



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

June 30, 1998

Mr. Robert E. Hager  
Nichols, Jackson, Dillard,  
Hager & Smith, L.L.P.  
1800 Lincoln Plaza  
500 North Akard  
Dallas, Texas 75201

OR98-1562

Dear Mr. Hager:

You ask whether certain information is subject to required public disclosure under the Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 117004.

The Lancaster Police Department (the "department"), which you represent, received a request for Officer Eugene Beaman's personnel file. You assert that the requested information is excepted from required public disclosure by sections 552.101, 552.102, and 552.103 of the Government Code. You submit the information the department seeks to withhold from public disclosure.

Section 552.103(a) of the Government Code reads as follows:

(A) Information is excepted from [required public disclosure] if it is information:

- (1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and
- (2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

To secure the protection of section 552.103(a), a governmental body must demonstrate that requested information "relates" to a pending or reasonably anticipated judicial or quasi-judicial proceeding. Open Records Decision No. 588 (1991). A governmental body

has the burden of providing relevant facts and documents to show the applicability of an exception in a particular situation. The test for establishing that section 552.103 applies is a two-prong showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.).

You argue that the requested information is related to a pending case, *Buchanon v City of Lancaster, et. al.*, Cause No. 3-98-CV265-G (N.D. Tex.). We conclude that you have shown that litigation is pending. However, you have not explained how the requested information relates to the pending litigation. Therefore, you may not withhold the requested information under section 552.103.

Next, you assert that the documents include medical records deemed confidential under the Medical Practice Act. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. The Medical Practice Act (the "MPA"), article 4495b of Vernon's Texas Civil Statutes, protects from disclosure "[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician." V.T.C.S. art. 4495b, § 5.08(b). The documents submitted to this office include medical records access to which is governed by provisions outside the Open Records Act. Open Records Decision No. 598 (1991). The MPA provides for both confidentiality of medical records and certain statutory access requirements. *Id.* at 2. The medical records, which we have marked, may only be released as provided by the MPA.<sup>1</sup>

You also assert that the information contains grades, transcripts, and student information protected by section 1232a, of title 20 of the United States Code. It appears that you are invoking the protection of the Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g. FERPA provides that no federal funds will be made available under any applicable program to *an educational agency or institution* that releases personally identifiable information (other than directory information) contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. *See* 20 U.S.C. § 1232g(b)(1). "Education records" means those records that contain information directly related to a student and are *maintained by an educational agency or institution* or by a person acting for such agency or institution. *Id.* § 1232g(a)(4)(A). Because the department is not an educational agency or institution, FERPA is inapplicable.

Furthermore, we note that the information includes information protected by common-law privacy. Section 552.101 encompasses common-law privacy and excepts from disclosure private facts about an individual. *Industrial Found. v. Texas Indus. Accident Bd.*,

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<sup>1</sup>In addition, you assert that section 143.089 of the Local Government Code exempts the medical information from public disclosure. As the medical records are deemed confidential by the MPA, we need not address your claim under section 143.089.

540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Under common-law privacy, 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 protection of common-law privacy extends to information that reveals an individual's personal financial decision that does not involve a transaction with a governmental body, including the individual's choice of insurance carrier and types of coverage sought. Open Records Decision No. 600 (1992) and authorities cited therein. We have marked the information that the department must withhold pursuant to section 552.101 of the Government Code to protect the privacy interests of the peace officer.

The submitted documents also contain criminal history information protected by section 411.083 of the Government Code. 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). We have marked the CHRI that you must withhold under section 411.083 of the Government Code.

Lastly, the information includes information excepted from public disclosure by sections 552.117 and 552.130 of the Government Code. Section 552.117(2) excepts from public disclosure a peace officer's home address, home telephone number, social security number, and information concerning whether the peace officer has family members. Thus, you must withhold the information we have marked under section 552.117(2).

Section 552.130 provides in relevant part as follows:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

(1) a motor vehicle operator's or driver's license or permit issued by an agency of this state[.]

We have marked the information you must withhold pursuant to section 552.130.

We are resolving this matter with this 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 may 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,



Yen-Ha Le  
Assistant Attorney General  
Open Records Division

YHL/nc

Ref.: ID# 117004

Enclosures: Marked documents

cc: Ms. Patricia J. Armstrong  
Owner/Manager  
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(w/o enclosures)