



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 17, 2005

Ms. Jerris Penrod Mapes
Assistant City Attorney
City of Killeen
P. O. Box 1329
Killeen, Texas 76540-1329

OR2005-05394

Dear Ms. Mapes:

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# 226386.

The Killeen Police Department (the "department") received a request for information related to a named peace officer. You state you have released some information from the civil service file maintained by the director of civil service in the City of Killeen (the "city"). See Local Gov't Code § 143.089(a). However, you claim portions of the submitted information are excepted from disclosure under sections 552.101, 552.117, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

You claim Exhibit C is excepted from disclosure under section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information deemed confidential by statute, such as section 143.089 of the Local Government Code. You state that the City of Killeen is a civil service city under chapter 143 of the Local Government Code. Section 143.089 contemplates two different types of personnel files, a police officer's civil service file that the civil service director is required to maintain, and an internal file that the police department may maintain for its own use. Local Gov't Code § 143.089(a), (g). Section 143.089(g) 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 [of the civil service commission] 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.

Local Gov't Code § 143.089(g). Subsection (g) authorizes city police departments to maintain for their own use a file on a police officer that is separate from the file maintained by the city civil service commission. *Id.* Moreover, information that reasonably relates to a police officer's employment relationship with the department and that is maintained in a department's internal file pursuant to section 143.089(g) is confidential and must not be released. *City of San Antonio v. San Antonio Express-News*, 47 S.W.3d 556 (Tex. App.—San Antonio 2000, pet. denied); *City of San Antonio v. Texas Attorney General*, 851 S.W.2d 946, 949 (Tex. App.—Austin 1993, writ denied).

You state that the submitted documents in Attachment C are maintained in the department's file maintained under section 143.089(g). Based on your representations and our review of the submitted information, we agree that Attachment C is confidential pursuant to section 143.089(g). Therefore, the department must withhold Attachment C under section 552.101 of the Government Code.

You state that the remaining submitted information in Attachments D and E are from the city's civil service file for the peace officer. You claim that the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 42 U.S.C. §§ 1320d-1320d-8, governs the release of Attachment E. 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, excepted as provided by parts 160 and 164 of the Code of Federal Regulations. 45 C.F.R. § 164.502(a).

This office has addressed the interplay of the Privacy Rule and the Act. Open Records Decision No. 681 (2004). In that decision, we noted that section 164.512 of title 45 of the Code of Federal Regulations provides that a covered entity may use or disclose protected health information to the extent that 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 that the Act “is a mandate in Texas law that compels Texas governmental bodies to disclose information to the public.” *See* Open Records Decision No. 681 at 8 (2004); *see also* Gov’t Code §§ 552.002, .003, .021. We therefore held that 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. Open Records Decision No. 681 at 9 (2004); *see also* Open Records Decision No. 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). Because the Privacy Rule does not make confidential information that is subject to disclosure under the Act, the city may withhold Attachment E from the public only if an exception in subchapter C of the Act applies. We now address your arguments for the remaining submitted information.

Attachment D includes an Employment Eligibility Verification I-9 Form. An I-9 Form 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). Release of this document under the Act would be “for purposes other than for enforcement” of the referenced federal statute. Accordingly, we conclude that the I-9 Form is confidential for purposes of section 552.101 of the Government Code and may only be released in compliance with the federal laws and regulations governing the employment verification system.

You seek to withhold the transcript in Attachment D pursuant to the federal Family Educational Rights and Privacy Act of 1974 (“FERPA”), section 1232g of Title 20 of the United States Code. 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). We note that the city is not an educational agency or institution. Furthermore, the transcript indicates the city did not receive it directly from an educational institution. *See* 34 C.F.R. § 99.33(a)(2) (third party authorized to receive information from educational agency may use information only for purposes for which disclosure was made). We therefore determine the transcript is not confidential under FERPA and may not be withheld on that basis.

Attachment E includes medical records, access to which is governed by the Medical Practice Act (“MPA”), chapter 159 of the Occupations Code. Section 159.002 of the MPA provides:

(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. The medical records must be released upon the patient's signed, 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. Occ. Code §§ 159.004, .005. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). We have marked the submitted medical records subject to the MPA.

Attachment E includes L-2 Declarations of Medical Condition and L-3 Declarations of Psychological and Emotional Health required by the Texas Commission on Law Enforcement Officer Standards and Education. These declarations are confidential pursuant to section 1701.306 of the Occupations Code, which provides:

(a) The commission may not issue a license to a person as an officer or county jailer unless the person is examined by:

(1) a licensed psychologist or by a psychiatrist who declares in writing that the person is in satisfactory psychological and emotional health to serve as the type of officer for which a license is sought; and

(2) a licensed physician who declares in writing that the person does not show any trace of drug dependency or illegal drug use after a physical examination, blood test, or other medical test.

(b) An agency hiring a person for whom a license as an officer or county jailer is sought shall select the examining physician and the examining psychologist or psychiatrist. The agency shall prepare a report of each declaration required by Subsection (a) and shall maintain a copy of the report on file in a format readily accessible to the commission. A declaration is not public information.

Occ. Code § 1701.306. Therefore, the city must withhold the L-2 and L-3 declarations in Attachment E under section 552.101 in conjunction with section 1701.306 of the Occupations Code.

Section 552.101 also encompasses the doctrine of common law privacy. Common law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The type 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. 540 S.W.2d at 683.

This office has found that the following types of information are excepted from required public disclosure under 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, *see* Open Records Decision Nos. 600 (1992) (public employee's withholding allowance certificate, designation of beneficiary of employee's retirement benefits, direct deposit authorization, and employee's decisions regarding voluntary benefits programs, among others, are protected under common law privacy), 545 (1990) (deferred compensation information, mortgage payments, assets, bills, and credit history protected under common law privacy), 373 (1983) (sources of income not related to financial transaction between individual and governmental body protected under common law privacy). However, we note there is a legitimate public interest in the salary of a public employee. *See generally* Gov't Code § 552.022 (salary of employee of governmental body is public information unless expressly confidential under other law); Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow). Accordingly, we have marked the medical and personal financial information in Attachments D and E that must be withheld under section 552.101 in conjunction with common law privacy.¹

¹ We note that you redacted some of the submitted responsive information that you seek to withhold from the requestor under the doctrine of common law privacy. However, the city does not have a previous determination pursuant to which it may redact such information without seeking a ruling from this office. *See* Open Records Decision No. 673 (2001). Because we are able in this instance to discern the nature of the information at issue, we will determine whether it is excepted from public disclosure. In the future, you should refrain from blacking out any information that must be submitted to this office when seeking an open records ruling. *See* Gov't Code §§ 552.301(e)(1)(D) (a governmental body is required to submit to this office within fifteen business days of receiving an open records request a copy of the specific information requested or representative samples). A failure to properly submit requested information may result in the release of that information. *See* Gov't Code § 552.302 (governmental body's failure to comply with the procedural requirements of the Act results in the legal presumption that the information at issue is public and must be released).

Section 552.117(a)(2) of the Government Code excepts from disclosure the current and former home addresses and telephone numbers, social security numbers, and family member information regarding a peace officer regardless of whether the officer elected under section 552.024 or 552.1175 of the Government Code to keep such information confidential.² We note that you have redacted personal information of the peace officer pursuant to the previous determination of this office in Open Records Decision No. 670 (2001). In that decision, we determined that a governmental body may withhold a peace officer's personal information without the necessity of requesting an attorney general decision as to the applicability of the exception in section 552.117(a)(2) of the Government Code. *See* Gov't Code § 552.117(a)(2); Open Records Decision No. 670 (2001); *see also* Open Records Decision No. 673 at 7-8 (2001) (listing elements of second type of previous determination under section 552.301(a)). We have marked additional personal information in Attachments D and E that must be withheld under section 552.117(a)(2) of the Government Code.

Attachments D and E also contains Texas motor vehicle record information. 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. In accordance with section 552.130 of the Government Code, the city must withhold the Texas motor vehicle record information we have marked in Attachment D. *See* Gov't Code § 552.130. We note that you have marked additional information which you contend is protected motor vehicle record information. However, you have not explained, nor are we able to discern, how such information is excepted under section 552.130. Accordingly, we have marked this information for release.

We note Attachment E includes a private e-mail address. 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). We note that section 552.137 does not apply to a government employee's work e-mail address. The e-mail address we have marked is not of a type specifically excluded by section 552.137(c). Therefore, the city must withhold the e-mail address in accordance with section 552.137 unless the city receives consent for its release.

In summary, Attachment C must be withheld under section 552.101 in conjunction with section 143.089(g) of the Local Government Code. The marked I-9 form must be withheld under section 552.101 in conjunction with federal law. We have marked the medical records that may be released only as provided by the MPA. The city must withhold the submitted L-2 and L-3 declarations under section 552.101 in conjunction with section 1701.306 of the Occupations Code. We have marked the medical and personal financial information in Attachments D and E that must be withheld under section 552.101 and common law privacy.

² "Peace officer" is defined by Article 2.12 of the Texas Code of Criminal Procedure.

The peace officer's marked personal information in Attachments D and E must be withheld under section 552.117(a)(2) of the Government Code. We have marked the information that must be withheld under sections 552.130 and 552.137 of the Government Code. The remaining submitted information must be released.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code

§ 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Ramsey A. Abarca
Assistant Attorney General
Open Records Division

RAA/jev

Ref: ID# 226386

Enc. Submitted documents

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(w/o enclosures)