ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 3, 2005

Mr. Jeffrey L. Moore
Brown & Hofmeister, L.L.P.
740 East Campbell Road, Suite 800
Richardson, Texas 75081

OR2005-08934

Dear Mr. Moore:

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# 233468.

The City of Crandall (the "city"), which you represent, received a request for (1) the personnel files of four named city police officers; (2) certain other information pertaining to one of the named officers, including information pertaining to an administrative investigation; and (3) certain information "related to or referencing the management or supervision of the Crandall Police Department's Property Room." You claim that the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.130, 552.136, and 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.[1]

Initially, we note that you have not submitted information "related to or referencing the management or supervision of the Crandall Police Department's Property Room." To the extent any such responsive information existed at the time the city received this request for information, we assume it has been released to the requestor. If not, the city must release such information at this time. *See* Gov't Code §§ 552.006, .301, .302; Open Records Decision No. 664 (2000) (concluding that section 552.221(a) requires that information not excepted from disclosure must be released as soon as possible under the circumstances).

[1]We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Also, we note that you seek to redact social security numbers pursuant to section 552.147 of the Government Code.[2] This section provides that "[t]he social security number of a living person is excepted from" required public disclosure under the Act. We agree that the city must withhold the social security numbers contained in the submitted information under section 552.147.[3]

We next address your arguments under section 552.101 of the Government Code. This section excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses information made confidential by other statutes. The submitted information contains medical records, access to which is governed by the Medical Practice Act (the "MPA"), chapter 159 of the Occupations Code. Section 159.002 of the MPA provides as follows:

> (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). 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. *Id.* §§ 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 agree that the drug test results and most of the other records you have marked are medical records subject to the MPA. However, we find that the submitted absence report and pre-existing conditions form are not medical records and may not be withheld from disclosure on this basis.

Next, we note that some information is subject to section 611.002 of the Health and Safety Code, which 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

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[2]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).

[3]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.

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). We have marked the mental health records that are confidential under section 611.002 and may not be released except in accordance with sections 611.004 and 611.0045 of the Health and Safety Code. Health & Safety Code § 611.002(b); *see id.* §§ 611.004, 611.0045.

You note that the submitted information contains W-4 forms. Prior decisions of this office have held that section 6103(a) of title 26 of the United States Code renders tax return information confidential. *See* Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision Nos. 600 (1992) (W-4 forms), 226 (1979) (W-2 forms). Tax return information is defined as data furnished to or collected by the Internal Revenue Service with respect to the determination of possible existence of liability of any person under title 26 of the United States Code for any tax. *See* 26 U.S.C. § 6103(b). The W-4 forms constitute tax return information that must be withheld under section 552.101 of the Government Code in conjunction with federal law.

The submitted information also contains I-9 forms (Employment Eligibility Verification), which are governed by section 1324a of Title 8 of the United States Code. This section provides that an I-9 form and "any information contained in or appended to such 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. *See* 8 U.S.C. § 1324a(b)(5); see also 8 C.F.R. § 274a.2(b)(4). Release of the forms in this instance would be "for purposes other than for enforcement" of the referenced federal statutes. Accordingly, we conclude that the I-9 forms are confidential and may only be released in compliance with the federal laws and regulations governing the employment verification system.

The submitted records also include 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, which 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. We have marked the type of CHRI in the submitted documents that must be withheld on this basis.[4]

Next, the submitted documents contain fingerprint information. Sections 560.001, 560.002, and 560.003 of the Government Code provide as follows:

> Sec. 560.001. DEFINITIONS. In this chapter:
>
> > (1) "Biometric identifier" means a retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry.
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> > (2) "Governmental body" has the meaning assigned by Section 552.003 [of the Government Code], except that the term includes each entity within or created by the judicial branch of state government.
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> Sec. 560.002. DISCLOSURE OF BIOMETRIC IDENTIFIER. A governmental body that possesses a biometric identifier of an individual:
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> > (1) may not sell, lease, or otherwise disclose the biometric identifier to another person unless:
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> > > (A) the individual consents to the disclosure;
> > >
> > > (B) the disclosure is required or permitted by a federal statute or by a state statute other than Chapter 552 [of the Government Code]; or
> > >
> > > (C) the disclosure is made by or to a law enforcement agency for a law enforcement purpose; and
> >
> > (2) shall store, transmit, and protect from disclosure the biometric identifier using reasonable care and in a manner that is the same as or more protective than the manner in which the governmental body stores, transmits, and protects its other confidential information.
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> Sec. 560.003. APPLICATION OF CHAPTER 552. A biometric identifier in the possession of a governmental body is exempt from disclosure under Chapter 552.

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[4]We note that a portion of this information is illegible. As this office cannot review illegible information, we are unable to determine whether any information contained in the illegible documents must be withheld from disclosure. *See* Gov't Code § 552.301(e)(1)(D). Consequently, we have marked the type of information that the city must withhold from the public as CHRI.

Gov't Code §§ 560.001-.003. Upon review, we find that section 560.002 does not permit the disclosure of the submitted fingerprint information in this instance. Therefore, the city must withhold the fingerprint information we have marked under section 552.101 in conjunction with section 560.003 of the Government Code.

Also, the submitted 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 ("TCLEOSE") are confidential under section 1701.306 of the Occupations Code. Chapter 1701 of the Occupations Code is applicable to TCLEOSE. Specifically, section 1701.306 provides as follows:

> (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(a), (b). Therefore, the city must withhold the submitted declarations that you have marked under section 552.101 in conjunction with section 1701.306 of the Occupations Code.

The submitted information includes F-5 forms (Report of Resignation or Separation of License Holder), which are also TCLEOSE reports. In this regard, section 1701.454 of the Occupation Code provides as follows:

> (a) A report or statement submitted to the commission under this subchapter is confidential and is not subject to disclosure under Chapter 552, Government Code, unless the person resigned or was terminated due to substantiated incidents of excessive force or violations of the law other than traffic offenses.
>
> (b) Except as provided by this section, a commission member or other person may not release the contents of a report or statement submitted under this subchapter. The report or statement may be released only by the commission

> employee having the responsibility to maintain the report or statement and only if:
>
> > (1) the head of a law enforcement agency or the agency head's designee makes a written request on the agency's letterhead for the report or statement accompanied by the agency head's or designee's signature; and
> >
> > (2) the person who is the subject of the report or statement authorizes the release by providing a sworn statement on a form supplied by the commission that includes the person's waiver of liability regarding an agency head who is responsible for or who takes action based on the report or statement.

Occ. Code § 1701.454. After reviewing the submitted information, we conclude that the city must withhold the F-5 forms pursuant to section 552.101 in conjunction with section 1701.454. We note that you have also marked L-1 forms (Report of Appointment/License Application) to withhold on this basis. However, L-1 forms are not made confidential by section 1701.454 and may therefore not be withheld under section 552.101 on that basis.

We note that some of the remaining information in Exhibit C is subject to common-law privacy. Section 552.101 also encompasses the doctrine of common-law privacy, which 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). 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. *Id.* at 683. In addition, this office has found that some kinds of medical information or information indicating disabilities or specific illnesses are protected under common-law privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). We have reviewed the submitted records and marked the private information in Exhibit C that must be withheld pursuant to section 552.101 in conjunction with common-law privacy.

You also claim that information in Exhibit D pertaining to a sexual harassment investigation is subject to common-law privacy on the basis of the holding in *Morales v. Ellen,* 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied). In *Ellen,* the court addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment. The investigation files in *Ellen* contained individual witness statements, an affidavit by the individual accused of the misconduct responding to the allegations, and conclusions of the board of inquiry that conducted the investigation. *Ellen*, 840 S.W.2d at 525. The court ordered the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the public's interest was

sufficiently served by the disclosure of such documents. *Id.* In concluding, the *Ellen* court held that "the public did not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released." *Id.*

When there is an adequate summary of a sexual harassment investigation, the summary must be released along with the statement of the accused, but the identities of the victims and witnesses must be redacted and their detailed statements must be withheld from disclosure. However, when no adequate summary exists, detailed statements regarding the allegations must be released, but the identities of witnesses and victims must still be redacted from the statements. In either case, the identity of the individual accused of sexual harassment is not protected from public disclosure. We note that because supervisors are not witnesses for purposes of *Ellen*, supervisors' identities may not generally be withheld under section 552.101 and common-law privacy. We further note that common-law privacy does not protect information about a public employee's alleged misconduct on the job or complaints made about a public employee's job performance. *See* Open Records Decision Nos. 438 (1986), 405 (1983), 230 (1979), 219 (1978).

In this instance, the submitted information does not include an adequate summary of the investigation. Consequently, the city must only withhold the identifying information of the alleged victim and the witnesses, which we have marked, pursuant to section 552.101 in conjunction with common-law privacy and the holding in *Ellen*. None of the remaining information at issue may be withheld under section 552.101 on this basis.

Next, you claim that some of the remaining information in Exhibit D is excepted from disclosure under section 552.107 of the Government Code. This section protects information coming within the attorney-client privilege. Gov't Code § 552.107(1). When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002).

First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client

privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." *Id.* 503(a)(5). Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

In this instance, you inform us that the documents you have marked under section 552.107 are communications between the city attorney and the city manager. You explain that confidentiality of these communications has been maintained. Based on these representations and our review of the information at issue, we agree that the information for which you claim section 552.107 consists of privileged attorney-client communications that the city may withhold.

Next, we note that some of the submitted information is subject to section 552.117 of the Government Code. Section 552.117(a)(2) excepts from disclosure the present and former home addresses and telephone numbers, social security numbers, and family member information of a peace officer regardless of whether the officer requests confidentiality under section 552.024 or 552.1175.[5] We have reviewed the submitted records and understand that the individuals whose information appears in the documents at issue were all licensed peace officers at the time the city received this request. We note, however, that an individual's personal post office box number is not a "home address" and therefore may not be withheld under section 552.117. *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.)). We have marked the information that the department must withhold pursuant to section 552.117(a)(2).

Next, section 552.130 of the Government Code excepts from disclosure information that relates to a driver's license or motor vehicle title or registration issued by an agency of this state. Gov't Code § 552.130. Accordingly, the city must withhold Texas motor vehicle record information you have marked pursuant to section 552.130; we have also marked additional information that must be withheld on this basis.

Lastly, the submitted information contains a credit card account number that is subject to section 552.136 of the Government Code. This section states that, "[n]otwithstanding any

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[5]"Peace officer" is defined by article 2.12 of the Code of Criminal Procedure.

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. The city must, therefore, withhold the account number you have marked in accordance with section 552.136.

In summary: (1) except for the absence report and the pre-existing conditions form, the medical records you have marked may only be released in accordance with the MPA; (2) the mental health records we have marked may only be released in accordance with chapter 611 of the Health and Safety Code; (3) the W-4 forms must be withheld under section 552.101 and federal law; (4) I-9 forms are confidential and may only be released in compliance with the federal laws and regulations governing the employment verification system; (5) the type of CHRI we have marked must be withheld pursuant to section 552.101 of the Government Code in conjunction with chapter 411, subchapter F of the Government Code; (6) the fingerprint information we have marked must be withheld under section 552.101 in conjunction with section 560.003 of the Government Code; (7) the L-2 and L-3 declarations you have marked must be withheld under section 552.101 in conjunction with section 1701.306 of the Occupations Code; (8) the F-5 forms you have marked must be withheld under section 552.101 in conjunction with section 1701.454 of the Occupations Code; (9) the private information and the identifying information of the alleged victim and witnesses in the sexual harassment investigation, which we have marked, must be withheld under section 552.101 in conjunction with common-law privacy; (10) the information you have marked as privileged attorney-client communications in Exhibit D may be withheld under section 552.107 of the Government Code; (11) the information pertaining to the named officers that we have marked must be withheld under section 552.117(a)(2) of the Government Code; (12) the Texas motor vehicle record information must be withheld under section 552.130 of the Government Code; (13) the credit card account number must be withheld under section 552.136 of the Government Code; and (14) 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 ten 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

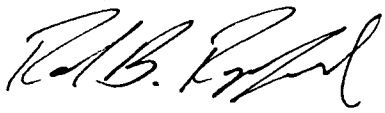
statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental 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); *Texas 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 Office of the Attorney General 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. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within ten calendar days of the date of this ruling.

Sincerely,



Robert B. Rapfogel
Assistant Attorney General
Open Records Division

RBR/krl

Ref: ID# 233468

Enc. Submitted documents

c: Mr. Vincent E. Wisely
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