

Tex. Atty. Gen. Op. OR2010-07477 (Tex.A.G.), 2010 WL 2151474

Office of the Attorney General

State of Texas

Informal Letter Ruling No. OR2010-07477

May 24, 2010

*1 Mr. Rodolfo Ramirez
Assistant District Attorney
Fort Bend County District Attorney's Office
301 Jackson, Room 101
Richmond, Texas 77469

Dear Mr. Ramirez:

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# 381179.

The Fort Bend County District Attorney's Office (the "district attorney") received two requests from the same requestor for eleven categories of information pertaining to a specified incident. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.108, 552.117, 552.130, 552.1325, and 552.147 of the Government Code. You also notified Memorial Hermann Texas Medical Center ("Memorial Hermann") of this request for information and of its right to submit arguments to this office as to why the requested information should not be released. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have received comments from Memorial Hermann, considered the submitted arguments, and reviewed the submitted information.

Initially, we address Memorial Hermann's assertion that the submitted medical records are not responsive to the request. A governmental body must make a good-faith effort to relate a request for information to responsive information that is within the governmental body's possession or control. *See* Open Records Decision No. 561 at 8-9 (1990). We note the request, in part, seeks copies "of any additional notes or reports" relating to the specified incident. Further, the district attorney submitted the information at issue as responsive to the request. Upon review, we conclude the submitted medical records are responsive to the request. Therefore, we will address the submitted arguments against the disclosure of this information.

Next, we note the submitted information is subject to section 552.022(a)(1) of the Government Code. Section 552.022(a)(1) provides for the required public disclosure of "a completed report, audit, evaluation, or investigation made of, or, or by a governmental body, except as provided by Section 552.108." Gov't Code § 552.022(a)(1). In this instance, the submitted information consists of a completed investigation made of, for, or by the district attorney. Accordingly, the information must be released under section 552.022(a)(1) of the Government Code, unless it is excepted from disclosure under section 552.108 of the Government Code or expressly confidential under other law. You claim, in part, the submitted information is excepted from disclosure under section 552.103 of the Government Code. However, section 552.103 is a discretionary exception to public disclosure that protects the governmental body's interests and may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.--Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.103 is not "other law" that makes information confidential for the purposes of section 552.022. Therefore, the district attorney may not withhold any portion of the submitted information under section 552.103. However, because information subject to section 552.022(a)(1) may be withheld under sections 552.101, 552.108, 552.117, 552.1175, 552.130, 552.1325, and 552.147 of the Government Code, we will address the applicability of these exceptions to the submitted information.¹

*2 Next, we note the submitted information contains a CRB-3 accident report form completed pursuant to chapter 550 of the Transportation Code. *See* Transp. Code § 550.064 (officer's accident report). Section 550.065(b) states that, except as provided by subsection (c), accident reports are privileged and confidential. Section 550.065(c)(4) provides for the release of accident reports to a person who provides two of the following three pieces of information: (1) the date of the accident; (2) the name of any person involved in the accident; and (3) the specific location of the accident. *Id.* § 550.065(c)(4). In this instance, the requestor has provided the district attorney with all three requisite pieces of information specified by the statute. Accordingly, the district attorney must release the submitted CRB-3 accident report, which we have marked, in its entirety pursuant to chapter 550 of the Transportation Code. We note that although you have marked portions of this information under section 552.130 of the Government Code, the exceptions found in the Act generally do not apply to information that is made public by other statutes. *See* Open Records Decision No. 525 (1989) (statutory predecessor).

Section 552.101 of the Government Code excepts from public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov't Code § 552.101. Memorial Hermann claims some of the submitted information is protected from disclosure under the federal Health Insurance Portability and Accountability Act of 1996 (“HIPAA”), 42 U.S.C. §§ 1320d-1320d-8. At the direction of Congress, the Secretary of Health and Human Services (“HHS”) promulgated regulations setting privacy standards for medical records, which HHS issued as the Federal Standards for Privacy of Individually Identifiable Health Information. *See* Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 1320d-2 (Supp. IV 1998) (historical & statutory note); Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. Pts. 160, 164 (“Privacy Rule”); *see also* Attorney General Opinion JC-0508 at 2 (2002). These standards govern the releasability of protected health information by a covered entity. *See* 45 C.F.R. pts. 160, 164. Under these standards, a covered entity may not use or disclose protected health information, except as provided by parts 160 and 164 of the Code of Federal Regulations. *See id.* § 164.502(a). This office has addressed the interplay of the Privacy Rule and the Act. In Open Records Decision No. 681 (2004), we noted section 164.512 of title 45 of the Code of Federal Regulations provides a covered entity may use or disclose protected health information to the extent such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law. *See* 45 C.F.R. § 164.512(a)(1). We further noted the Act “is a mandate in Texas law that compels Texas governmental bodies to disclose information to the public.” *See* ORD 681 at 8; *see also* Gov't Code §§ 552.002, .003, .021. We, therefore, held the disclosures under the Act come within section 164.512(a). Consequently, the Privacy Rule does not make information confidential for the purpose of section 552.101 of the Government Code. *See Abbott v. Tex. Dep't of Mental Health & Mental Retardation*, 212 S.W.3d 648 (Tex. App.--Austin 2006, no pet.); ORD 681 at 9; *see also* Open Records Decision No. 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). Thus, because the Privacy Rule does not make information that is subject to disclosure under the Act confidential, the district attorney may withhold protected health information from the public only if the information is confidential under other law or an exception in subchapter C of the Act applies.

*3 Section 552.101 also encompasses the Medical Practice Act (the “MPA”), subtitle B of title 3 of the Occupations Code. Section 159.002 of the MPA provides in part the following:

(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 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 also found when a file is created as the result of a hospital stay, “all the documents relating to diagnosis and treatment would 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).

Further, information that is subject to the MPA also includes information obtained from medical records. *See* Occ. Code. § 159.002(a), (b), (c); *see also* Open Records Decision No. 598 (1991).

You assert portions of the remaining information consist of medical records subject to the MPA. Upon review, we agree portions of this information, which we have marked, consist of medical records subject to the MPA. The medical records we have marked must only be released in accordance with the MPA. However, you have not demonstrated how the remaining information you have marked consists of medical records or information obtained directly from medical records; therefore, none of this information may be withheld under section 552.101 on that basis.

Next, we will address your claim under chapter 411 of the Government Code, which is also encompassed by section 552.101. Criminal history record information (“CHRI”) obtained from the National Crime Information Center (“NCIC”) or the Texas Crime Information Center is confidential under federal and state law. Federal law governs the dissemination of CHRI obtained from the NCIC network. Federal regulations prohibit the release to the general public of CHRI maintained in state and local CHRI systems. *See* 28 C.F.R. § 20.21(c)(1) (“Use of criminal history record information disseminated to noncriminal justice agencies shall be limited to the purpose for which it was given.”) and (c)(2) (“No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself.”); *see also* Open Records Decision No. 565 at 10-12 (1990). The federal regulations allow each state to follow its own individual law with respect to CHRI that it generates. *See* ORD 565 at 10-12. Sections 411.083(b)(1) and 411.089(a) of the Government Code 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. *See* Gov’t Code § 411.089(b). Any CHRI generated by the federal government or another state may be disclosed only in accordance with the federal regulations. Any CHRI obtained from the Department of Public Safety (“DPS”) or another criminal justice agency must be withheld as provided by subchapter F of chapter 411 of the Government Code. We note, however, the definition of CHRI does not include driving record information maintained by DPS under chapter 521 of the Transportation Code. *See id.* § 411.082 (2)(B). Upon review, we agree portions of the remaining information consist of CHRI subject to chapter 411. The department must withhold this information, which we have marked, under section 552.101 in conjunction with chapter 411.² However, none of the remaining information consists of CHRI subject to chapter 411, and no portion of it may be withheld under section 552.101 on that basis.

*4 Section 552.101 also encompasses section 62.0132 of the Government Code. This provision authorizes the Office of Court Administration of the Texas Judicial System to create a standardized juror questionnaire form to be used in courts throughout the state. *See id.* § 62.0132(a). Section 62.0132(f) states information contained in a completed questionnaire is confidential and not subject to the Act. You assert Exhibit H consists of information contained in completed juror questionnaires. Based on your representation, we agree a portion of the information at issue consists of information contained in completed juror questionnaires. The district attorney must withhold this information, which we have marked, under section 552.101 in conjunction with section 62.0132(f) of the Government Code. However, the remaining list of juror names is not confidential under section 62.0132(f) and may not be withheld under section 552.101 on that basis. *See* [Attorney General Opinion GA-0422 at 5 \(2006\)](#) (names on jury list not made confidential by section 62.0132).

You raise section 552.101 in conjunction with article 35.29 of the Code of Criminal Procedure for the remaining portion of Exhibit H. Article 35.29 provides:

Information collected by the court or by a prosecuting attorney during the jury selection process about a person who serves as a juror, including the juror's home address, home telephone number, social security number, driver's license number, and other personal information, is confidential and may not be disclosed by the court, the prosecuting attorney, the defense counsel, or any court personnel except on application by a party in the trial or on application by a bona fide member of the news media acting in such capacity to the court in which the person is serving or did serve as a juror. On a showing of good cause, the court shall permit disclosure of the information sought.

Crim. Proc. art. 35.29. Article 35.29 makes confidential certain personal information pertaining only to those individuals who actually served on the petit jury in a criminal trial. In addition to the confidential information listed in article 35.29, “other personal information” which is confidential pursuant to article 35.29 includes the juror's present employer, business telephone number, and spouse's employer. Juror names, however, are not made confidential by article 35.29 and are not “other personal information” that is confidential pursuant to article 35.29. See [Attorney General Opinion GA-0422 at 6](#). Upon review, we find none of the remaining information at issue is subject to article 35.29, and thus no portion of it may be withheld under section 552.101 on that basis.

Section 552.101 also encompasses the common-law right of privacy. Common-law privacy 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 types 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. *Id.* at 683. This office has found some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. See Open Records Decision Nos. 470 (1987) (information pertaining to illness from severe emotional and job-related stress protected by common-law privacy), 455 (1987) (information pertaining to prescription drugs, specific illnesses, operations and procedures, and physical disabilities protected from disclosure). This office has also found that personal financial information not relating to the financial transaction between an individual and a governmental body is excepted from required public disclosure. See Open Records Decision Nos. 600 (1992), 545 (1990). Finally, this office has found a compilation of an individual's criminal history is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person. 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). Furthermore, we find a compilation of a private citizen's criminal history is generally not of legitimate concern to the public.

*5 You assert portions of the remaining information are excepted from disclosure under section 552.101 in conjunction with common-law privacy. Upon review, we agree portions of the remaining information, which we have marked, are highly intimate or embarrassing and not of legitimate concern to the public. The district attorney must withhold this information, as well as the same information in the submitted video recording, under section 552.101 in conjunction with common-law privacy. However, we note if the district attorney lacks the technical capacity to redact information from the submitted video recording, then the district attorney must withhold the recording in its entirety. See Open Records Decision No. 364 (1983). We note a portion of the information you seek to withhold as a compiled criminal history was provided by the individual whose information is at issue, not the district attorney. Thus, this information was not compiled by any governmental entity. Furthermore, we find you have failed to demonstrate how any portion of the remaining information at issue is highly intimate or embarrassing and not of legitimate public interest. Accordingly, no portion of the remaining information at issue may be withheld under section 552.101 in conjunction with common-law privacy.

We next address your argument under section 552.108 of the Government Code, which provides in pertinent part:

(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:

...

(4) it is information that:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) represents the mental impressions or legal reasoning of an attorney representing the state.

Gov't Code §§ 552.108(a)(4). Sections 552.108(a)(4) is applicable to information that was prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation or that reflects the mental impressions or legal reasoning of an attorney representing the state. A governmental body that claims an exception to public disclosure under section 552.108 must reasonably explain how and why section 552.108 is applicable to the information. *See id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986). You indicate submitted Exhibit C was prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation. Upon review, we determine section 552.108(a)(4) is applicable to the information at issue. Accordingly, the district attorney may withhold Exhibit C under section 552.108(a)(4) of the Government Code.³

We note portions of the remaining information may be subject to section 552.1175 of the Government Code. Section 552.1175 provides in part:

*6 (a) This section applies only to:

(1) peace officers as defined by Article 2.12, Code of Criminal Procedure;

...

(b) Information that relates to the home address, home telephone number, 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.

Gov't Code § 552.1175(a), (b). We have marked portions of the remaining information that may be subject to section 552.1175. To the extent this information pertains to currently licensed peace officers who elect to restrict access to their information in accordance with section 552.1175(b), it must be withheld.⁴

You assert submitted Exhibit F is subject to section 552.1325 of the Government Code, which provides as follows:

(a) In this section:

(1) "Crime victim" means a person who is a victim as defined by Article 56.32, Code of Criminal Procedure.

(2) "Victim impact statement" means a victim impact statement under Article 56.03, Code of Criminal Procedure.

(b) The following information that is held by a governmental body or filed with a court and that is contained in a victim impact statement or was submitted for purposes of preparing a victim impact statement is confidential:

(1) the name, social security number, address, and telephone number of a crime victim; and

(2) any other information the disclosure of which would identify or tend to identify the crime victim.

Id. § 552.1325. A portion of Exhibit F, which we have marked, consists of a victim impact statement as defined by article 56.03 of the Code of Criminal Procedure. *See* Code Crim. Proc. art. 56.03. We note the victim, in this instance, meets the definition of a crime victim under article 56.32 of the Code of Criminal Procedure. *See id.* art. 56.32. In most cases, the district attorney would only be allowed to withhold the victim's identifying information from public disclosure. In this instance, however, because the requestor knows the identity of the victim, withholding only the identifying information would not effectuate the purpose of the statute. Accordingly, the district attorney must withhold the information we have marked in its entirety pursuant to section 552.1325 of the Government Code.⁵ However, the remaining information does not consist of a victim impact statement as defined by article 56.03. Consequently, none of the remaining information may be withheld under section 552.1325.

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 agree the information you have marked, as well as the additional information we have marked, is subject to section 552.130. Accordingly, the district attorney must withhold the marked information, as well as the same information within the submitted photographs and video recording, under section 552.130 of the Government Code.⁶ As previously mentioned, if the district attorney lacks the technical capacity to redact information from the submitted recording, then the district attorney must withhold the recording in its entirety. *See* ORD 364.

*7 You raise section 552.147 of the Government Code for portions of the remaining information. Section 552.147 provides “[t]he social security number of a living person is excepted from” required public disclosure under the Act. *Id.* § 552.147(a). Accordingly, the district attorney may withhold social security numbers from the remaining information under section 552.147 of the Government Code.⁷

We note portions of the remaining information are protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are protected by copyright. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of materials protected by copyright, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

In summary, the district attorney must release the marked CRB-3 accident report form in accordance with section 550.065(c) (4) of the Transportation Code. The marked medical records may only be released in accordance with the MPA. The district attorney must withhold the information marked under section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code, section 62.0132 of the Government Code, and common-law privacy. The district attorney may withhold Exhibit C under section 552.108(a)(4) of the Government Code. The district attorney must withhold the information we marked under section 552.1175 of the Government Code, to the extent this information pertains to currently licensed peace officers who elect to restrict access to their information in accordance with section 552.1175(b). The district attorney must withhold the information we have marked under section 552.1325 of the Government Code and the marked Texas motor vehicle record information under section 552.130 of the Government Code. The district attorney may withhold social security numbers under section 552.147 of the Government Code. If the district attorney lacks the technical capacity to redact information from the submitted recording, then the district attorney must withhold the recording in its entirety. The remaining information must be released, but only in accordance with copyright law.

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,

*8 Matt Entsminger
Assistant Attorney General
Open Records Division

Footnotes

- 1 The Office of the Attorney General will raise a mandatory exception such as section 552.1175 of the Government Code on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).
- 2 As our ruling is dispositive, we need not address your remaining argument against disclosure as it pertains to this information.
- 3 As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.
- 4 As our ruling is dispositive, we need not address your argument against disclosure of this information.
- 5 As our ruling is dispositive, we need not address your remaining arguments against disclosure as they pertains to this information.
- 6 We note this office recently issued Open Records Decision No. 684 (2009), a previous determination authorizing all governmental bodies to withhold ten categories of information, including Texas driver's license and license plate numbers under section 552.130 of the Government Code, without the necessity of requesting an attorney general decision.
- 7 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 under the Act. *See* Gov't Code § 552.147(b).

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