



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

April 24, 1997

Ms. Barbara Roberts
Assistant City Attorney
Legal Department
P.O. Box 779
Galveston, Texas 77553-0779

OR97-0930

Dear Ms. Roberts:

You have asked whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 30580.

The City of Galveston (the "city") received a request for the employment application of a particular police officer. Specifically, the requestor seeks "any information concerning any employment applications, promotions, awards, training, reprimands, complaints, disciplinary actions, qualifications, educational background and other information relating to this individual." You assert that the requested information is excepted from required public disclosure pursuant to sections 552.101, 552.102, 552.103 and 552.117 of the Government Code. We have considered the exceptions you have raised and reviewed the submitted documents.¹

The documents at issue appear to be governed by the Local Government Code. Section 143.089 of the Local Government Code works in conjunction with section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information deemed confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Section 143.089 of the Local Government Code contemplates two different types of personnel files, one that the police department is required to maintain as part of the police officer's civil service file, and one that the police department may maintain for its own internal use. Local Gov't Code § 143.089(a), (g). You represent that some of the documents submitted to this office for review, Exhibit "B," are not a part of the officer's personnel file. You state that this information is used in determining whether to hire this particular individual. You do not indicate, however, where the information at issue is maintained.

¹Recently, you informed this office that litigation is no longer pending or reasonably anticipated; thus, we do not address your 552.103 claim.

Section 143.089(g) of the Local Gov't Code provides:

A fire or police department may maintain a personnel file on a fire fighter or police officer employed by the department for the department's use, but the department may not release any information contained in the department file to any agency or person requesting information relating to a fire fighter or police officer. The department shall refer to the director or the director's designee a person or agency that requests information that is maintained in the fire fighter's or police officer's personnel file.

In *City of San Antonio v. Texas Attorney Gen.*, 851 S.W.2d 946 (Tex. App.--Austin 1993, writ denied), the court addressed a request for information contained in an internal file maintained by the city police department for its own use and addressed the applicability of section 143.089(g) to that file. The records included in the personnel file related to complaints against the police officer for which no disciplinary action was taken. The court determined that section 143.089(g) made these records confidential. *City of San Antonio*, 851 S.W.2d at 949. However, in cases in which a police department takes disciplinary action against a police officer, section 143.089(a)(2) mandates that documents relating to "any misconduct by the fire fighter or police officer" must be placed in a police officer's civil service file "if the letter, memorandum, or document is from the employing department and if the misconduct resulted in disciplinary action by the employing department in accordance with this chapter."

Thus, if the information at issue is properly held only within the department's internal file, the request for information must be referred to the civil service director or his designee. If, on the other hand, the requested information is part of the civil service file, the city may not withhold the information under section 143.089(g) of the Local Government Code. Since you did not mark the submitted information to show which portions are confidential under § 143.089(g), we therefore address your other arguments against disclosure.

You first assert that the requested personnel file is excepted from disclosure by sections 552.101 and 552.102. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the act. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Therefore, information may be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 (1992) at 1.

The constitutional right to privacy protects two interests. Open Records Decision No. 600 (1992) at 4 (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985), *cert. denied*, 474 U.S. 1062 (1986)). The first is the interest in independence in making certain important decisions related to the "zones of privacy" recognized by the United States Supreme Court. Open Records Decision No. 600 (1992) at 4. The zones of privacy recognized by the United States Supreme Court are matters pertaining to marriage, procreation, contraception, family relationships, and child rearing and education. *See id.*

The second interest is the interest in avoiding disclosure of personal matters. The test for whether information may be publicly disclosed without violating constitutional privacy rights involves a balancing of the individual's privacy interests against the public's need to know information of public concern. *See* Open Records Decision No. 455 (1987) at 5-7 (citing *Fadjo v. Coon*, 633 F.2d 1172, 1176 (5th Cir. 1981)). The scope of information considered private under the constitutional doctrine is far narrower than that under the common law; the material must concern the "most intimate aspects of human affairs." *See* Open Records Decision No. 455 (1987) at 5 (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490, 492 (5th Cir. 1985), *cert. denied*, 474 U.S. 1062 (1986)).

This office has found that the following types of information are excepted from required public disclosure under constitutional or common-law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps), and personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990), and information concerning the intimate relations between individuals and their family members. *See* Open Records Decision No. 470 (1987). We have reviewed the submitted documents and have marked the information that must be withheld under constitutional or common-law privacy.

We further note that section 552.101 also encompasses information protected by other statutes. Federal regulations prohibit the release of criminal history record information ("CHRI") maintained in state and local CHRI systems to the general public. *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."), (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."). Section 411.083 provides that any CHRI maintained by the Department of Public Safety ("DPS") is confidential. Gov't Code § 411.083(a). Similarly, CHRI obtained from the DPS pursuant to statute is also confidential and may only be disclosed in very limited instances. *Id.* § 411.084; *see also id.* § 411.087 (restrictions on disclosure of CHRI obtained from DPS also apply to CHRI obtained from other criminal justice agencies). Therefore, if you have CHRI in your possession and it falls within the ambit of these state and federal regulations, you must withhold the CHRI from the requestor.

Other information must also be withheld under federal law. Form W-4, the Employee's Withholding Allowance Certificate, is confidential as tax return information under title 26, section

6103(a) of the United States Code. Open Records Decision No. 600 (1992) at 8-9. Further, social security numbers that were obtained or maintained by a governmental body pursuant to any provision of law, enacted on or after October 1, 1990, are confidential pursuant to section 405(c)(2)(C)(viii)(I) of title 42 of the United States Code.

We note that one of the documents you submitted to this office for review includes an Employment Eligibility Verification, Form I-9. Form I-9 is governed by title 8, section 1324a of the United States Code, which provides that the form "may not be used for purposes other than for enforcement of this chapter" and for enforcement of other federal statutes governing crime and criminal investigations. 8 U.S.C. § 1324a(b)(5); *see* 8 C.F.R. § 274a.2(b)(4). Release of this document under chapter 552 of the Government Code would be "for purposes other than for enforcement" of the referenced federal statutes. Accordingly, we conclude that Form I-9 is confidential under section 552.101 of the Government Code and may only be released in compliance with the federal laws and regulations governing employment verification system.

We also note that the file contains information relating to the home address, home telephone number, and social security number of city employee's and peace officers, as well as the names of family members. Section 552.117 of the Government Code protects from required public disclosure information relating to a peace officers' home address, home telephone number, or social security number, as well as names of family members. Open Records Decision Nos. 622 (1994), 455 (1987). The information at issue here contains the peace officer's home address, telephone number, social security number, and names of family members. Therefore, the city must not release information that discloses the officer's home address, social security number, home telephone number, and names of family members. We have marked the documents accordingly.

The records at issue also contain information obtained from a polygraph test which must be withheld under section 552.101. Information pertaining to a polygraph examination is confidential under section 19A(b) of article 4413 (29cc), V.T.C.S. Accordingly, you must withhold the polygraph examination and any information acquired from the examination under section 552.101 of the Government Code in conjunction with V.T.C.S., article 4413(29cc), section 19A(b). We have marked the information which must be withheld under section 552.101.

Additionally, photographs of officers are included with one of the sample applications submitted to this office for review. Pursuant to section 552.119 of the Government Code, you must withhold the photograph of the officer unless the officer has given the city written consent to its disclosure.

Furthermore, some of the information at issue includes medical records, access to which is governed by the Medical Practice Act (the "MPA"), article 4495b of Vernon's Texas Civil Statutes. Section 5.08(b) and (c) of the MPA provide:

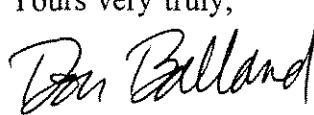
- (b) Records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician are confidential and privileged and may not be disclosed except as provided in this section.

(c) Any person who receives information from confidential communications or records as described in this section other than the persons listed in Subsection (h) of this section who are 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.

Section 5.08(j)(1) provides for release of medical records upon the patient's written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Section 5.08(j)(3) requires that any subsequent release of medical records be consistent with the purposes for which the department obtained the records. Open Records Decision No. 565 (1990) at 7. Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991).

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Don Ballard
Assistant Attorney General
Open Records Division

JDB/SAB/ch

Ref.: ID# 30580

Enclosures: Marked documents

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(w/o enclosures)

