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ATTORNEY GENERAL OF TEXAS

September 27, 2019

Ms. Linda Pemberton
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City of Killeen
P.O. Box 1329
Killeen, Texas 76540

OR2019-27129

Dear Ms. Pemberton:

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# 788017 (KPD Request ID# W029380).

The Killeen Police Department (the "department") received a request for information pertaining to seven specified incidents. The department states it has no information responsive to one of the requested incidents.¹ The department informs us it has released some information to the requestor. The department claims the submitted information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have considered the exceptions the department claims and reviewed the submitted information.

Section 552.108(a)(1) of the Government Code excepts 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). A governmental body claiming section 552.108(a)(1) must 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). The department states report

¹ The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983).

numbers 19-006940, 19-07255, 19-007415, 19-007603, and 19-007610 relate to active investigations or prosecutions. We note, however, report number 19-007415 includes a DIC-24 Statutory Warning and a DIC-25 Notice of Suspension. The Statutory Warning and Notice of Suspension have previously been provided to the offender. Because copies of these documents have previously been released to the offender, we find the department has not demonstrated release of these documents will interfere with the detection, investigation, or prosecution of crime. *See Gov't Code § 552.108(a)(1)*. Thus, the department may not withhold the DIC-24 and DIC-25 forms under section 552.108(a)(1). However, based on the department's representation and our review, we conclude release of the remaining information at issue 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, we find the department may generally withhold report numbers 19-006940, 19-07255, 19-007603, and 19-007610 and the remaining information in report number 19-007415 under section 552.108(a)(1) of the Government Code.²

However, the requestor is a representative of the Civil Police Liaison Office of the Directorate of Emergency Services of the United States Army (the "Army") and, thus, may have a right of access to some of the information at issue. Section 411.089(a) of the Government Code provides, "[a] criminal justice agency is entitled to obtain from the [Texas Department of Public Safety (the "DPS")] any criminal history record information ["CHRI"] maintained by [DPS] about a person." *See Gov't Code § 411.089(a)*. In addition, section 411.087(a)(2) of the Government Code provides,

(a) [A] person, agency, department, political subdivision, or other entity that is authorized by this subchapter or Subchapter E-1 to obtain from [DPS CHRI] maintained by [DPS] that relates to another person is authorized to:

(2) obtain from any other criminal justice agency in this state [CHRI] maintained by that criminal justice agency that relates to that person.

Id. § 411.087(a)(2). CHRI is defined as "information collected about a person by a criminal justice agency that consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions." *See id.* § 411.082(2). Thus, the submitted information contains CHRI. However, a criminal justice agency that receives CHRI from another criminal justice agency pursuant to section 411.087(a)(2) may receive such information only for a criminal justice purpose. *See id.* §§ 411.083(c), .087(b); *see also* Open Records Decision No. 655 (1997) (discussing limitations on release of CHRI). Accordingly, to the extent the requestor represents a "criminal justice agency," he is authorized to obtain CHRI from the department pursuant to section 411.087(a)(2) of the Government Code, but only for a criminal justice purpose. *See Gov't Code §§ 411.083(c), .087(b)*.

² The department states it has previously released basic information from these reports to the requestor.

A “criminal justice agency” is defined in part as “a federal or state agency that is engaged in the administration of criminal justice under a statute or executive order and that allocates a substantial portion of its annual budget to the administration of criminal justice[.]” *Id.* § 411.082(3)(A). “Administration of criminal justice” has the meaning assigned to it by article 66.001 of the Code of Criminal Procedure. *See id.* § 411.082(1). Article 66.001 defines “administration of criminal justice” as “the performance of any of the following activities: detection, apprehension, detention, pretrial release, post-trial release, prosecution, adjudication, correctional supervision, or rehabilitation of an offender. The term includes “criminal identification activities and the collection, storage, and dissemination of criminal history record information.” Crim. Proc. Code art. 66.001(1).

We are unable to determine whether the requestor is a representative of a criminal justice agency or whether the requestor intends to use the CHRI for a criminal justice purpose. We note a statutory right of access generally prevails over exceptions to public disclosure under the Act. *See* Open Records Decision Nos. 613 at 4 (1993) (exceptions in Act cannot impinge on statutory right of access to information), 451 (1986) (specific statutory right of access provisions overcome general exceptions to disclosure under the Act). Consequently, if the department determines (1) the requestor is a representative of a criminal justice agency for purposes of chapter 411 and (2) the requestor intends to use the CHRI for a criminal justice purpose, then the department must release the CHRI and the DIC-24 and DIC-25 forms, but may withhold report numbers 19-006940, 19-07255, 19-007603, and 19-007610 and the remaining information in report number 19-007415 under section 552.108(a)(1) of the Government Code. However, if the department determines the requestor either is not a representative of a criminal justice agency for purposes of chapter 411 or does not intend to use the CHRI for a criminal justice purpose, then the department must release the DIC-24 and DIC-25 forms, but may withhold report numbers 19-006940, 19-07255, 19-007603, and 19-007610 and the remaining information in report number 19-007415 under section 552.108(a)(1) of the Government Code.

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 the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) 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 satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987). The Third Court of Appeals has concluded public citizens’ dates of birth are protected by common-law privacy pursuant to section 552.101. *See Paxton v. City of Dallas*, No. 03-13-00546-CV, 2015 WL 3394061, at *3 (Tex. App.—Austin May 22, 2015, pet. denied) (mem. op.). Generally, only highly intimate information that implicates the privacy of an individual is withheld. However, in

certain instances, where it is demonstrated the requestor knows the identity of the individual involved as well as the nature of certain incidents, the entire report must be withheld to protect the individual's privacy. Although the department seeks to withhold the entirety of report number 19-007224 under section 552.101 in conjunction with common-law privacy, we note the department has not demonstrated, nor does it otherwise appear, this is a situation in which the entirety of the information at issue must be withheld on that basis. Accordingly, the department may not withhold the entirety of report number 19-007224 under section 552.101 of the Government Code in conjunction with common-law privacy. Nevertheless, upon review, we find portions of the remaining information are highly intimate or embarrassing and not of legitimate public concern. Thus, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find the remaining information is not confidential under common-law privacy and the department may not withhold it under section 552.101 on that ground.

Section 552.101 of the Government Code also encompasses information made confidential by statute, such as the Medical Practice Act ("MPA"), subtitle B of title 3 of the Occupations Code, which governs release of medical records. Section 159.002 of the MPA provides, in relevant 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). Information subject to the MPA includes both medical records and information obtained from those medical 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 (1987), 370 (1983), 343 (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 (1990). Upon review, we find a portion of the remaining information constitutes records of the identity, diagnosis, evaluation, or

treatment of a patient by a physician that were created or are maintained by a physician. Accordingly, the department must withhold the medical records we have marked under section 552.101 of the Government Code in conjunction with the MPA.

We note some of the remaining information is subject to section 552.130 of the Government Code.³ Section 552.130 of the Government Code provides information relating to a motor vehicle operator's license, driver's license, motor vehicle title or registration, or personal identification document issued by an agency of this state or another state or country is excepted from public release. *See Gov't Code § 552.130.* Accordingly, the department must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code.

We note the remaining information contains an e-mail address that is subject to section 552.137 of the Government Code. Section 552.137 of the Government Code excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See Gov't Code § 552.137(a)-(c).* The e-mail address at issue is not excluded by subsection (c). Therefore, the department must withhold the personal e-mail address we have marked under section 552.137 of the Government Code, unless the owner affirmatively consents to its public disclosure.

In summary, if the department determines (1) the requestor is a representative of a criminal justice agency for purposes of chapter 411 and (2) the requestor intends to use the CHRI for a criminal justice purpose, then the department must release the CHRI and the DIC-24 and DIC-25 forms, but may withhold report numbers 19-006940, 19-07255, 19-007603, and 19-007610 and the remaining information in report number 19-007415 under section 552.108(a)(1) of the Government Code. However, if the department determines the requestor either is not a representative of a criminal justice agency for purposes of chapter 411 or does not intend to use the CHRI for a criminal justice purpose, then the department must release the DIC-24 and DIC-25 forms, but may withhold report numbers 19-006940, 19-07255, 19-007603, and 19-007610 and the remaining information in report number 19-007415 under section 552.108(a)(1) of the Government Code. The department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The department must withhold the medical records we have marked under section 552.101 of the Government Code in conjunction with the MPA. The department must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code. The department must withhold the personal e-mail address we have marked under section 552.137 of the

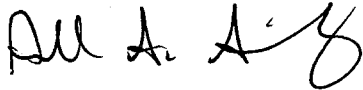
³ The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).*

Government Code, unless the owner affirmatively consents to its public disclosure. The department must release the remaining information.⁴

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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,



Gerald Arismendez
Assistant Attorney General
Open Records Division

GAA/be

Ref: ID# 788017

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁴ The information being released 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).