



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 21, 2012

Mr. John C. West
General Counsel
Office of the Inspector General
Texas Department of Criminal Justice
4616 West Howard Lane, Suite 250
Austin, Texas 78728

OR2012-04154

Dear Mr. West:

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# 448229.

The Texas Department of Criminal Justice (the "department") received a request for the employee records of a named individual. You state some of the requested information will be released. You also state you will redact certain information subject to section 552.117 pursuant to Open Records Letter No. 2005-01067 (2005) and section 552.147(b) of the Government Code.¹ You claim the remaining information is excepted from disclosure under sections 552.101, 552.102, 552.108, and 552.134 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides in relevant part the following:

¹Open Records Letter No. 2005-01067 authorizes the department to withhold the present and former home addresses and telephone numbers, social security numbers, and family member information of its current or former employees under section 552.117(a)(3) of the Government Code, regardless of whether the current or former employee complies with section 552.1175 of the Government Code, without the necessity of requesting a decision under the Act. *See* Open Records Decision No. 673 at 7-8 (2001) (listing elements of second type of previous determination under section 552.301(a) of the Government Code). Section 552.147(b) of the Government Code authorizes a governmental body to redact the social security number of a living person from public release without the necessity of requesting a decision under the Act.

Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

...

(17) information that is also contained in a public court record[.]

Gov't Code § 552.022(a)(17). The submitted information includes court-filed documents, which we have marked, that are subject to section 552.022(a)(17). Although you raise section 552.108 of the Government Code for this information, this is a discretionary exception and does not make information confidential under the Act. *See* Act of May 30, 2011, 82nd Leg., R.S., S.B. 602, §§ 3-21, 23-26, 28-37 (providing for “confidentiality” of information under specified exceptions); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 177 (1977) (governmental body may waive statutory predecessor to section 552.108). Therefore, the court-filed documents we have marked may not be withheld under section 552.108 of the Government Code. However, we will address the applicability of sections 552.101, 552.1175, and 552.134 of the Government Code, which are confidentiality provisions for the purposes of section 552.022(a)(1), to the court-filed documents we have marked.

You claim case 2008-3077 and case UF.15.0261.08 are subject to section 552.108 of the Government Code. This exception provides in part the following:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:

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

Gov't Code § 552.108(a)(1). A governmental body claiming section 552.108 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). We note that section 552.108 is generally not applicable to records of an internal 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.), *Morales v. Ellen*, 840 S.W.2d 519, 525-26 (Tex. Civ. App.—El Paso 1992, writ denied) (statutory predecessor to section 552.108 not applicable to internal investigation that did not result in criminal investigation or prosecution). You explain, however, case UF.15.0261.08 is the use of force investigation that resulted in the criminal charges of official oppression presented in case 2008-3077. You assert case 2008-3077 and case UF.15.0261.08 relate to an open criminal investigation and release of anything other than basic information could compromise the integrity of the investigation

and hinder prosecution. Further, you state, and provide documentation showing, case 2008-3077 has been presented to and true billed by the grand jury. Based upon your representations and our review, we conclude the release of the remaining information in cases 2008-3077 and UF.15.0261.08 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). Accordingly, section 552.108(a)(1) of the Government Code is generally applicable to the remaining information in cases 2008-3077 and UF.15.0261.08.

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). Basic information refers to the information held to be public in *Houston Chronicle*. 531 S.W.2d at 186–87. This information includes the identity of the complainant and a detailed description of the offense. See Open Records Decision No. 127 (1976) (summarizing types of information deemed public by *Houston Chronicle*). We note basic information does not include the identifying information of witnesses or suspects who were not arrested or dates of birth. See ORD 127 at 3-4. Thus, with the exception of the basic information, which must be released, the department may withhold the remaining information in cases 2008-3077 and UF.15.0261.08 under section 552.108(a)(1) of the Government Code.²

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 also encompasses the Medical Practice Act (the “MPA”), subtitle B of title 3 of the Occupations Code. Medical records are confidential under section 159.002 of the MPA, which 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.

²As our ruling under section 552.108 of the Government Code is dispositive, we need not address your remaining arguments against disclosure for this information, except to note the basic information is not excepted from disclosure under section 552.134. See Gov't Code § 552.029(8) (basic information about an incident involving the use of force is not excepted under section 552.134).

Occ. Code § 159.002(a)-(c). 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). This office also has concluded when a file is created as the result of a hospital stay, all of the documents in the file that relate 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). Medical records must be released on receipt of the patient's signed, written consent, provided 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 release of medical records must be consistent with the purposes for which the governmental body obtained the records. *Id.* § 159.002(c); Open Records Decision No. 565 at 7 (1990). You contend portions of the remaining information are confidential under the MPA. Upon review, we find the pages we have marked consist of records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that were created by a physician or someone under the supervision of a physician. Therefore, this information constitutes confidential medical records and may be released only in accordance with the MPA.

Section 552.101 also encompasses section 611.002(a) of the Health and Safety Code, which provides “[c]ommunications 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). Section 611.001 defines a “professional” as (1) a person authorized to practice medicine, (2) a person licensed or certified by the state to diagnose, evaluate or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. *See id.* § 611.001(2). Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals. *See* Open Records Decision No. 565 (1990). These sections permit disclosure of mental health records to a patient, a person authorized to act on the patient's behalf, or a person who has the written consent of the patient. *See* Health & Safety Code §§ 611.004, .0045. We understand you seek to withhold a portion of the remaining information under section 611.002(a) of the Health and Safety Code. Upon review, we find none of the remaining information consists of communications or records made confidential by section 611.002 of the Health and Safety Code. Therefore, none of the remaining information may be withheld under section 552.101 on that basis.

You raise section 552.134 of the Government Code for the remaining information. Section 552.134(a) is applicable to information relating to inmates and former inmates of the department and provides as follows:

- (a) Except as provided by Subsection (b) or by Section 552.029 [of the Government Code], information obtained or maintained by the [department] is excepted from [required public disclosure] if it is information about an inmate who is confined in a facility operated by or under a contract with the department.

Gov't Code § 552.134(a). Section 552.134 is explicitly made subject to section 552.029, which provides in part:

Notwithstanding Section 508.313 or 552.134, the following information about an inmate who is confined in a facility operated by or under a contract with the [department] is subject to required disclosure under Section 552.021:

...

(8) basic information regarding the death of an inmate in custody, an incident involving the use of force, or an alleged crime involving the inmate.

Id. § 552.029(8). We note the remaining information includes information relating to a use of force investigation. The department must release basic information about a use of force pursuant to section 552.029(8). *See id.* For purposes of section 552.029(8), basic information includes the time and place of the incident, the names of inmates and of department employees who were involved, a brief narrative of the incident, a brief description of any injuries sustained by anyone involved, and information regarding any criminal charges or disciplinary actions that were filed as a result of the incident. Thus, those types of information must be released pursuant to section 552.029(8) and may not be withheld under section 552.134. We also note much of the remaining information pertains to employees of the department and their conduct. Such information does not constitute "information about an inmate" for purposes of section 552.134 and may not be withheld on that basis. We have marked the portions of the remaining information related to inmates. The department must withhold this information under section 552.134 of the Government Code. However, none of the remaining information is subject to section 552.134 and it may not be withheld on that basis.

Section 552.117(a)(3) excepts from public disclosure the home address and telephone number, emergency contact information, social security number, and family member information of current or former employee of the department or any division of the department, regardless of whether the current or former employee complies with section 552.1175 of the Government Code. *Id.* § 552.117(a)(3). Therefore, the department must withhold the information we have marked under section 552.117(a)(3) of the Government Code.

We note the court-filed documents in case 2008-3077 contain the personal information of employees or former employees of the department. These documents are law enforcement records held by the department in its investigative capacity as a law enforcement entity, and not as the employer of department employees involved. Accordingly, section 552.117 is not applicable to the personal information in those documents. However, this information may be excepted from disclosure under section 552.1175, which provides in part:

(a) This section applies only to:

(3) current or former employees of the Texas Department of Criminal Justice or of the predecessor in function of the department or any division of the department[.]

(b) Information that relates to the home address, home telephone number, emergency contact information, or social security number of an individual to whom this section applies, 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(a)(3), (b). Therefore, to the extent the individual whose information we have marked elects to restrict access to his information in accordance with section 552.1175(b), the department must withhold the information we marked under section 552.1175 of the Government Code. If the individual does not elect to restrict access to the information we have marked, then the department may not withhold this information under section 552.1175.

Section 552.101 also encompasses the doctrine of common-law privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681–82. The type of information considered highly intimate or 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. This office has found a legitimate public interest in information relating to employees of governmental bodies and their employment qualifications and job performance. *See* Open Records Decision Nos. 542 at 5 (1990), 470 at 4 (1987) (public has legitimate interest in job qualifications and performance of public employees); *see also* Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow). Upon review, we find none of the remaining information is highly intimate or embarrassing and a matter of no legitimate public concern. Therefore, the department may not withhold any of it under section 552.101 in conjunction with common-law privacy.

In summary, the department (1) may withhold, with the exception of basic information and the court-filed documents we marked under section 552.022(a)(17), cases 2008-3077 and UF.15.0261.08 under section 552.108(a)(1) of the Government Code; (2) may only release the marked medical records in accordance with the MPA; (3) must withhold the marked

inmate information under section 552.134 of the Government Code; (4) must withhold the information we have marked under section 552.117(a)(3) of the Government Code; and (5) must withhold the information we marked under section 552.1175 of the Government Code if the individual whose information we have marked elects to restrict access to his information in accordance with section 552.1175(b). The remaining information must be released.³

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,



Michelle R. Garza
Assistant Attorney General
Open Records Division

MRG/em

Ref: ID# 448229

Enc. Submitted documents

c: Requestor
(w/o enclosures)

³Because this requestor has a special right of access to the information that may be released, if the department receives another request for this information from an individual other than this requestor, the department must again seek a decision from this office.