



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 21, 2011

Ms. Dori Wind
Special Counsel
Harris County Attorney
1019 Congress, 15th Floor
Houston, Texas 77002

OR2011-01041

Dear Ms. Wind:

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# 406394 (C.A. File No. 10GEN2605).

The Harris County Sheriff's Office (the "sheriff") received a request for the personnel records of a named former employee. You state that some of the requested information has been released to the requestor. You claim that the submitted information is excepted from disclosure pursuant to sections 552.101, 552.102, 552.108, 552.117, 552.1175, 552.136, 552.137, and 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

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. Section 552.101 encompasses information made confidential by other statutes, including the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. *See* Occ. Code §§ 151.001-165.160. Section 159.002 of the MPA provides in relevant 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.

¹We assume the sample records submitted to this office are 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 those records contain substantially different types of information than that submitted to this office.

(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). Information subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004; Open Records Decision No. 598 (1991). This office has concluded 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). We also have concluded that when a file is created as the result of a hospital stay, all of the documents in the file relating 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). You assert portions of the submitted information constitute medical records subject to the MPA. Upon review, we agree the information we have marked constitutes medical records, which may be released only in accordance with the MPA. However, no portion of the remaining information constitutes a medical record subject to the MPA.

Section 552.101 of the Government Code also encompasses section 1703.306 of the Occupations Code. Section 1703.306 provides as follows:

(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;
- (2) the person that requested the examination;
- (3) a member, or the member's agent, of a governmental agency that licenses a polygraph examiner or supervises or controls a polygraph examiner's activities;
- (4) another polygraph examiner in private consultation; or
- (5) any other person required by due process of law.

(b) The [Texas Department of Licensing and Regulation] or any other governmental agency that acquires information from a polygraph examination under this section shall maintain the confidentiality of the information.

(c) A polygraph examiner to whom information acquired from a polygraph examination is disclosed under Subsection (a)(4) may not disclose the information except as provided by this section.

Occ. Code § 1703.306. Portions of the remaining information, which we have marked, consist of information acquired from polygraph examinations subject to section 1703.306. The requestor does not appear to fall into any of the categories of individuals who are authorized to receive the polygraph information under section 1703.306(a). Accordingly, the sheriff must withhold the marked polygraph information under section 552.101 in conjunction with section 1703.306. However, none of the remaining information is confidential under section 1703.306 and may not be withheld on that basis.

Section 552.101 of the Government Code 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. *See* 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 the Department of Public Safety ("DPS") maintains, except 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. Furthermore, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 in conjunction with Government Code chapter 411, subchapter F. *See id.* § 411.082(2)(B) (term CHRI does not include driving record information). However, section 411.083 does not apply to active warrant information or other information relating to one's current involvement with the criminal justice system. *See id.* § 411.081(b) (police department allowed to disclose information pertaining to person's current involvement in the criminal justice system). Upon review, we find portions of the remaining information, which we marked, consist of CHRI that is confidential under chapter 411. Accordingly, the sheriff must withhold the information we marked under section 552.101 in conjunction with chapter 411 and federal law. However, none of the remaining information consists of CHRI for the purposes of chapter 411 of the Government Code. Accordingly, the sheriff may not withhold any of the remaining information on that basis.

You also claim that the submitted information contains fingerprints. Section 552.101 encompasses chapter 560 of the Government Code, which governs the public availability of fingerprints. Section 560.003 of the Government Code provides "[a] biometric identifier in the possession of a governmental body is exempt from disclosure under [the Act]." *Id.*

§§ 560.003; .001(1) (“biometric identifier” means retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry), .002 (governmental body may not sell, lease, or otherwise disclose individual’s biometric identifier to another person unless individual consents to disclosure). Thus, the sheriff must withhold the fingerprints we marked under section 552.101 in conjunction with section 560.003.

Section 552.101 also encompasses section 6103(a) of title 26 of the United States Code. Section 6103(a) renders tax return information confidential. Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision No. 600 (1992) (W-4 forms). Section 6103(b) defines the term “return information” as a taxpayer’s “identity, the nature, source, or amount of his income[.]” See 26 U.S.C. § 6103(b)(2)(A). Federal courts have construed the term “return information” expansively to include any information gathered by the Internal Revenue Service regarding a taxpayer’s liability under title 26 of the United States Code. See *Mallas v. Kolak*, 721 F. Supp. 748, 754 (M.D.N.C. 1989), aff’d in part, 993 F.2d 1111 (4th Cir. 1993). Consequently, the sheriff must withhold the W-4 form we have marked under section 552.101 in conjunction with section 6103(a) of title 26 of the United States Code.

You claim a portion of the remaining information is subject to section 1701.306 of the Occupations Code. Section 552.101 encompasses section 1701.306, which pertains to an L-2 Declaration of Medical Condition and an L-3 Declaration of Psychological and Emotional Health required by the Texas Commission on Law Enforcement Officer Standards and Education (“TCLEOSE”). Section 1701.306 provides as follows:

(a) [TCLEOSE] 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). Upon review, we find that none of the submitted information consists of an L-2 or L-3 declaration. Accordingly, none of the remaining information is

confidential under section 1701.306, and the sheriff may not withhold it under section 552.101 on that ground.

You also claim that the submitted information includes an F-5 form, Report of Resignation or Separation of License Holder, which is also a TCLEOSE report encompassed by section 552.101. Section 1701.454 of the Occupations Code provides in relevant part that “[a] report or statement submitted to the commission under this subchapter is confidential and is not subject to disclosure under Chapter 552 of the Government Code.” *Id.* § 1701.454(a). Upon review, however, we find that none of the submitted information consists of an F-5 form. Therefore, the sheriff may not withhold any of the submitted information under section 552.101 in conjunction with section 1701.454 of the Occupations Code.

You claim the remaining submitted information is excepted from disclosure under section 552.102 of the Government Code. Section 552.102(a) 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). The Texas Supreme Court recently held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex. & The Dallas Morning News, Ltd.*, No. 08-0172, 2010 WL 4910163 (Tex. Dec. 3, 2010) (Dec. 20, 2010, motions for reconsideration and rehearing pending). Having carefully reviewed the information at issue, we have marked the information that must be withheld under section 552.102(a) of the Government Code. The remaining information is not excepted under section 552.102(a) and may not be withheld on that basis.

We now address your arguments under common-law privacy, which is encompassed by section 552.101. For information to be protected from public disclosure by the common-law right of privacy, the information must meet the criteria set out by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976). In *Industrial Foundation*, the Texas Supreme Court stated information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts, the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. 540 S.W.2d at 685. To demonstrate the applicability of common-law privacy, both prongs of this test must be demonstrated. *See id.* at 681-82. The type 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. *See id.* at 683. This office has also found personal financial information not relating to the financial transaction between an individual and a governmental body is excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 600 (1992), 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history). Further, this office has determined common-law privacy generally protects the identities of juvenile

offenders. See Open Records Decision No. 394 (1983); cf. Fam. Code § 58.007(c). Additionally, we have concluded that a compilation of an individual's criminal history is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person, and is generally not of legitimate concern to the public. 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). However, we note that the public generally has a legitimate interest in information that relates to public employment and public employees. See Open Records Decisions 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), 542 (1990), 470 at 4 (1987) (public has legitimate interest in job qualifications and performance of public employees), 444 at 5-6 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees), 423 at 2 (1984) (scope of public employee privacy is narrow).

Upon review, we find the information we have marked is highly intimate or embarrassing and not of legitimate public concern. Accordingly, the sheriff must withhold the information we have marked under section 552.101 in conjunction with common-law privacy.² Although you generally claim the remaining submitted information is excepted from disclosure under section 552.101 in conjunction with common-law privacy and the ruling in *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied), none of the remaining information concerns an investigation of sexual harassment. Therefore, we find that *Ellen* is not applicable in this instance. Furthermore, we find that no portion of the remaining information is highly intimate or embarrassing and of no legitimate concern to the public. Consequently, the sheriff may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.108 of the Government Code provides, in pertinent part:

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from the requirements of Section 552.021 if:

....

(2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication[.]

²As our ruling is dispositive for this information, we need not address your argument against disclosure under section 552.101 of the Government Code in conjunction with the Fair Credit Reporting Act.

Gov't Code § 552.108(b)(2). A governmental body claiming subsection 552.108(b)(2) must demonstrate the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. *See id.* § 552.301(e) (governmental body must provide comments explaining why exceptions raised should apply to information requested). We note section 552.108 is generally not applicable to records of an internal affairs investigation that is purely administrative in nature and does not involve the investigation or prosecution of crime. *See City of Fort Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App.—Austin 2002, no pet.).

You generally state that there are “unsustained criminal investigations/criminal conduct included within these records which should be excepted from disclosure that did not result in conviction or deferred adjudication.” We note that the submitted information contains several internal affairs investigations and one incident report. You do not identify which of the submitted reports are subject to section 552.108(b)(2). Furthermore, you have not explained, and the reports do not reflect, any of the internal administrative investigations resulted in criminal investigations or prosecutions. Gov't Code § 552.301(e) (governmental body must provide comments explaining why exceptions raised should apply to information requested). Consequently, you have failed to demonstrate the information at issue consists of law enforcement records relating to an investigation that did not result in a conviction or deferred adjudication. Accordingly, the sheriff may not withhold any of the submitted information under section 552.108 of the Government Code.

Section 552.117(a)(2) of the Government Code excepts from public disclosure a peace officer's home address and telephone number, social security number, and family member information regardless of whether the peace officer made an election under section 552.024 of the Government Code. *Id.* § 552.117(a)(2). Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. To the extent the former employee at issue is currently a licensed peace officers as defined by article 2.12, the sheriff must withhold the information you have highlighted, as well as the additional information we have marked, under section 552.117(a)(2) of the Government Code.³

If the former employee is not currently a licensed peace officer, section 552.117(a)(1) of the Government Code may apply to the information at issue. Section 552.117(a)(1) excepts from disclosure the home address and telephone numbers, social security number, and family member information of current or former officials or employees of a governmental body who request this information be kept confidential under section 552.024 of the Government Code. *Id.* § 552.117(a)(1). Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See Open Records Decision No. 530 at 5 (1989)*. The sheriff may only withhold the information at issue under section 552.117(a)(1) if the individual elected confidentiality under

³We note the previous determination issued in Open Records Decision No. 670 (2001) authorizes a governmental body to withhold the home addresses and telephone numbers, personal pager and cellular telephone numbers, social security numbers, and family member information of its peace officers under section 552.117(a)(2) without the necessity of requesting an attorney general decision.

section 52.024 prior to the date on which the request for this information was made. If the individual at issue made a timely election under section 552.024, the sheriff must withhold the information you have highlighted, as well as the additional information we have marked, under section 552.117(a)(1). If the individual did not make a timely election under section 552.024, this information may not be withheld under section 552.117(a)(1).

Section 552.130 of the Government Code 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. Upon review, we find the remaining information you have highlighted, in addition to the information we have marked, is confidential and must be withheld under section 552.130.

You claim that the remaining information contains information subject to section 552.136(b) of the Government Code. This section provides “[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). Upon review, you failed to establish how any of the remaining information constitutes an access device number for purposes of section 552.136. Thus, none of the remaining information may be withheld on this basis.

Section 552.137 of the Government Code provides, “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act],” unless the owner of the e-mail address has affirmatively consented to its release or the e-mail address is specifically excluded by subsection (c). *Id.* § 552.137(a)-(c). Upon review, we find the remaining information does not contain any e-mail addresses of a member of the public. Accordingly, none of the submitted information may be withheld under section 552.137.

The remaining information contains DD-214 forms. Section 552.140 of the Government Code provides a military veteran’s DD-214 form or other military discharge record that is first recorded with or that otherwise first comes into the possession of a governmental body on or after September 1, 2003 is confidential for a period of seventy-five years and may only be disclosed in accordance with section 552.140 or in accordance with a court order. *See id.* § 552.140(a), (b). We have marked the DD-214 forms at issue. You do not inform us when the sheriff came into possession of these forms. Therefore, if the sheriff came into possession of the forms on or after September 1, 2003, it must withhold the marked DD-214 forms under section 552.140 of the Government Code. If the forms were received by the sheriff before September 1, 2003, then the sheriff may not withhold them pursuant to section 552.140 of the Government Code.

Finally, we address your arguments under section 552.147 of the Government Code, which states that “[t]he social security number of a living person is excepted from” required public disclosure under the Act. *Id.* § 552.147. Thus, the sheriff may withhold the social security

numbers you have highlighted, in addition to the numbers we have marked, under section 552.147.⁴

In summary, the marked medical records may only be released in accordance with the MPA. The sheriff must withhold the information we have marked under section 552.101 of the Government Code in conjunction with: section 1703.306 of the Occupations Code; chapter 411 and federal law; section 560.003 of the Government Code; and 6103(a) of title 26 of the United States Code. The sheriff must withhold the information we have marked under section 552.102(a) and section 552.101 in conjunction with common-law privacy. To the extent the former employee at issue is a licensed peace officer, the sheriff must withhold the information you have highlighted, in addition to the information we have marked under section 552.117(a)(2) of the Government Code. If the former employee at issue is not a licensed peace officer, then to the extent this individual timely requested confidentiality under section 552.024 of the Government Code, the sheriff must withhold the highlighted information and the information we have marked under section 552.117(a)(1) of the Government Code. The sheriff may withhold the social security numbers you have highlighted, in addition to the information we have marked under section 552.147 of the Government Code. Pursuant to section 552.130 of the Government Code, the sheriff must also withhold the information you have highlighted and the information we have marked. The marked DD-214 forms must be withheld under section 552.140 of the Government Code if the sheriff came into possession of the forms on or after September 1, 2003.⁵ The remaining information must be released.⁶

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

⁴Section 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. *Id.* § 552.147(b).

⁵We note this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including fingerprints under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code; a W-4 form under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code; Texas driver's license and license plate numbers and a copy of a Texas driver's license under section 552.130 of the Government Code; and DD-214 forms under section 552.140 of the Government Code, without the necessity of requesting an attorney general decision.

⁶As our ruling is dispositive, we do not address your remaining argument.

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 "Debbie K. Lee". The signature is fluid and cursive, with a long horizontal stroke at the end.

Debbie K. Lee
Assistant Attorney General
Open Records Division

DKL/dls

Ref: ID# 406394

Enc. Submitted documents

c: Requestor
(w/o enclosures)