



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

April 1, 2015

Mr. Mark G. Daniel
Counsel for the City of Watauga
Evans, Daniel, Moore, Evans & Biggs
115 West Second Street, Suite 202
Fort Worth, Texas 76102

OR2015-06168

Dear Mr. Daniel:

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# 558297 (Request 15-19).

The Watauga Police Department (the "department") received a request for five categories of information pertaining to any incidents during a specified time period in which a department police officer discharged a firearm, resulting in the injury or death of a human being. You state you have released some information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101, 552.108, 552.130, and 552.152 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

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 protected by other statutes, such as the Medical Practice Act ("MPA"), subtitle B of title 3 of the Occupations Code, which governs release of medical records. *See* Occ. Code §§ 151.001-168.202. Section 159.002 of the MPA provides, in relevant part, the following:

- (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.

Id. § 159.002(a)-(c). Information subject to the MPA includes both medical records and information obtained from those records. *See id.* §§ 159.002, .004. 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 at 3-4 (1987), 370 at 2 (1983), 343 at 1 (1982). We have further found when a file is created as a result of a hospital stay, all the documents in the file referring to diagnosis and treatment constitute physician-patient communications or “[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician.” Open Records Decision No. 546 at 1 (1990). You claim the information in Exhibit G is protected by the MPA. Upon review, we find the information we have marked constitutes medical records. Accordingly, the department must withhold the information we have marked in Exhibit G under section 552.101 of the Government Code in conjunction with the MPA. However, we find none of the remaining information in Exhibit G constitutes a record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that was created or is maintained by a physician. Thus, none of the remaining information in Exhibit G may be withheld under section 552.101 of the Government Code in conjunction with the MPA.

Section 552.101 also encompasses information section 773.091 of the Health and Safety Code, which provides, in relevant 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.

...

(g) The privilege of confidentiality under this section does not extend to information regarding the presence, nature of injury or illness, age, sex, occupation, and city of residence of a patient who is receiving emergency medical services.

Health & Safety Code § 773.091(b), (g). Thus, except for the information specified in section 773.091(g), emergency medical services (“EMS”) records are deemed confidential under section 773.091 and, therefore, may only be released in accordance with chapter 773 of the Health and Safety Code. *See id.* §§ 773.091-.093. Upon review, we find the information in Exhibit E consists of EMS records subject to chapter 773. Thus, with the exception of the information subject to section 773.091(g), which must be released, the department must withhold Exhibit E under section 552.101 of the Government Code in conjunction with section 773.091(b) of the Health and Safety Code.

Section 552.108(a)(2) of the Government Code excepts from disclosure information concerning an investigation that concluded in a result other than conviction or deferred adjudication. Gov’t Code § 552.108(a)(2). A governmental body claiming section 552.108(a)(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)(1)(A) (governmental body must provide comments explaining why exceptions raised should apply to information requested). You state the information in Exhibits B.1, C, D, and F relates to a closed law enforcement investigation conducted by the department and the Texas Department of Public Safety Texas Ranger Division (the “Texas Rangers”) that did not result in a conviction or deferred adjudication. You also state the Texas Rangers objects to the release of the information at issue. Based on your representations and our review, we agree section 552.108(a)(2) is applicable to the information at issue. *See* Open Records Decision No. 372 (1983) (statutory predecessor to section 552.108 may be invoked by any proper custodian of law enforcement information).

However, we note, and you acknowledge, section 552.108 does not except from disclosure basic information about an arrested person, an arrest, or a crime. *Id.* § 552.108(c). Basic information refers to the information held to be public in *Houston Chronicle Publishing 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). *See* Open Records Decision No. 127 (1976) (summarizing types of information considered to be basic information). We note basic information includes, among other things, an identification and description of the complainant and the names of arresting and investigating officers, but does not include motor vehicle record information subject to section 552.130 of the Government Code or the identities of victims or witnesses who are not also complainants. *See* ORD 127 at 3-4; *see also* Gov’t Code § 552.130. Thus, with the exception of basic information, the department may withhold Exhibits B.1, C, D, and F under section 552.108(a)(2) of the Government Code.¹

You seek to withhold some of the basic information under the common-law informer’s privilege. Section 552.101 also encompasses information protected by the common-law

¹As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

informer's privilege, which has long been recognized by Texas courts. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928). The informer's privilege protects the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law enforcement authority, provided that the subject of the report does not already know their identities. Open Records Decision Nos. 515 at 2-3 (1988), 434 at 1-2 (1986), 208 at 1-2 (1978). For the informer's privilege to apply, the report must be of a violation of a criminal or civil statute. *See* Open Records Decision Nos. 582 at (1990), 515 at 3-4. The privilege affords protection to individuals who report violations of statutes to criminal law enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." Open Records Decision No. 279 at 1-2 (1981) (citing 8 John H. Wigmore, *Evidence in Trials at Common Law*, § 2374, at 767 (J. McNaughton rev. ed. 1961)).

You state portions of the basic information identify individuals who reported a violation of the law to the department, which is charged with the enforcement of the law. You do not indicate, nor does it otherwise appear, the subject of the complaint knew the identities of these individuals. Based on your representations and our review, we find, in releasing basic information, the department may withhold the identifying information of these individuals, which we have marked, under section 552.101 of the Government Code in conjunction with the common-law informer's privilege.

You also seek to withhold some of the basic information under section 552.152 of the Government Code, which provides:

Information in the custody of a governmental body that relates to an employee or officer of the governmental body is excepted from [required public disclosure] if, under the specific circumstances pertaining to the employee or officer, disclosure of the information would subject the employee or officer to a substantial threat of physical harm.

Gov't Code § 552.152. You seek to withhold the identity of the department police officer you have indicated. You inform us an individual has already threatened another department police officer under the mistaken belief he was the officer at issue. You further inform us the "individual involved was physically restrained from attacking the police officer and the police officer had to retreat in order to protect his physical safety." Therefore, you explain, the release of the identity of the officer at issue would subject that officer to a substantial threat of physical harm or actual harm. Upon review, we find you have demonstrated the release of the information at issue would create a substantial threat of physical harm to this individual. Accordingly, in releasing basic information, the department must withhold the information we have marked under section 552.152 of the Government Code.

In summary, the department must withhold the information we have marked in Exhibit G under section 552.101 of the Government Code in conjunction with the MPA. With the exception of the information subject to section 773.091(g) of the Health and Safety Code, which must be released, the department must withhold Exhibit E under section 552.101 of the Government Code in conjunction with section 773.091(b) of the Health and Safety Code. With the exception of basic information, the department may withhold Exhibits B.1, C, D, and F under section 552.108(a)(2) of the Government Code. In releasing basic information, the department may withhold the information we have marked under 552.101 of the Government Code in conjunction with the common-law informer's privilege, and must withhold the information we have marked under section 552.152 of the Government Code. The department must release the remaining information.²

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Alley Latham
Assistant Attorney General
Open Records Division

AKL/dls

Ref: ID# 558297

Enc. Submitted documents

c: Requestor
(w/o enclosures)

²We note the remaining information contains social security numbers. 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. See Gov't Code § 552.147(b).