withhold information under section 552.117(a)(2) of the Government Code on the basis of the previous determination issued in Open Records Letter No. 670 (2001). *See* ORD 670 at 5-6; *see also* ORD 673 at 7-8 (listing elements of second type of previous determination). We note, however, that the department holds the submitted information as a law enforcement agency investigating alleged crimes and not as the employer of the police officer who is the subject of the investigation. Therefore, the department may not withhold any of the submitted information under section 552.117(a)(2). *See* Gov't Code § 552.024, .117.

²This letter ruling assumes that the submitted representative samples of information are truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the department to withhold any information that is substantially different from the submitted information. *See* Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

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 exception encompasses information that other statutes make confidential. Medical records are confidential under the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. Section 159.002 of the MPA provides in 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). This office has determined that in governing access to a specific subset of information, the MPA prevails over the more general provisions of the Act. *See* Open Records Decision No. 598 (1991). Medical records must be released on the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) the 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 medical records that must be withheld from the requestor under section 159.002 of the MPA, unless the department receives the required written consent for release under sections 159.004 and 159.005 of the MPA.

You raise section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code, which provides in 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[.]

Occ. Code § 1703.306. We have marked information acquired from a polygraph examination that is confidential under section 552.101 in conjunction with section 1703.306. We note that the department has the discretion to release the marked information to the polygraph examinee or his authorized representative pursuant to section 1703.306(a)(1). *See* Open Records Decision No. 481 at 9 (1987) (statutory predecessor to Occ. Code § 1703.306 permitted, but did not require, examination results to be disclosed to polygraph examinees).

Next, we address your claim under section 552.108 of the Government Code. We note that some of the information that you seek to withhold under this exception appears to have been released to the public. The Act does not permit the selective disclosure of information to the public. *See* Gov't Code §§ 552.007(b), .021; Open Records Decision No. 463 at 1-2 (1987). Information that has been voluntarily released to a member of the public may not subsequently be withheld from another member of the public, unless public disclosure of the information is expressly prohibited by law or the information is confidential under law. *See* Gov't Code § 552.007(a); Open Records Decision Nos. 518 at 3 (1989), 490 at 2 (1988); *but see* Open Records Decision Nos. 579 (1990) (exchange of information among litigants in "informal" discovery is not "voluntary" release of information for purposes of statutory predecessor to Gov't Code § 552.007), 454 at 2 (1986) (governmental body that disclosed information because it reasonably concluded that it had constitutional obligation to do so could still invoke statutory predecessor to Gov't Code § 552.108). Section 552.108 is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 177 at 3 (1977) (statutory predecessor to Gov't Code § 552.108 subject to waiver). As such, section 552.108 neither prohibits public disclosure of information nor makes information confidential under law. Therefore, any information that the department previously released to the public may not be withheld from the present requestor under section 552.108.

Section 552.108(a)(1) excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]" Gov't Code § 552.108(a)(1). A governmental body must reasonably explain how and why section 552.108 is applicable to the information at issue. *See id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state that the rest of the submitted information is related to an investigation that is pending presentation to a grand jury for consideration of possible criminal charges. Based on your representation, we conclude that section 552.108(a)(1) is generally applicable to the remaining information at issue. *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).

We note that 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*. *See* 531 S.W.2d at 186-88; Open Records Decision No. 127 at 3-4 (1976) (summarizing types of information deemed public by *Houston Chronicle*). Basic information includes the identity of the complainant and a detailed description of the offense. In this instance, the information in question involves alleged sexual offenses. Therefore, the identities of the alleged victims of those offenses must be withheld from the public under section 552.101 of the Government Code in conjunction with common law privacy. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976); Open Records Decision Nos. 393 (1983), 339 (1982). Although parts of the submitted documents use pseudonyms to identify the victims, other

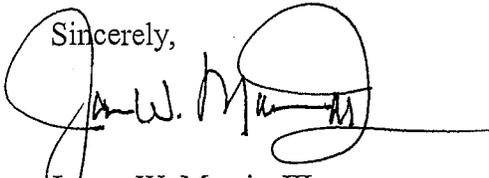
portions of the records contain the victims' real names and other identifying information. We have marked the types of identifying information that the department must withhold under section 552.101 in conjunction with common-law privacy. Otherwise, the department must release basic information in accordance with section 552.108(c), including detailed descriptions of the offenses, even if the information does not literally appear on the front page of an offense or arrest report. The department may withhold the rest of the submitted information under section 552.108(a)(1).

In summary: (1) the marked medical records must be withheld from the requestor under section 159.002 of the MPA, unless the department receives the required written consent for release under sections 159.004 and 159.005 of the MPA; (2) the marked information that was acquired from a polygraph examination is confidential under section 1703.306 of the Occupations Code, but the department has the discretion to release the marked information to the polygraph examinee or his authorized representative pursuant to section 1703.306(a)(1); (3) any information that the department has previously released to the public may not be withheld from the present requestor under section 552.108 of the Government Code; (4) the department may withhold the rest of the submitted information under section 552.108(a)(1), except for the basic information that must be released under section 552.108(c); and (5) in releasing basic information, the department must withhold the marked types of information that identify the victims of the alleged sexual offenses under section 552.101 in conjunction with common-law privacy. As we are able to make these determinations, we need not address the other exception you claim.

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,

A handwritten signature in black ink, appearing to read "James W. Morris, III". The signature is stylized and includes a large, circular flourish at the end.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/cc

Ref: ID# 352837

Enc: Submitted information

c: Requestor
(w/o enclosures)
