



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 22, 2005

Ms. Rebecca Brewer
Abernathy, Roeder, Boyd, & Joplin, P.C.
P.O. Box 1210
McKinney, Texas 75070-1210

OR2005-06585

Dear Ms. Brewer:

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# 228528.

The Melissa Police Department (the "department"), which you represent, received a request for information related to a specified arrest, as well the personnel information of the department peace officers involved in the arrest. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.108, 552.117, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Some of the submitted information was the subject of a previous ruling issued by this office. In Open Records Letter No. 2005-04229 (2005), this office determined that section 552.108 of the Government Code authorized the department to withhold the offense report and other information now submitted as Exhibit B-1. You inform this office that the relevant facts and circumstances have not changed since the issuance of this previous ruling. Thus, we determine that the department may continue to withhold this information in accordance with Open Records Letter No. 2005-04229.¹ See Open Records Decision No. 673 (2001) (governmental body may rely on previous determination when 1) the records or information at issue are precisely the same records or information that were previously submitted to this

¹ Because this office has already ruled on this information, we need not consider your arguments against the disclosure of this information.

office pursuant to section 552.301(e)(1)(D); 2) the governmental body which received the request for the records or information is the same governmental body that previously requested and received a ruling from the attorney general; 3) the prior ruling concluded that the precise records or information are or are not excepted from disclosure under the Act; and 4) the law, facts, and circumstances on which the prior ruling was based have not changed since the issuance of the ruling). We now address your arguments regarding the personnel information at issue, submitted as Exhibit B-2.

We first address your claim under section 552.108 of the Government Code. Section 552.108 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:

(1) release of the information would interfere with the detection, investigation or prosecution of crime[.]

...

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from [required public disclosure] if:

(1) release of the internal record or notation would interfere with law enforcement or prosecution[.]

Gov't Code § 552.108(a), (b). Sections 552.108(a)(1) applies when release of information relating to a pending criminal investigation will 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). Section 552.108(b)(1) is applicable to internal records of a law enforcement agency, provided the law enforcement agency reasonably explains how and why release of the information at issue would interfere with law enforcement or prosecution. *See City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet.) (section 552.108(b)(1) exception intended to protect information which, if released, would permit private citizens to anticipate weaknesses in a police department, avoid detection, jeopardize officer safety, and generally undermine law enforcement efforts). Generally, a governmental body claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See Gov't Code §§552.108(a)(1), (b)(1), .301(e)(1)(A); see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). In this instance, the department has not reasonably explained how release of

the requested personnel information would interfere with the investigation or prosecution of crime or would otherwise undermine the department's law enforcement efforts. We therefore find that you have failed to establish that section 552.108 is applicable to Exhibit B-2, and we determine that the department may not withhold this information pursuant to section 552.108. *See* Gov't Code § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986).

We next address your claim that Exhibit B-2 is excepted from disclosure in its entirety under section 552.102 of the Government Code. 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(a) 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. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Accordingly, we will consider your privacy claims under section 552.101 and section 552.102(a) together.

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. In order for information to be protected from public disclosure by the doctrine of common-law privacy under section 552.101, the information must meet the criteria set out in *Industrial Foundation*. In *Industrial Foundation*, the Texas Supreme Court stated that information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Id.* at 685. You assert that release of the personnel information at issue is an invasion of personal privacy. However, this information relates solely to the officers' applications, qualifications, and conditions for continued employment. Since there is a legitimate public interest in the qualifications of a public employee and how that employee performs job functions and satisfies employment conditions, the department may not withhold all of submitted information from public disclosure based on the common-law right to privacy. *See generally* Open Records Decision Nos. 470 at 4 (1987) (public has legitimate interest in job performance of public employees), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees), 423 at 2 (1984) (scope of public employee privacy is narrow). Therefore, the department may not withhold all of Exhibit B-2 under section 552.102.

However, 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 body, *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). Accordingly, we have marked the medical and personal financial information in Exhibit B-2 that must be withheld under section 552.101 in conjunction with common-law privacy.

Section 552.101 also encompasses information made confidential by statute. You assert that the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 42 U.S.C. §§ 1320d-1320d-8, governs the release of portions of Exhibit B-2. 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). The department may not withhold any of Exhibit B-2 under HIPAA.

You also assert that some of the documents in Exhibit B-2 are mental health records that are confidential under section 611.002 of the Health and Safety Code. This provision applies to “[c]ommunications between a patient and a professional, [and] records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional.” *See also* Health & Safety Code § 611.001 (defining “patient” and “professional”). Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals. *See* Open Records Decision No. 565 (1990). However, upon review, we conclude that Exhibit B-2 does not include any mental health records that are confidential under section 611.002. Thus, you may not withhold any of Exhibit B-2 pursuant to section 552.101 in conjunction with section 611.002 of the Health and Safety Code.

You assert that a portion of Exhibit B-2 contains 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. However, upon review, we conclude that Exhibit B-2 does not include any medical records subject to the MPA. Thus, the department may not withhold any portion of Exhibit B-2 under the MPA.

However, we find that Exhibit B-2 includes some information that is made confidential by statute. *See* Gov’t Code § 552.101. Federal tax return information is confidential under section 6103(a) of title 26 of the United States Code. *See* 26 U.S.C. § 6103(a). The term “return information” includes “the nature, source, or amount of income” of a taxpayer. *See* 26 U.S.C. § 6103(b)(2). Our office has specifically held that a governmental body must withhold a W-4 form in its entirety. Open Records Decision No. 600 at 9 (1992). Therefore, the department must withhold the submitted W-4 forms under section 552.101 of the Government Code in conjunction with section 6103 of title 26 of the United States Code.

Section 552.101 also encompasses confidentiality relating to criminal history record information (“CHRI”). CHRI generated by the National Crime Information Center (“NCIC”) or by the Texas Crime Information Center (“TCIC”) is confidential. Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations

allow each state to follow its individual law with respect to CHRI it generates. *Id.* Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety (“DPS”) maintains, except that the DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See* Gov’t Code § 411.083.

Sections 411.083(b)(1) and 411.089(a) 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. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090 - .127. Thus, any CHRI generated by the federal government or another state may not be made available to the requestor except in accordance with federal regulations. *See* Open Records Decision No. 565 (1990). Furthermore, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F. Some of the information in Exhibits B-2 is CHRI generated by TCIC and NCIC. Accordingly, this information, which we have marked, is excepted from required public disclosure by section 552.101 of the Government Code.

Exhibit B-2 also contains fingerprint information. Chapter 560 of the Government Code provides that a governmental body may not release fingerprint information except in certain limited circumstances. *See* Gov’t Code §§ 560.001 (defining “biometric identifier” to include fingerprints), .002 (prescribing manner in which biometric identifiers must be maintained and circumstances in which they can be released), .003 (providing that biometric identifiers in possession of governmental body are exempt from disclosure under Act). You do not inform us, and the submitted information does not indicate, that section 560.002 permits the disclosure of the submitted fingerprint information. Therefore, the department must withhold this information, which we have marked, under section 552.101 in conjunction with section 560.003 of the Government Code.

The submitted information 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 (the “commission”). 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 department must withhold the L-2 and L-3 declarations in Exhibit B-2 under section 552.101 in conjunction with section 1701.306 of the Occupations Code.

The submitted personnel information also contains copies of a form F-5 (Report of Separation of License Holder), which is made confidential by section 1701.454 of the Occupations Code. Section 1701.454 provides in relevant part:

(a) A report or statement submitted to the commission under this subchapter is confidential and is not subject to disclosure under Chapter 552 of the Government Code.

Occ. Code § 1701.454. Therefore, the department must withhold the marked F-5 forms pursuant to section 552.101 in conjunction with section 1701.454 of the Occupations Code.

Exhibit B-2 also contains personal information that is excepted from disclosure under section 552.117 of the Government Code. Section 552.117(a)(2) excepts from public disclosure a peace officer's home address and telephone number, social security number, and family member information regardless of whether the peace officer made an election under section 552.024 of the Government Code.² We note that section 552.117 also encompasses a personal cellular telephone number, provided that the cellular phone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular mobile phone numbers paid for by governmental body and intended for official use). Personal pager numbers of peace officers are excepted under section 552.117(a)(2) as well. *See* Open Records Decision No. 670 (2001). If the cellular and pager numbers of peace officer's in Exhibit B-2 are not paid for by a governmental body they must be withheld under section 552.117(a)(2); otherwise, these cellular and pager numbers must be released. We further note that an individual's personal post office box number is not a "home address" and therefore may not be withheld under section 552.117.

² Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure.

See Gov't Code § 552.117; Open Records Decision No. 622 at 4 (1994) ("The legislative history of section 552.117(1)(A) makes clear that its purpose is to protect public employees from being harassed *at home*. *See* House Committee on State Affairs, Bill Analysis, H.B. 1976, 69th Leg. (1985); Senate Committee on State Affairs, Bill Analysis, H.B. 1976, 69th Leg. (1985)." (Emphasis added.)); *see also* Open Records Decision Nos. 658 at 4 (1998) (statutory confidentiality provision must be express and cannot be implied), 478 at 2 (1987) (language of confidentiality statute controls scope of protection), 465 at 4-5 (1987) (statute explicitly required confidentiality). Pursuant to section 552.117(a)(2), the department must withhold the peace officers' personal information marked in the submitted documents.

Some of the information in Exhibit B-2 may also be excepted under section 552.1175 of the Government Code, which provides, in relevant part³:

(b) Information that relates to the home address, home telephone number, or social security number of [a peace officer as defined by article 2.12 of the Code of Criminal Procedure], 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(b). Exhibit B-2 contains the personal information of peace officers who do not work for the department. If these individuals are currently licensed peace officers who elect to restrict access to this information in accordance with section 552.1175(b), the department must withhold the information we have marked under section 552.1175. If the department does not receive the appropriate elections, this information must be released.

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 department must withhold the Texas motor vehicle record information we have marked. *See* Gov't Code § 552.130.

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

Exhibit B-2 also includes insurance policy numbers that are subject to section 552.136 of the Government Code. This section provides that “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136. Accordingly, the department must withhold the policy numbers we have marked pursuant to section 552.136.

The submitted information 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 because such an address is not that of the employee as a “member of the public” but is instead the address of the individual as a government employee. The e-mail address we have marked is not of a type specifically excluded by section 552.137(c). Therefore, the department must withhold this e-mail address in accordance with section 552.137 unless the department receives consent for its release.

Exhibit B-2 also contains military discharge information. Section 552.140 of the Government Code provides in relevant part:

- (a) This section applies only to a military veteran’s Department of Defense Form DD-214 or other military discharge record that is first recorded with or that otherwise first comes into the possession of a governmental body on or after September 1, 2003.

Gov’t Code § 552.140(a). Section 552.140 provides that a military veteran’s DD-214 form or other military discharge record that is first recorded with or that otherwise first comes into the possession of a governmental body on or after September 1, 2003 is confidential for a period of seventy-five years and may only be disclosed in accordance with section 552.140 or in accordance with a court order. *See* Gov’t Code § 552.140(a), (b). You do not indicate when the department first came into possession of the submitted DD-214 forms. Therefore, if these forms came into the possession of the department on or after September 1, 2003, we conclude that the department must withhold this information under section 552.140. Otherwise, the forms must be released, subject to the markings we have made under section 552.117(a)(2).

Exhibit B-2 also contains social security numbers of individuals who are not peace officers. Section 552.147 of the Government Code⁴ provides that “[t]he social security number of a

⁴ Added by Act of May 23, 2005, 79th Leg., R.S., S.B. 1485, § 1, sec. 552.147(a) (to be codified at Tex. Gov’t Code § 552.147).

living person is excepted from” required public disclosure under the Act. Therefore, the department must withhold these individuals’ social security numbers under section 552.147.⁵

In summary, the department may continue to withhold Exhibit B-1 in accordance with Open Records Letter No. 2005-04229. In regard to Exhibit B-2, the department must withhold (1) the medical and personal financial information we have marked under section 552.101 and the doctrine of common-law privacy, (2) the submitted W-4 forms under section 552.101 and federal law, (3) the marked CHRI under section 552.101 and chapter 411 of the Government Code, (4) the marked fingerprint information under section 552.101 and section 560.003 of the Government Code, (5) the marked L-2 and L-3 declarations under section 552.101 and section 1701.306 of the Occupations Code, (6) the marked F-5 forms under section 552.101 and section 1701.454 of the Occupations Code, (7) the marked section 552.117(a)(2) information, as well as the cellular and pager numbers to which section 552.117(a)(2) applies, (8) the marked section 552.1175 information if the department receives elections to restrict access to personal information from the appropriate peace officers, (9) the marked Texas motor vehicle record information under section 552.130, (10) the marked policy numbers under section 552.136, (11) the marked e-mail address under section 552.137, (12) the submitted DD-214 forms if the department came into possession of them on or after September 1, 2003, and (13) the marked social security numbers of individuals who are not peace officers under section 552.147. 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

⁵ We note that 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.

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# 228528

Enc. Submitted documents

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(w/o enclosures)