



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 4, 2011

Ms. J. Middlebrooks
Assistant City Attorney
Criminal Law and Police Section
City of Dallas
1400 South Lamar
Dallas, Texas 75215

OR2011-03127

Dear Ms. Middlebrooks:

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# 411063 (PIR# 2010-10620).

The Dallas Police Department (the "department") received a request for specified internal affairs records relating to a named Dallas police officer. You claim some of the requested information is excepted from disclosure under sections 552.101, 552.108, 552.117, 552.130, and 552.136 of the Government Code. We have considered the exceptions you claim and reviewed the information you submitted.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. This exception encompasses information 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:

¹This letter ruling assumes the submitted representative sample of information is 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).

(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 understand you to claim the MPA is applicable to the submitted information you have marked "medical." Having reviewed that information, we have marked the information the department must withhold under section 159.002 of the MPA, unless the department receives the required consent for release under section 159.004 and 159.005. We conclude the remaining information you have marked does not fall within the scope of the MPA and may not be withheld on that basis.

You also claim section 552.101 of the Government Code in conjunction with section 773.091 of the Health and Safety Code, which provides in part:

(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(b)-(c). Section 773.091 is applicable to records of the provision of emergency medical services ("EMS"). *See* Open Records Decision No. 632 (1995). Although you appear to contend the remaining information marked "medical" is confidential under section 773.091, you have not demonstrated that the information at issue was created by EMS personnel or a physician providing medical supervision or that the

information is maintained by an EMS provider. *See* Health & Safety Code § 773.091(b); *see also* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection). We therefore conclude the department may not withhold the information at issue under section 552.101 of the Government Code in conjunction with section 773.091 of the Health and Safety Code.

Section 552.101 of the Government Code 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). To demonstrate the applicability of common law privacy, both elements of the test must be established. *Id.* at 681-82. Common-law privacy protects 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 concluded other types of information also 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 recognized that public employees may have a privacy interest in their drug test results. *See* Open Records Decision Nos. 594 (1991) (suggesting identification of individual as having tested positive for use of illegal drug may raise privacy issues), 455 at 5 (1987) (*citing Shoemaker v. Handel*, 619 F. Supp. 1089 (D.N.J. 1985), *aff'd*, 795 F.2d. 1136 (3rd Cir. 1986)).

You claim common-law privacy for information relating to the results of a drug test administered to a police officer. As this office has stated on many occasions, the public generally has a legitimate interest in public employment and public employees, particularly those who are involved in law enforcement. *See* Open Records Decision No. 444 at 6 (1986) (public has genuine interest in information concerning law enforcement employee's qualifications and performance and circumstances of his termination or resignation); *see also* Open Records Decision Nos. 562 at 10 (1990) (personnel information does not involve most intimate aspects of human affairs, but in fact touches on matters of legitimate public concern), 473 at 3 (1987) (fact that public employee received less than perfect or even very bad evaluation not private), 470 at 4 (1987) (job performance does not generally constitute public employee's private affairs). We therefore conclude the department may not withhold the information at issue under section 552.101 of the Government Code in conjunction with common-law privacy.

We note section 552.102 of the Government Code is applicable to some of the submitted information.² 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."

²The Office of the Attorney General will raise a mandatory exception like section 552.102 on behalf of a governmental body, but ordinarily will not raise other exceptions.

Gov't Code § 552.102(a). The Texas Supreme Court recently held section 552.102(a) exempts 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) 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.

You also claim section 552.108 of the Government Code, which exempts 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). You claim section 552.108(a)(1) for marked portions of a report created by the Fort Worth Police Department. Your department appears to have obtained the report for administrative purposes.³ We note 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). In this instance, however, you explain the marked information is related to a pending criminal prosecution. You state that both your department and the Tarrant County District Attorney's Office object to disclosure of the marked information at this time because its release would interfere with the prosecution. Based on your representations, we conclude the department may withhold the information you have marked under section 552.108(a)(1) of the Government Code. *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975) (court delineates law enforcement interests present in active cases), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976).

Next, we address your claims under sections 552.117, 552.130, and 552.136 of the Government Code. Section 552.117(a)(2) exempts from disclosure the home address, home 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 officer complies with sections 552.024 or 552.1175 of the Government Code. *See* Gov't Code

³In Open Records Decision No. 661 (1999), this office concluded the question of whether a governmental entity may release information to another governmental entity is not an issue under the Act, which is concerned with the release of information to the public. Gov't Code §§ 552.001, .002, .021; *see* Attorney General Opinions H-683 (1975), H-242 (1974), M-713 (1970); Open Records Decision No. 655 (1997). We have recognized it is the public policy of this state that governmental bodies should cooperate with each other in the interest of the efficient and economical administration of their statutory duties. *See, e.g.*, Attorney General Opinion H-836 (1976); ORD 655. In adherence to this policy, we have concluded information may be transferred between governmental bodies that are subject to the Act without waiving exceptions to the public disclosure of the information or affecting its confidentiality on the basis of a recognized need to maintain an unrestricted flow of information between governmental bodies. *See* Attorney General Opinions H-836, H-242, M-713; Open Records Decision Nos. 655, 414 (1984). Thus, one agency's release of information to another agency is not a release to the public for purposes of section 552.007 of the Government Code, which prohibits selective disclosure of information. *See* ORD 655 at 8.

§ 552.117(a)(2). Section 552.117(a)(2) adopts the definition of peace officer found at article 2.12 of the Code of Criminal Procedure. We note section 552.117(a)(2) protects a peace officer's personal cellular telephone number if the officer pays for the cellular telephone service with his personal funds. *See* Open Records Decision No. 670 at 6 (2001) (Gov't Code § 552.117(a)(2) excepts from disclosure peace officer's cell phone or pager number if officer pays for cell phone or pager service); *but see* Open Records Decision No. 506 at 5-6 (1988) (statutory predecessor to Gov't Code § 552.117 not applicable to numbers for cellular mobile phones installed in county officials' and employees' private vehicles and intended for official business). You have marked the information the department seeks to withhold under section 552.117 of the Government Code. If the individual concerned is still a peace officer, we agree the department must withhold the marked information under section 552.117(a)(2), provided the individual pays for her cellular telephone service with her personal funds. But if the individual concerned is no longer a peace officer, the marked information may not be withheld under section 552.117(a)(2).

In the event the individual concerned is no longer a peace officer, section 552.117(a)(1) may be applicable to the marked information. Section 552.117(a)(1) excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former employee of a governmental body who requests that this information be kept confidential under section 552.024. *See* Gov't Code §§ 552.117(a)(1), .024. Section 552.117(a)(1) encompasses a current or former employee's personal cellular telephone number if the employee pays for the cellular telephone service with his or her personal funds. *See* ORD 506 at 5-6. Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Information may only be withheld under section 552.117(a)(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee who did not timely request confidentiality under section 552.024. Thus, to the extent the individual concerned timely requested confidentiality for the information under section 552.024, the information you have marked under section 552.117 must be withheld under section 552.117(a)(1), including the personal cellular telephone number if the individual pays for her cellular telephone service with her personal funds. The marked information may not be withheld under section 552.117(a)(1) to the extent confidentiality was not timely requested.

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). We agree the department must withhold the Texas driver's license and motor vehicle information you have marked, as well as the additional Texas motor vehicle information we have marked, under section 552.130 of the Government Code.

Section 552.136 of the Government Code 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”). You have marked a debit card number to be withheld under section 552.136. You also indicate the submitted information includes an employee identification number, which you state is the same number used for the city credit union bank accounts. We agree the department must withhold the marked debit card number and the employee identification number under section 552.136 of the Government Code.

In summary: (1) the department must withhold the marked medical records under section 159.002 of the MPA unless it receives the required consent for release under sections 159.004 and 159.005; (2) the department must withhold the information we have marked under section 552.102(a) of the Government Code; (3) the department may withhold the marked information that relates to the pending prosecution under section 552.108(a)(1) of the Government Code; (4) if the individual concerned is still a peace officer, the information you have marked under section 552.117 of the Government Code must be withheld under section 552.117(a)(2), provided the individual concerned pays for her cellular telephone service with her personal funds; (5) if the individual concerned is no longer a peace officer, the information you have marked under section 552.117 must be withheld under section 552.117(a)(1) to the extent the individual timely requested confidentiality under section 552.024 of the Government Code, including the personal cellular telephone number if the individual pays for her cellular telephone service with her personal funds; (6) the department must withhold the Texas driver’s license and motor vehicle information you have marked, as well as the additional Texas motor vehicle information we have marked, under section 552.130 of the Government Code; and (7) the department must withhold the marked debit card number and the employee identification number under section 552.136 of the Government Code.⁴ The department must release the rest of the submitted information.

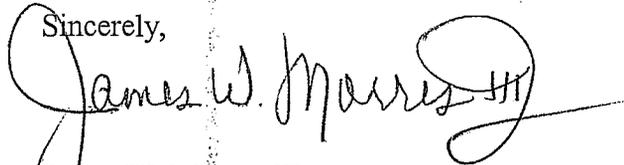
This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

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

⁴We note this office issued Open Records Decision No. 684 (2009), a previous determination authorizing all governmental bodies to withhold ten categories of information without the necessity of requesting an attorney general decision, including Texas driver’s license and license plate numbers under section 552.130 of the Government Code and a debit card number under section 552.136 of the Government Code.

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 that reads "James W. Morris III". The signature is written in a cursive style with a large, looping initial "J" and a long horizontal flourish at the end.

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

JWM/em

Ref: ID# 411063

Enc: Submitted documents

c: Requestor
(w/o enclosures)