



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 30, 2009

Ms. Rebecca H. Brewer
Abernathy Roeder Boyd & Joplin P.C.
P.O. Box 1210
McKinney, Texas 75070-1210

OR2009-13775

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# 356817.

The Wylie Police Department (the "department"), which you represent, received a request for (1) the name of the IT person for the Plano Police Department; (2) departmental policies and procedures regarding the uploading and preservation of videos of DWI arrests; (3) personnel information relating to a named police officer; (4) the number of DWI arrests made by the officer since the date of his employment; and (5) computer-aided dispatch data and mobile data terminal transmissions involving the officer during a specific time interval on a specified date. You state that some of the requested information either has been or will be released. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.117 and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the information you submitted.

We first note that some of the submitted mobile data transmissions do not fall within the time interval specified by the requestor. Thus, that information is not responsive to the instant request for information. This decision does not address the public availability of the non-responsive information, which we have marked, and that information need not be released in response to this request.

We also note that information has been redacted from the submitted documents. Section 552.301 of the Government Code prescribes procedures that a governmental body must follow in asking this office to determine whether requested information is excepted

from public disclosure, unless the information is the subject of a previous determination. *See* Gov't Code §§ 552.006, .301(a), .302; Open Records Decision No. 673 (2001) (previous determinations). Among other things, a governmental body must submit to this office either the specific information that it seeks to withhold or representative samples if the information is voluminous. *See* Gov't Code § 552.301(e)(1)(D). This office has no means of determining whether redacted information falls within the scope of an exception to disclosure. We note that 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. We also note that Open Records Decision No. 670 (2001) authorizes all governmental bodies covered by the Act to withhold the home addresses and telephone numbers, personal cellular phone and pager numbers, social security numbers, and family member information of peace officers, as defined by article 2.12 of the Code of Criminal Procedure, without the necessity of requesting a decision as to whether the information is excepted from disclosure under section 552.117(a)(2) of the Government Code. *See* ORD 670 at 6. You do not inform us that the department has any other authorization to withhold information without first requesting a decision under section 552.301. Therefore, except for any information that the department is authorized to withhold pursuant to section 552.147(b) of the Government Code or Open Records Decision No. 670, the department must release the information that was redacted from the submitted documents. *See* Gov't Code § 552.006, .301(a), .302.

Next, we address your claims under section 552.101 of the Government Code for the rest of the responsive information. This section excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," and encompasses information made confidential by statute. *Id.* § 552.101. You raise section 552.101 in conjunction with 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, excepted 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 confidential information that is subject to disclosure under the Act, 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.

You also raise section 552.101 in conjunction with confidentiality provisions found in chapter 55 of the Code of Criminal Procedure. Articles 55.01 through 55.05 of the Code of Criminal Procedure provide for the expunction of criminal records in certain limited circumstances. Article 55.03 prescribes the effect of an expunction order and provides:

When the order of expunction is final:

- (1) the release, maintenance, dissemination, or use of the expunged records and files for any purpose is prohibited;
- (2) except as provided in Subdivision (3) of this article, the person arrested may deny the occurrence of the arrest and the existence of the expunction order; and
- (3) the person arrested or any other person, when questioned under oath in a criminal proceeding about an arrest for which the records have been expunged, may state only that the matter in question has been expunged.

Crim. Proc. Code art. 55.03. Article 55.04 imposes sanctions for violations of an expunction order and provides in part:

Sec. 1. A person who acquires knowledge of an arrest while an officer or employee of the state or of any agency or other entity of the state or any political subdivision of the state and who knows of an order expunging the records and files relating to that arrest commits an offense if he knowingly releases, disseminates, or otherwise uses the records or files.

Id. art. 55.04, § 1. This office has determined that the expunction statute prevails over the Act. See Open Records Decision No. 457 at 2 (1987) (governmental body prohibited from releasing or disseminating arrest records subject to expunction order, as “those records are not subject to public disclosure under the [Act]”). You contend, and have provided an

affidavit from the department stating, that the records submitted as Exhibit B-1 contain information that is the subject of an expunction order. You seek to withhold that information under article 55.03 of the Code of Criminal Procedure. However, in seeking a ruling from this office, you did not provide this office with a copy of the expunction order, nor did you mark specific information that you contend is subject to the expunction order. Accordingly, pursuant to section 552.303 of the Government Code, we requested further documentation of your claim under article 55.03. In response, you inform us that the department is not in possession of a copy of the expunction order. Although you have not provided a copy of the order, we nevertheless conclude that to the extent that the information in Exhibit B-1 is the subject of an expunction order, the department must withhold any such information under section 552.101 of the Government Code in conjunction with article 55.03 of the Code of Criminal Procedure. To the extent that the information in Exhibit B-1 is not the subject of an expunction order, it may not be withheld under section 552.101 on the basis of article 55.03, and the department must dispose of any such information in accordance with the rest of this ruling.

Next, we address the other confidentiality provisions you claim. 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:

- (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 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)*. Although you contend that the MPA is applicable to some of the responsive information, you have not demonstrated that any of the information at issue either consists of or was obtained from medical records. *See Occ. Code § 159.002(a)-(c)*. We therefore conclude that the department may not withhold any of the responsive information on the basis of the MPA.

Mental health records are confidential under section 611.002 of the Health and Safety Code, which 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.

(b) Confidential communications or records may not be disclosed except as provided by Section 611.004 or 611.0045.

Health & Safety Code § 611.002(a)-(b); *see also id.* § 611.001 (defining “patient” and “professional”). Sections 611.004 and 611.0045 provide for access to information that is made confidential by section 611.002 only by certain individuals. *See id.* §§ 611.004, 611.0045; Open Records Decision No. 565 (1990). Although you contend that section 611.002 is applicable in this instance, you have not demonstrated that any of the information at issue falls within the scope of the statute. We therefore conclude that the department may not withhold any of the responsive information under section 552.101 of the Government Code in conjunction with section 611.002 of the Health and Safety Code.

Sections 772.118, 772.218, and 772.318 of the Health and Safety Code are applicable to emergency 911 districts established in accordance with chapter 772 of the Health and Safety Code. *See* Open Records Decision No. 649 (1996). These sections make originating telephone numbers and addresses of 911 callers furnished by a service supplier confidential. *Id.* at 2. Section 772.118 applies to an emergency communication district for a county with a population of more than two million. Section 772.218 applies to an emergency communication district for a county with a population of more than 860,000. Section 772.318 applies to an emergency communication district for a county with a population of more than 20,000. You have not demonstrated that the responsive records contain any information relating to a 911 caller that was furnished by a service supplier. We therefore conclude that the department may not withhold any of the responsive information under section 552.101 of the Government Code in conjunction with section 772.118, section 772.218, or section 772.318 of the Health and Safety Code.

Section 773.091 of the Health and Safety Code is applicable to records of the provision of emergency medical services (“EMS”) and provides in part:

(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.

(c) Any person who receives information from confidential communications or records as described by this chapter, other than a person listed in Section 773.092 who is acting on the survivor's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was obtained.

Health & Safety Code § 773.091(a)-(c). Although you contend that section 773.091 is applicable to some of the responsive information, you have not demonstrated that any of the information either consists of or was obtained from EMS records. We therefore conclude that the department may not withhold any of the responsive information under section 552.101 of the Government Code in conjunction with section 773.091 of the Health and Safety Code.

Next, we address your privacy claims under sections 552.101 and 552.102 of the Government Code. Section 552.101 also encompasses constitutional privacy, which protects two kinds of interests. See *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); Open Records Decision Nos. 600 at 3-5 (1992), 478 at 4 (1987), 455 at 3-7 (1987). The first is the interest in independence in making certain important decisions related to the "zones of privacy," pertaining to marriage, procreation, contraception, family relationships, and child rearing and education, that have been recognized by the United States Supreme Court. See *Fadjo v. Coon*, 633 F.2d 1172 (5th Cir. 1981); ORD 455 at 3-7. The second constitutionally protected privacy interest is in freedom from public disclosure of certain personal matters. See *Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5th Cir. 1985); ORD 455 at 6-7. This aspect of constitutional privacy balances the individual's privacy interest against the public's interest in disclosure of the information. See ORD 455 at 7. Constitutional privacy under section 552.101 is reserved for "the most intimate aspects of human affairs." *Id.* at 8 (quoting *Ramie*, 765 F.2d at 492). You have not demonstrated that any of the responsive information is protected by constitutional privacy, and the department may not withhold any of the information on that basis under section 552.101 of the Government Code.

Section 552.101 also encompasses common-law privacy, which protects information that is highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and of no legitimate public interest. See *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Common-law privacy encompasses the specific types of information that are held to be intimate or embarrassing in *Industrial Foundation*. See *id.* at 683 (information relating to sexual assault, pregnancy, mental or physical abuse in workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). This office has determined that other types of information are private under section 552.101. See generally Open Records Decision No. 659 at 4-5 (1999) (summarizing information attorney general has held to be

private). We also have determined that common-law privacy encompasses certain types of personal financial information. Financial information that relates only to an individual ordinarily satisfies the first element of the common-law privacy test, but the public has a legitimate interest in the essential facts about a financial transaction between an individual and a governmental body. *See* Open Records Decision Nos. 600 at 9-12 (identifying public and private portions of certain state personnel records), 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), 523 at 4 (1989) (noting distinction under common-law privacy between confidential background financial information furnished to public body about individual and basic facts regarding particular financial transaction between individual and public body), 373 at 4 (1983) (determination of whether public's interest in obtaining personal financial information is sufficient to justify its disclosure must be made on case-by-case basis).

Section 552.102 of the Government Code excepts from 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(a) is applicable to information relating to public officials and employees. The privacy analysis under section 552.102(a) is the same as the common-law privacy test under section 552.101 and *Industrial Foundation*. *See Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref'd n.r.e.) (addressing statutory predecessor to Gov't Code § 552.102). Accordingly, we will determine whether any of the submitted information is protected by common-law privacy under section 552.101 or section 552.102.

Generally, only highly intimate information that implicates the privacy of an individual may be withheld. However, in certain instances where it is demonstrated that the requestor knows the identity of the individual involved, as well as the nature of certain incidents, all of the information at issue must be withheld to protect the individual's privacy. In this instance, the responsive information is related to a police officer and to investigations of complaints lodged against the officer by members of the public. As this office has frequently stated, the public generally has a legitimate interest in such information. *See, e.g.*, Open Records Decision Nos. 562 at 10 (1990) (personnel file information does not involve most intimate aspects of human affairs but in fact touches on matters of legitimate public concern), 444 at 3 (1986) (public has obvious interest in information concerning qualifications and performance of governmental employees, particularly those involved in law enforcement). Therefore, this is not an instance in which all of the responsive information is protected by common-law privacy.

Nevertheless, we conclude that some of the responsive information contained in the submitted documents is intimate or embarrassing and not a matter of legitimate public interest. The department must withhold that information, which we have marked, under section 552.101 in conjunction with common-law privacy. We also note that private

information is contained in the DVD labeled Com-2006-018, beginning at 00:10, and in the DVD labeled Com-2006-0004, beginning at 50:43 and 1:00:03. That information also must be withheld under section 552.101 and common-law privacy. If the department has no means of redacting that information, then the DVD's must be withheld in their entirety. We conclude that the department may not withhold any of the remaining information on privacy grounds under section 552.101 or section 552.102.

You also raise sections 552.117 and 552.130 of the Government Code. Section 552.117(a)(2) excepts from disclosure the home address and telephone number and social security number of a peace officer, as well as information that reveals whether the peace officer has family members, regardless of whether the peace officer complies with sections 552.024 or 552.1175 of the Government Code. Section 552.117(a)(2) adopts the definition of peace officer found at article 2.12 of the Code of Criminal Procedure. You inform us that the remaining records contain information relating to peace officers. We have marked information relating to a peace officer that the department must withhold under section 552.117(a)(2).

Section 552.130 of the Government Code excepts from disclosure information relating to a motor vehicle operator's or driver's license or permit or a motor vehicle title or registration issued by an agency of this state. *See* Gov't Code § 552.130(a)(1)-(2). The department must withhold the Texas driver's license and motor vehicle information we have marked in the submitted documents under section 552.130. We also note that the DVD labeled Com-2006-007 contains two Texas license plate numbers and the month and year in which a vehicle was registered. That information must be redacted from the DVD under section 552.130; if the department has no means of redacting that information, then the entire DVD must be withheld.

Lastly, we note that section 552.136 of the Government Code is applicable to some of the remaining information.¹ Section 552.136 provides in part that "[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"). The department must withhold the insurance policy numbers we have marked under section 552.136.

In summary: (1) to the extent that the information contained in Exhibit B-1 is the subject of an expunction order, the department must withhold any such information under section 552.101 of the Government Code in conjunction with article 55.03 of the Code of Criminal Procedure; (2) the department must withhold the information we have marked in the responsive documents, as well as the information on the DVD labeled Com-2006-018, beginning at 00:10, and the information on the DVD labeled Com-2006-0004, beginning

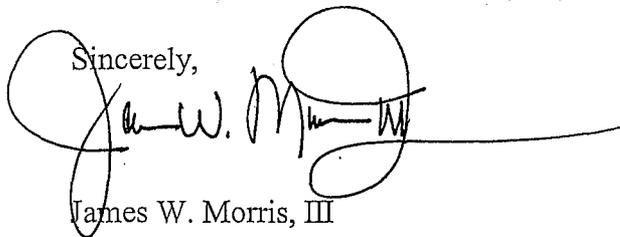
¹Unlike other exceptions to disclosure under the Act, this office will raise section 552.136 on behalf of a governmental body, as this exception is mandatory and may not be waived. *See* Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

at 50:43 and 1:00:03, under section 552.101 in conjunction with common-law privacy; (3) the peace officer's marked information must be withheld under section 552.117(a)(2) of the Government Code; (4) the Texas driver's license and motor vehicle information we have marked in the responsive documents, as well as the license plate numbers and motor vehicle registration information on the DVD labeled Com-2006-007, must be withheld under section 552.130 of the Government Code; and (5) the marked insurance policy numbers must be withheld under section 552.136 of the Government Code. If the department has no means of redacting information from the DVD's, then the DVD's must be withheld in their entirety. The rest of the 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, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, appearing to read "James W. Morris, III". The signature is stylized with large loops and a long horizontal line extending to the right.

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

JWM/cc

Ref: ID# 356817

Enc: Submitted information

c: Requestor
(w/o enclosures)